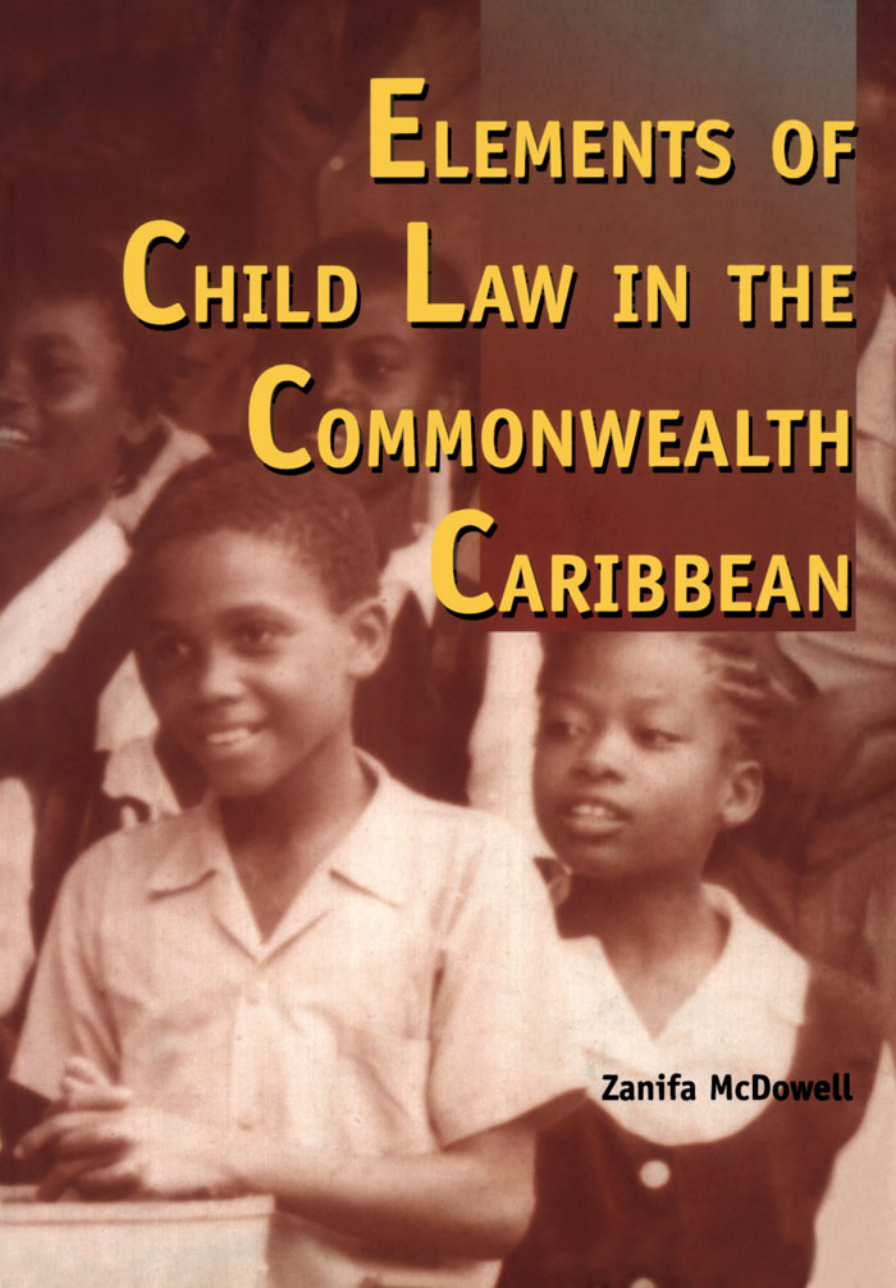
Elements of Child Law in the Commonwealth Caribbean



Zanifa McDowell

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Zanifa McDowell

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To my children, Kimberley, Sheri and Sasha, the memory of my mother, Isha, and for my husband, Sean

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Contents

Preface and Acknowledgments

The subject of child law has now become so important that it has invaded the teaching of law by demanding its study as an area of law in its own right and not merely one attached in passing to a formal Family Law course, as was formerly the case.

In deciding to write this book, two factors played on my mind as to its justification. Firstly, when I was a student of the law myself, there were as yet no textbooks on Caribbean child law, and whatever materials were then available, were insufficient to provide proper take-home information which I could ponder at my leisure. Secondly, I thought that since child law in the Commonwealth Caribbean is in such a varied state depending on the jurisdiction in question, it would be useful for the region combined to know what was going on in each other's territory. In this way, a comparative study could assist law reformers in their plight to improve the laws relating to children in their own regional countries.

It is hoped that this work would provide a basic yet solid foundation in the subject. I have attempted to present the material in as clear and as simple a manner so that it will be a useful introduction both for students as well as for all others who are committed to learning and enlightenment in a matter that affects us all.

While the law in some regional countries has been traced consistently throughout the book, it was not possible to highlight every

jurisdiction, but where necessary, others have been referred to for comparative purposes.

The book contains a historical background, and in many instances, the legal position is placed upon a social setting. This is because I felt it would be easier to identify with the various topics if one was able to understand the way in which they originally emerged and the way in which society today feels they should be understood. In many areas new developments have taken place, from the implementation of the UN Convention on the Rights of the Child into domestic law in Belize to allowing spouses in a common law union to adopt children in Guyana.

Any possible shortcomings to emerge must be apologized for beforehand. In writing the first and second drafts of the manuscript, one difficulty encountered was the fact that several chapters had to be continuously updated to take into account recent legislation enacted in particular jurisdictions, such as the 1997 Antigua and Barbuda Divorce Act, the 1997 Guyana Adoption (Amendment) Act, the 1998 Belize Families and Children Act, the 1998 Trinidad and Tobago Cohabitational Relationships Act and the 1998 Trinidad and Tobago Community Mediation Act. It goes without saying that access to recent enactments is not always easy especially when these originate overseas.

I am in debt to Mr. Andrew Burgess, the Dean of the Faculty of Law of the University of the West Indies, Cave Hill campus, for renewing my interest in the subject. Thanks are also due to the various government offices of regional countries which granted permission for the reproduction of statutes.

I am extremely grateful to the faculty for the use of its computing facilities whereby I was able to type the manuscript. I am grateful to the faculty for the use of the Family Law handouts or worksheets, which I am sure the previous lecturer of the course, Miss Norma Forde, had the privilege of preparing and updating, so I am also deeply indebted to Miss Forde. These handouts or worksheets represented the starting point, and indeed, one of the main sources of reference in the preparation of the first draft.

I would also like to thank the Faculty of Law Library for the use of their facilities, and in particular, for access to the collection of unreported decisions.

I would like to especially thank Miss Tracy Robinson for her comments on the manuscript. Her dedication to the teaching of law, friendship and interest in my ambition to write this book, provided a source of inspiration and encouragement to see the project to an end.

I would like to thank Mrs. Hurley for assisting me tirelessly with the printing of the many drafts of the various chapters, and Miss Deborah Boynes for typing up the appendices.

Last but not least, I thank my husband Sean for proofreading the manuscript, and my children Kimberley, Sheri and Sasha for their love and support and their willingness to overlook my often neglected household chores.

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Cases

Statutes

Chapter 1

Scope of the Law Relating to Children

Normally, predictions as to the future should be shunned by law texts and left to the science fiction writer. Yet, predictions of the future course of family law become important to everyday practice, because the direction in which the future law will tend is being shaped by today's thinking. Today's concepts of right and justice shape today's decisions by the courts.
– Clad, Halstead and Crocker[1]

Introduction

The law relating to children is a subject of interest to all universally, if only on account of the fact that we are all experienced hands in the field – we were all once children ourselves, still are children, might presently have children or grandchildren or nieces or nephews, might some day produce children of our own, or at least we have the ability to do this. To this extent, we all have a direct interest in the law relating to children.

Previously, when much of the law depended upon the common law for its validity, when statute law was not yet in the so-called sophisticated state that it is in today, of course relatively speaking, rights which were deemed to belong to certain classes of children were not deemed to belong to others. Legitimate children were afforded advantages that illegitimate children were denied access to, legitimate male children were entitled to participate on the intestacy of their parents before legitimate female children, and of course there was a presumption against any illegitimate children sharing. One might also mention that during the days of slavery and its immediate aftermath, there was much legal and social discrimination against

1. *Family Law*, Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 3d ed. (Philadelphia, PA: American Law Institute 1964), 209.

children based on race. On the sugar plantations, for example, black children were forced to work, while off the plantations, white children could pursue an education, enjoy the comfort and protection of a home, parents and family. Happily, a lot of this has changed and statute has ameliorated the old discriminations immensely. But that is not to say that the law is perfect.

LEGAL REGIMES

In looking at the law as it relates to children in the Commonwealth Caribbean region, it should be noted at the outset that the law is neither uniform, nor is it ideal. The region is presently in different stages of development - some territories still possess 'old' law on the subject, being either the common law alone, or together with reproductions of older UK legislation. Other territories have newer legislation based on recent or relatively recent UK legislation which have altered and ameliorated the rights of children either generally or specifically. Some other territories in a limited number of areas, and specifically in relation to *status of children* legislation, have departed from the English tradition and have followed Australian and New Zealand models in providing for children. Yet one or two territories stand ahead of the others, such as Barbados, which seems to have the newest and most progressive legislation in some respects. Guyana has also jumped ahead and has reflected some of these advances in its constitution.

One may get a sense that the bigger countries of the region, such as Jamaica, Trinidad and Tobago, Guyana and Barbados, are taking the lead in law reform. There is evidence, from the nature of the legislation enacted over the last two decades, that legal reform is being strongly influenced by world trends.[2] Thus, legislation relating to domestic violence, the legal rights of spouses and children belonging to unions other than marriage, as well as community mediation, are some of the recent accomplishments of which some of these countries can boast. It also appears, however, that the smaller

2. One significant example of this is the establishment of family courts in some Caribbean countries, such as in Jamaica, which indicates a move from the adversarial approach to family law issues towards the more favourable welfare approach. The need to establish these courts in regional countries is great, and the judiciary itself has recognized this. See for example Shah J. in *Balraj v. Dewar* (unreported) 30 June 1994, HC, T&T (No. S-878 of 1993) where he lamented: "I have pondered over this and must here state my utter regret that the supportive services for a family court or family matters in our nation are woefully inadequate." For more on regional family courts see: Gloria Cumper, "Planning and Implementing the Family Court Project", *Working Paper No. 27* (Mona, Jamaica: ISER 1981); Suzanne LaFont, *The Emergence of an Afro-Caribbean Legal Tradition: Gender Relations and Family Courts in Kingston, Jamaica* (Bethesda: Austin and Winfield 1996).

countries are embracing law reform at a considerably slower pace, and many of these countries continue to exhibit colonial formulations of the law relating to children, and to family law generally.

Nevertheless, in some areas countries from both groups have effected necessary reform, the most striking being in relation to domestic violence, and the abolition of legal discriminations against children born out of wedlock. These developments are significant in that it indicates a degree of acknowledgment by the law that the word 'family' can no longer be defined in terms of marriage, but that regional law must also be prepared to acknowledge the psyche of Caribbean people as being inclined to marry less, to bear children outside of marriage, and that a considerable number of women bear the primary responsibility for supporting and raising children.[3] Regional law makers are thus beginning to acknowledge the different types of conjugal unions in the Caribbean which is a positive aid in the acquisition of legal rights in persons who might have formerly been discriminated against in relation to certain aspects of the law.

ENGLISH BASIS OF REGIONAL FAMILY LAW

As far as the English basis of our laws is concerned, Professor Carnegie had this to say:[4]

> Basically the law in the English speaking Caribbean has as its residuary base the common law of England. This is the general position to which there are two main exceptions, those exceptions being St. Lucia which has a system which is to a large degree based on French law, and Guyana where although the system of law is based on English law, the land law is exceptionally still based on the earlier system of Roman-Dutch law . . . [The] basic residuary law of all the other territories of the Commonwealth Caribbean is English law . . . This is your residuary source of law, it is the source of your basic concepts, it's the source to which you go in the absence of anything else . . . And so . . . in each of the West Indian states, you will have a basic common law structure, but that common law has been largely built on by local legislation. Of course even in England the common law has been built on by local legislation, and the changes which have taken place in the common law of England have frequently not taken place here, so you will find that the law of the West Indian states sometimes represents English law at an earlier stage than you will find presently in English law.

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3. See M. Lazarus-Black "My Mother Never Fathered Me: Rethinking Kinship and the Governing of Families", *Social and Economic Studies* 44, no. 1 (1995), 49.
4. Ralph Carnegie, "The Law in the English Speaking Caribbean" in *Caribbean Background*, 17th–23rd September, 1972, 46–47 (copy lodged with Faculty of Law Library, UWI, Cave Hill).

Bromley and Lowe in describing the law relating to children in England before the UK Children Act 1989 made criticisms of the law which are criticisms equally applicable to West Indian jurisdictions. They reported that:[5]

> Before the Children Act 1989, child law, like so much of English law, had developed upon an ad hoc basis through both statute and case law and predominantly in terms of remedies rather than rights. In the result the law had become complicated and technical and had no underlying general philosophy. Remedies and procedure varied according to the jurisdiction invoked and the court involved. There were, for example, separate statutes conferring different powers on the courts to make orders relating to children in divorce proceedings, in proceedings for financial relief before magistrates and in so-called free standing proceedings, namely those solely concerned with disputes about children.

From a West Indian perspective, some of the problems identified by the learned authors apply to these jurisdictions today. One marked example is the fact that in most jurisdictions applications for maintenance on behalf of children are to be made under different statutes depending on whether or not the child is born in or outside of marriage. And this applies even to a territory such as Barbados which, in other respects, stands way ahead of the others, as for example, in their recognition of children born to a "union other than marriage" under the Barbados Family Law Act.

While it is not possible to examine in detail every territory of the region, nevertheless, the various territories selected will serve as models representing in a general way the group of territories having similar legislation belonging to that hierarchical classification mentioned previously.

GENERAL CONTENT OF THE LAW RELATING TO CHILDREN

The law relating to children is about a number of things. Traditionally, this law was tagged on to the law relating to husband and wife in the authoritative academic texts. Today, child law is recognized as substantive an area of law as any other established area. Books are now being written exclusively on the subject, and one will find it amazing how broad a subject it is. The most important aspect of the subject relates to the "rights" of children, or, in other words, the duties or obligations which the child could expect the parent or guardian to perform for the benefit of the child. These include, for example, the right to maintenance, the right to an

5. P.M. Bromley and N.V. Lowe, *Bromley's Family Law* 250, 8th ed. (Butterworths 1992).

education, the right to medical care, the right to care and protection and so forth. Secondly, it is about the rights of the parent or guardian in relation to the child, and include, for example, the right to custody of the child, the right to care and control, the right to determine what course the child's education or religion should take, the right to discipline the child, the right to protect the child and so on. Thirdly, the subject involves an examination of the right of the state to intervene in the parent-child relationship, and to supersede the right of the parent or guardian in appropriate cases. These aspects listed represent the more private elements involved. As a supplement to this, one cannot exclude from a discussion of child law the fact that the state has enacted numerous pieces of legislation in most countries, which serve the useful purpose of protecting children from the vices and unscrupulous behaviour of adults, as well as protecting children from themselves. Examples of these statutory provisions include enactments directed at protecting children from moral corruption and sexual exploitation; from being exposed to the evils of alcohol and drug abuse; from neglect and physical abuse; from employment unsuitable to their age and so forth. The criminal law plays a fundamental role in this connection, as breach of the provisions are visited by criminal sanctions, being either fine or imprisonment.

An examination of the more important aspects of child law in the Commonwealth Caribbean would involve a consideration of the legal status of children in the various territories as much of the child's rights depend on whether he is born in or out of wedlock; the concepts of legitimacy and illegitimacy; the common law presumption of legitimacy and how this may be rebutted; legitimation by statute; *status of children* legislation in the region; parental responsibilities or rights and duties; the maintenance of children born within as well as out of wedlock; testate and intestate succession; custody; adoption; and legislation dealing with the care and protection of children. As a background to these areas, the provisions of the United Nations Convention on the Rights of the Child will also be considered as these expound a universal definition of what *children's rights* should entail.

DEFINITION OF CHILD

Various pieces of legislation in the region define *child* in different ways, depending on the purpose of the particular legislation in which the word in being used. Legislation is generally inconsistent in the use of the term, some referring to a child as "minor", "minor child", "child of the family", "child of the marriage", "relevant child", "infant", and

so forth. However, almost all of the jurisdictions under examination are in agreement to the extent that a child is defined as a person who has not yet attained the age of 18.

The 1989 United Nations Convention on the Rights of the Child[6] defines child as "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."[7] In Trinidad and Tobago, the Age of Majority Act[8] reflects this position. Section 2 of the act provides that:

> (1) Subject to this Act . . . a person shall attain full age on attaining the age of eighteen . . .
> (2) Subsection (1) applies for the purposes of any rule of law, and in the absence of a definition or of any indication of a contrary intention, for the construction of 'full age', 'infant', 'infancy', 'minor', 'minority', and similar expressions.

According to Section 2 of the Bahamas Guardianship and Custody of Infants Act,[9] child means a person under 18 years of age but does not include a person who is or has been married. The 1998 Belize Families and Children Act defines "child" in Section 2 as follows, "'child' means, unless provided otherwise in any law, a person below the age of 18 years".

LEGAL POSITION OF FOETUS

Article 6 of the convention recognizes that every child has an inherent right to life, but the convention does not state that it considers a foetus to be a human being. Presumably therefore, childhood commences at a person's birth.

In some territories having an Offences Against the Persons Act, it is an offence to procure a miscarriage, so that one can say with authority that the law does protect the foetus and recognizes it as having a right to life. Section 56 of the Trinidad and Tobago Offences Against the Person Act provides that:

> Every woman, being with child, who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, and any person who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully

6. See chapter 13, *infra*, and Appendix D.
7. Article 1.
8. Laws of the Republic of Trinidad and Tobago, Chap. 46:06. See Appendix A.
9. Statute Law of the Bahamas 1987, Vol. III, Chap. 118.
10. Laws of the Republic of Trinidad and Tobago, Chap. 11:08.

> uses any instrument or other means whatsoever with the like intent, is liable to imprisonment for four years.[10]

Section 57 further provides that:

> Any person who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing, whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, is liable to imprisonment for two years.

However, case law, in the form of *R v. Bourne*[11] has held that termination of a pregnancy may be lawful in certain circumstances, as for example, where it is necessary to preserve the life or health of the mother, which includes the mother's mental health. From this decision, it may be concluded that a foetus has a lesser right to life than the child which exists outside of the womb, so long as medical opinion allows the mother to make the decision to terminate the pregnancy.

In *A-G's Reference* (No. 3 of 1994)[12] recognition was again given to the foetus. In this case a man whom we shall call X, stabbed a pregnant woman in several places, one of which was to the left of her lower abdomen, knowing that she was pregnant. This wound had punctured the uterus and entered the abdomen of the foetus. X was the father of the child. The woman received medical care at a hospital and was discharged in a satisfactory condition. However, some 16 days later, she went into premature labour and gave birth to a "grossly" premature baby who died after 121 days of life. The immediate cause of death was due to the failure of the baby's lungs to perform satisfactorily due to her premature birth. The injuries to her abdomen had been repaired, and the evidence indicated that they made no direct contribution to her death. Her premature birth was caused by the injuries which the mother had received.

X was charged with murder of the child and the trial judge directed that he be acquitted. The attorney-general referred the matter to the Court of Appeal for an opinion as to whether or not the crimes of murder or manslaughter could be committed where unlawful injury was deliberately inflicted on a child *in utero* or on a mother carrying a child *in utero* where the child was subsequently born alive but thereafter died in circumstances where the injuries inflicted either caused or substantially contributed to the death of the

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11. [1938] 3 All ER 615.
12. [1997] 3 WLR 421, HL. For further discussion of this case see Andrew Bainham, *Children: The Modern Law*, 2d ed. (Bristol: Family Law, Jordan Publishing 1998).

child; and secondly, whether the fact that the death of the child was caused solely as a consequence of injury to the mother rather than as a consequence of direct injury to the foetus could negate any liability for murder or manslaughter. The Court of Appeal held that murder or manslaughter could be committed in either of the circumstances, that is, where the unlawful injury had been deliberately inflicted either to the child *in utero*, or to its mother carrying it, and that the necessary intent to establish the crime of murder was an intention to kill or cause serious bodily harm to the mother, as the foetus was seen as an integral part of the mother. The matter was further referred to the House of Lords at the request of X. It was held that the mental element of murder could not be satisfied in such circumstances, but that the crime of manslaughter could be committed. It is significant to note that Lord Mustill expressly rejected the argument that:[13]

> All the case law shows that the child does not attain a sufficient human personality to be the subject of a crime of violence, and in particular of a crime of murder, until it enjoys an existence separate from its mother, hence, whilst it is in the womb it does not have a human personality; hence it must share a human personality with its mother . . . The argument involves one fiction too far, and I would reject it.

It is interesting to note that Section 10(1)(c) of the Trinidad and Tobago Status of Children Act 1981 makes provision for a man to apply for a declaration of paternity in respect of an unborn child. The provision reads:

> Any person who . . . alleges that he is the father of an unborn child . . . may apply in such manner as may be prescribed by rules of court to the High Court for a declaration of paternity, and if it is proved to the satisfaction of the court that the relationship exists the court may make a paternity order whether or not the father or child or both of them are living or dead.

The provision is an interesting one. While research has revealed no local decision in which the provision has been interpreted, the clear words of the subsection seem to use "unborn child" and "child" interchangeably. How is it that the court can come to a conclusion that a relationship of father and child exists between a man and an unborn child? What is the test? Can a relationship exist between two living things when one is still *in embryo*, is unaware of the other, unable to communicate with, or even acknowledge the existence of the other? The provision also gives the man the right to seek this

13. Ibid, 429.

declaration of paternity in respect of a deceased child, and under this particular subsection, it would seem, a child born dead. The provision therefore appears to indicate that the legislature acknowledges the foetus as a child, and as an independent personality for purposes of the section. Here again, recognition by the law of a foetus or unborn child.

RELEVANT LEGISLATION REGULATING ABORTIONS

In some countries of the region, the issue of a woman's right to abort a foetus, and conversely, the right of the foetus not to be aborted, has been regulated by legislation. In Barbados, the Medical Termination of Pregnancy Act 1983 provides that treatment for the termination of a pregnancy is lawful if administered in accordance with the provisions of the act. The act deals with pregnancies of various durations. For a pregnancy of not more than 12 weeks duration, treatment for termination may be administered by a medical practitioner in two circumstances. Firstly, if he is of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the woman or grave injury to her physical or mental health. Secondly, termination is legal if in the opinion of the doctor there is a substantial risk that if the child were born, it would suffer physical or mental abnormalities as to be seriously handicapped. These provisions are of course open to interpretation, and one might be tempted to conclude that the latter part of the first ground which allows termination on the basis of "grave injury to her [the pregnant woman] physical or mental health"[14] is open to abuse. However, the legislation then goes on to stipulate what may constitute "grave injury".

If the pregnant woman tenders a written statement that she reasonably believes her pregnancy to be the result of an act of rape or incest, then this is sufficient to amount to grave injury to mental health. Also, in deciding whether or not the pregnancy should be continued, the doctor is called upon by the legislation to take into account the pregnant woman's social and economic environment, whether this be actual or foreseeable.

In relation to pregnancies of 12 to 20 weeks duration, the same grounds for termination identified above are applicable, if not one, but *two* medical practitioners form the opinion, in good faith, that either of the grounds exist.

For pregnancies of over 20 weeks duration, termination is allowed if not one or two, but *three* medical practitioners form the

14. Section 4 (1) (a).

opinion in good faith that the treatment to terminate the pregnancy is immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health or that of the unborn child.

The duration of the pregnancy is determined by a combination of two methods: by calculating from the first day of the last normal menstruation of the woman ending on the last day of the relevant week, and by clinical examination.

The legislation provides for the written consent of the woman to be tendered to the doctor prior to termination.[15] Termination of the pregnancy of a female under the age of 16 years or of a person of unsound mind is not to be administered except with the written consent of the parent or guardian. Further, the act enables the chief medical officer or other person authorized by him in writing, to enter any premises at all reasonable times, to ascertain whether there has been a contravention of the legislation. A contravention of various specified provisions attracts criminal sanctions in the form of a fine or imprisonment.[16]

CONVENTION ON THE RIGHTS OF THE CHILD

The UN Convention on the Rights of the Child is currently influencing the way in which child law is being developed.[17] The degree of this influence is debatable, but this chapter would not be complete without a reference to the convention. According to one source,[18] the convention is:

> the result of 10 years of consultations and negotiations between government officials, lawyers, health care professionals, social workers, educators, children's support groups, non-governmental organizations and religious groups from around the world. More countries have ratified the convention than any other human rights treaty in history.

15. This seems to be discretionary and not mandatory as the legislation uses the word "may" – see Section 8(1).
16. See also the Guyana Medical Termination of Pregnancy Act 1995.
17. Other international treaties have from time to time identified children as rights holders. The International Covenant on Civil and Political Rights for example provides in Article 24 that –
    1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.
    2. Every child shall be registered immediately after birth and shall have a name.
    3. Every child has the right to acquire a nationality. The Convention on the Rights of the Child however by far provides a more exhaustive listing of children's rights.
18. *The Convention on the Rights of the Child: Questions Parents Ask*, UNICEF, Pamphlet, Education for Development (New York and Geneva: UNICEF Publication n.d.), 1.

It is reported that the convention has been ratified by some 187 countries, including those of the Commonwealth Caribbean Region,[19] but like all other international treaties, it is not directly justiciable in Commonwealth Caribbean Courts. However, the fact that the region ratified it by 1993 does indicate a strong degree of commitment on the part of the region's governments to the welfare and protection of children. It is also a clear indication that nations universally accept that the rights of children everywhere should be uniform and that they should conform to generally accepted and approved standards, as laid down by the convention.[20]

By ratifying the convention, the various governments of the region have in effect declared an important interest in promoting and protecting the rights of children, and although the express provisions of the convention do not yet form part of their domestic laws save in a few limited cases,[21] nevertheless, they are internationally obliged to implement whatever legislative and administrative measures are needed to put the provisions of the convention into effect in their respective territories.[22]

According to one UNICEF source:[23]

> When countries ratify the convention, they agree to review their laws relating to children. This involves assessing their social services, legal, health and educational systems, as well as levels of funding for these services. Governments are then obliged to take all necessary steps to ensure that the minimum standards set by the convention in these areas are being met. In some instances, this may involve changing existing laws or creating new ones. Such legislative changes are not imposed from the outside, but come about through the same process by which any law is created or reformed within a country.

The convention is intended to be a complete and entire statement on the rights of the child. It seeks to establish universally accepted standards and universal principles designed to protect children in a variety of situations, from abuse and exploitation, to

19. Heather Stewart, "The Convention on the Rights of the Child and the Role of UNICEF in its Implementation in the Commonwealth Caribbean", 3 (paper presented at Faculty of Law, UWI, 27 March 1997, copy lodged at Faculty of Law Library, UWI, Cave Hill).
20. See Sanford J. Fox, "Beyond the American Legal System for the Protection of Children's Rights", 31 *Family Law Quarterly* (1997–98), 237, for an examination of the sources and forms of children's rights in international law and the mechanisms for enforcement.
21. See for example First Schedule of the 1998 Families and Children Act, Belize, which has expressly made the provisions of the convention law in Belize, although any conflicts between the domestic law and the convention will be resolved in favour of the domestic law.
22. See chapter 13, *infra*, for a discussion of the difficulties of implementing the convention.
23. *The Convention on the Rights of the Child: Questions Parents Ask*, 1.

promoting their survival and development, to enabling them to participate as citizens in all aspects of life in their respective communities and countries.

Article 2 of the convention seeks to ensure for the child within his jurisdiction the various rights set forth in the convention irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth* or other status. The word birth bears particular significance since in some territories of the region, there is still much legal discrimination against children born out of wedlock.

Other relevant articles include Article 3 which is intended to promote the best interests of the child, and Article 6 on the right to survival and development.

Of the provisions dealing with the civil rights and political freedoms of the child, Article 12 deals with the right to self-expression; Articles 13 and 17 provide for the right to have access to information; Article 14 provides for freedom of thought, conscience and religion; Article 15 provides for the right to freedom of association and peaceful assembly; and Article 16 provides for the right to protection from arbitrary or unlawful interference with his or her privacy, family, home or correspondence, and protection against unlawful attacks on his or her honour and reputation. States ratifying the convention are to assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child to be given due weight in accordance with the age and maturity of the child.[24] In particular, the child is to be provided with the opportunity to be heard in judicial and administrative proceedings affecting him or her, either directly or indirectly.[25]

The convention also seeks to ensure for the child access to health services, social welfare, education, culture, and the right to participate in recreational activities, play and leisure.

Other provisions seek to ensure for the child the right to a name and nationality; protection from abduction and illegal adoption; right to family contact, and protection from abuse and neglect, including physical, sexual, and mental abuse. There are provisions relating to the protection and care of children having special needs, including children without families, disabled children, children who are refugees, or children involved in armed conflicts. The convention encourages the establishment and growth of rehabilitative facilities for children requiring special care and treatment.

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24. Article 12(1).
25. Article 12(2).

Having ratified the convention, the next step for the governments in the region, is to give the provisions domestic effect by expressly making them law. This involves an overhauling of the law relating to children in the various jurisdictions and would entail amendment and/or repeal of existing provisions, as well as the setting up of various bodies or departments to assist in the process of putting the words of the convention into action.[26] Many countries are in the process of doing this, some have prepared detailed reports on the state of child law in their countries, and Belize, in their 1998 Families and Children Act have made the convention law within their domestic system "with appropriate modifications to suit the circumstances in Belize."[27] The fact that Belize has taken this significant step does indicate that the convention is definitely influencing the way in which child law is developing in the Commonwealth Caribbean.[28]

LEGAL DISABILITIES OR INCAPACITIES OF CHILDREN

Children generally suffer from various legal disabilities or incapacities,[29] which, depending on the circumstances, might be an advantage or a disadvantage to the child. The rationale for this is that children, because of their age, immaturity and inexperience, are not physically or psychologically equivalent to adults, so that the law, for policy reasons, must protect them in cases where they may be put to disadvantage if treated as adults. On the other hand, some degree of responsibility should naturally be imposed by the law in appropriate cases.

Some of the more significant disabilities and incapacities are highlighted in the following pages.

(i) *contractual disability*

At common law a contract entered into by a child or minor is voidable at the instance of the child, although binding against the other party to it, except contracts for necessaries and a few other types of contracts such as those for services where allowed by the law, and those for apprenticeship, which will be held valid if for the

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26. For a more comprehensive study of the provisions of the convention and its applicability and adaptability to the local setting, see for example, Stephanie Daly, *Child and Family Law – Trinidad and Tobago* (1992), copy lodged at Faculty of Law Library, UWI, Cave Hill Campus; *Barbados' Initial Report on the Implementation of the Convention on the Rights of the Child*, prepared by the Barbados Child Care Board, copy lodged at the Faculty of Law Library, UWI, Cave Hill Campus.
27. See First Schedule to Act.
28. See chapter 13, *infra*, for an assessment of the convention in relation to children's rights in the Commonwealth Caribbean.
29. See "At What Age Can I?", *Childright* 11 (1991), 73.

infant's benefit. Voidable contracts may be repudiated during the child's infancy, or within a reasonable time of his attaining full age.[30]

Legislation has since stipulated the various restrictions placed upon infants in this context and now expressly provides that a contract with a child or minor for the supply of goods or for the repayment of a loan is void unless made in respect of necessaries.[31] Section 2 of the Bahamas Infants' Relief Act,[32] for example, provides that "all contracts, whether by speciality or by simple contract, henceforth entered into by infants for the repayment of money lent, or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void".[33] In relation to necessaries,[34] an infant may validly contract for these. In Trinidad and Tobago, this is stipulated in Section 4 of the Sale of Goods Act[35] which specifies that:

> Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. However, where necessaries are sold and delivered to an infant . . . he must pay a reasonable price there for . . .

30. Vol. 24, *Halsbury's Laws of England*, 4th ed., paras 407, 411 and 420.
31. See Infants Act, Laws of the Republic of Trinidad and Tobago Chap. 46:02, s. 19; Minors Act, The Laws of Barbados, Cap. 215, s. 19.
32. Statute Law of the Bahamas 1987, Chap. 120.
33. See *Strout et al. v. Baker et al.* (unreported) 10 November 1993, SC Equity Side, Bahamas (No. 1197 of 1988); Strachan J., where the court had to determine the effect of a minor being a party to a voluntary settlement. For a further discussion of the contractual incapacity of children see *Cowern v. Nield* [1912] 2 KB 419, but in *Bristow v. Eastman* (1744) 1 Esp. 172 infancy was no defence to an action for money had and received where the plaintiff relied upon the tort of conversion in circumstances in which the infant had embezzled money from him. However, if to allow a claim in tort would have the effect of indirectly enforcing a contract between a minor and the plaintiff, the court will not allow the action to succeed – *R Leslie Ltd. v. Sheill* [1914] 3 KB 607. It appears now that the modern trend in this area of law is to argue that the law of restitution applies since it would be unfair to allow an infant to be unjustly enriched and to get away with it on the ground of his infancy. In *Stocks v. Wilson* [1913] 2 KB 235, the infant had deliberately misrepresented his age and induced the plaintiff to sell certain goods to him, and then used the goods to his advantage by selling some and by using the rest to secure a loan, but failed to pay to the plaintiff the price agreed upon for them. The court found that the infant could rely on the defence of infancy to the contract, and that the infant also had a defence to an action in the tort of deceit because of the undermining of contract law, but the infant was nevertheless obligated to account in equity for the benefit he had received as a result of his wrongdoing. For a more detailed study of infancy in the law of restitution see Andrew Burrows, *The Law of Restitution* (Butterworths 1993), 450–56; Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press 1990) Rpt, 399–400; Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution*, 4th ed. (London: Sweet and Maxwell 1993), 524, *et seq.* See too G.H. Treitel, *The Law of Contract*, 9th ed. (London: Sweet and Maxwell 1995), 494, *et seq* and G.C. Cheshire, C.H.S. Fifoot and M.P. Furmston, *Law of Contract*, 13th ed. (Butterworths 1996), 440, *et seq.*
34. Necessaries include food, clothing, medicine and lodging, as well as other articles deemed suitable and proper in relation to the infant's position in life even though they may not be necessary for his existence. Vol. 24 *Halsbury's Laws of England* (4th ed.) para 417.
35. Laws of the Republic of Trinidad and Tobago, Chap. 82:30.

> Necessaries mean goods suitable to the condition in life of such infant . . . and to his actual requirements at the time of the sale and delivery.[36]

(ii) ***sale and lease of property belonging to infants***

Neither the infant nor an adult can validly sell or lease property belonging to the infant. However, sale or lease is permitted with the consent of the court. Section 2(1) of the Bahamas Infants' Property Act,[37] for example, provides that "It shall be lawful for the court on the petition of any infant by his guardian or next friend, if it shall deem it proper and for the benefit of such infant, from time to time, to authorize the sale of any lands of such infant". Section 3 provides that:

> It shall be lawful for the court on the petition of any infant by his guardian or next friend, if it shall deem it proper and for the benefit of such infant and consistent with due regard for the interests of any other persons interested in the lands, to authorize leases of any lands of such infant or of any parts thereof for any purposes whatsoever.[38]

(iii) ***settlement of infant's property***

The power to make settlements of property belonging to infants is limited and the courts will approve such a settlement in cases where it is made in contemplation of marriage. Section 1 of the Bahamas Infants' Settlements Act[39] provides that:

> It shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the court, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property . . . and every [such] conveyance, apportionment and assignment of such real or personal estate, or contract . . . executed by such infant . . . shall be valid and effectual as if the person executing the same were of the full age of 18 years.

(iv) ***parties to legal proceedings***

At common law, a child may sue and be sued subject to special rules relating to procedure, but children by themselves are not allowed to sue in their own names, but may do so with a *guardian ad litem* or *next friend.*[40] The recent 1998 Belize Families and Children Act has stipulated the circumstances in which an infant may bring an action as if he were of full age. Section 13 provides that:

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36. See *Nash v. Inman* [1908] 2 KB 1; Chapple v. Cooper (1844) 13 M&W 252.
37. Statute Law of the Bahamas1987, Chap. 121.
38. See *Misir v. Ramdoolarie and Others* [1964] LRBG 265 (Guyana) where the court had to determine the issue of leases granted on behalf of minors.
39. Statute Law of the Bahamas 1987, Chap. 122.
40. Traditionally the father was entitled to act on behalf of the child and could only be removed if he was acting improperly. See *Re Taylor's Application* [1972] 2 QB 369, CA.

> Notwithstanding the provisions of any written law to the contrary, and notwithstanding that a child is at common law incapable of suing or authorizing any person to sue in his own name in any court of law, he may prosecute any action in any court for any sum of money which may be due to him for salary, wages or piece work, or for work as an employee, in the same manner as if he were of full age.

In view of the paramountcy of the welfare principle, and recognition of the mature *Gillick competent* child,[41] legislation is now appearing in some countries which recognizes the right of the mature child to bring proceedings in his own right without the need to apply to the court through an adult. Under the Guyana 1996 Domestic Violence Act,[42] for example, Section 4(3) allows a child under the age of 16 to apply for a protection order. It provides that:

> A child under the age of sixteen may with leave of the court apply for a protection order but such leave shall not be given unless the court is satisfied that the child has sufficient understanding to make the proposed application.

(v) ***testamentary capacity***

Children do not possess the same testamentary capacity as do adults,[43] but a married child may be treated as an adult for this purpose. The Belize 1998 Families and Children Act provides in Section 11 that:

> Notwithstanding anything to the contrary contained in any law relating to the wills of children, a married child may make a will relating to his property, real and personal, and of every kind whatever.

(vi) ***trustees and executors***

At common law the appointment of an infant as trustee to any settlement or trust is void.[44] It is possible for an infant to be appointed as an executor, although he is not able to validly exercise the powers of the office until he attains his majority. This incapacity of course is still applicable unless modified by statute. In Belize, the 1998 Families and Children Act provides in Section 12 that:

> (1) A child may be appointed as executor or a trustee but shall be incapable of exercising the office until he has attained the age of 18 years.
> (2) Letters of administration under any law relating to the administration of

41. See chapter 5, *infra.*
42. No. 18 of 1996.
43. There are limited exceptions in English law where the child is a soldier in actual military service or a seaman at sea. See *In the Estate of Stanley* [1916] P 162 and *In the Estate of Rowson* [1944] 2 All ER 36.
44. *Salsbury v. Bagott* (1677) 2 Swan 603.

the estates of deceased persons shall not be granted to anyone before he has attained the age of 18 years.

(vii) ***liability for tort***

The mature child who is able to discern between right and wrong is responsible for his own tortious acts.[45] However, if injury is caused to a plaintiff by the child's use of a dangerous thing, the adult having control of the dangerous thing will be liable.[46] Further, parents not exercising proper control or supervision of the child[47] may be held responsible for the child's consequential tortious acts, or they may be vicariously liable where they have authorized the actions of the child or where the child was their employee. The parents may also be liable where they have later ratified the child's tortious actions.[48]

(viii) ***liability for crime***

Under this head, children are divided into three categories for the purposes of criminal responsibility.[49] The youngest children are exclusively exempt from criminal responsibility.[50] The common law position is that children under the age of seven years are incapable of committing a crime. According to Hall,[51] this rule applies in Barbados, Trinidad and Tobago, Guyana, Grenada, Belize, Dominica, and the Bahamas. Parliament has increased this age to eight years in some jurisdictions, such as in St. Lucia, St. Vincent, and Jamaica. In Montserrat, under section 12 of their Penal Code, criminal responsibility commences at the age of ten.

For children over seven but under fourteen years, a rebuttable presumption arises that such a child does not possess sufficient capacity to know right from wrong, although in some jurisdictions, such as Grenada, Belize and the Bahamas, statute has lowered the upper age limit to twelve years.[52] For this group of children, the presumption that the child is *doli incapax* may be rebutted where "the prosecution proves beyond reasonable doubt not only that he [the child] caused an *actus reus* with *mens rea* but also that he knew that

45. See *McHale v. Watson* [1966] ALR 513; *Mullin v. Richards* [1998] 1 All ER 920.
46. *North v. Wood* [1914] 1 KB 629; *Burfitt v. Kille* [1939] 2 KB 743.
47. See *Carmarthenshire County Council v. Lewis* [1955] AC 549; *Barnes v. Hampshire County Council* [1969] 1 WLR 1563.
48. Vol. 24 *Halsbury's Laws of England*, 4th ed., para 424.
49. In the UK the 1998 Crime and Disorder Act now distinguishes between two groups of children by abolishing the presumption of *doli incapax* in relation to children over ten but under fourteen. Under the act, two groups of children are now distinguished – those under ten and those over ten.
50. See *Walters v. Lunt* [1951] 2 All ER 645.
51. C.G. Hall, *Criminal Law: General Principles* (manual prepared for students in Criminal Law, Faculty of Law, Cave Hill Campus, UWI, 1998).
52. Hall, *Criminal Law: General Principles*, 102–103.

the particular act was not merely naughty or mischievous, but 'seriously wrong'".[53]

Children over fourteen years are presumed to have a degree of reason which is sufficient to make them criminally responsible for their actions.[54] In one case it was stated that such a child is "responsible for his actions entirely as if he were 40".[55]

(ix) ***limitation periods***

The commencement of legal proceedings to enforce rights do not start to run until the child has attained the age of majority.[56]

LAWS AFFECTING CHILDREN GENERALLY

Laws affecting children in the various territories, are directed to ensuring their care and protection from birth to their majority, starting with the registration of their birth, protection from disease through immunization, maintenance and schooling, physical care by parents or guardians, or in default, by the state. In disputes affecting children, both the common law and statute provide for these to be resolved in view of the principle that the welfare of the child or the best interest of the child is the overriding consideration. In the Barbados Minors Act,[57] for example, Section 8 reads:

> Where, in any proceeding before the Court, the custody or upbringing of a minor or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration.

Apart from the protection offered by the civil law, the criminal law offers special protection to children in relation to offences involving children and it also provides for special conditions and procedures to be followed in cases where children are accused of or charged with having committed criminal offences, in recognition of the principle that in these situations children ought to be treated differently from adults. Additionally, the criminal law imposes various penalties for offences committed against children by parents, guardians or other adult offenders, including the offences of cruelty,

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53. Smith and Hogan, *Criminal Law*, 8th ed. (Butterworths 1996), 195.
54. *R v. Oxford* (1840) 9 C&P 525.
55. Per Erle J. in *Smith* (1845) 1 Cox C. C. 260; For more on the criminal responsibility of children, see Andrew Bainham, *Children: The Modern Law*, pp. 484–88.
56. See for instance Sections 2(3)(a) and 11 of the Limitation of Certain Actions Act, No. 36 of 1997, Trinidad and Tobago.
57. Laws of Barbados, Cap. 215.

sexual offences, and other offences committed in circumstances where duties towards the children by particular individuals have not been fulfilled, as for example, in a situation where there is a maintenance order against a father for the benefit of the child, statute law in various jurisdictions provides for the committal to prison of the father for wilful neglect or culpable refusal to make the necessary payments.

In Trinidad and Tobago legislation affecting children and circumscribing the law relating to children, includes the following:

- Age of Majority Act (Chap. 46:06)
- Children Act (Chap. 46:01)
- Children and Young Persons (Harmful Publications) Act (Chap. 11:18)
- Corporal Punishment (Offenders Not Over 16) Act (Chap. 13:03)
- Domestic Violence Act (No. 10 of 1991)
- Education Act (Chap. 39:01)
- Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981 (Chap. 46:08)
- Infants Act (Chap. 46:02)
- Maintenance Orders (Enforcement) Act (Chap. 45:53)
- Attachment of Earnings (Maintenance) Act 1988 (1995 Amendment)
- Matrimonial Proceedings and Property Act (Chap. 45:51)
- Notification of Births Act (Chap. 44:03)
- Public Health (Nursery Schools and Primary Schools Immunisation) Act (Chap. 28:03)
- Registers of Births, Deaths and Marriages Act (Chap. 44:02)
- Status of Children Act 1981 (Chap. 46:07)
- Succession Act 1981 (unproclaimed)
- Widows and Orphans Pensions Act (Chap. 23:54)
- Workmen's Compensation Act (Chap. 88:05)
- Young Offenders Detention Act (Chap. 13:05)

STATUS OF CHILDREN: LEGITIMATE VERSUS ILLEGITIMATE

The status of the child both traditionally, and under the law in countries having reformed legislation is significant in that the child's rights under the law may be affected depending on his particular status. The traditional rule is that rights of children depend upon the circumstances of their birth and the status of the child as being legitimate or illegitimate. In jurisdictions having *status of children* legislation,[58] rights

58. See chapter 4, *infra*.

of children to a large extent are dependent upon whether or not paternity can be proved in accordance with the respective legislative provisions, for if paternity is not established then the child remains unaffected by the reformed legislation.

In territories without *status of children* legislation, there is still much legal discrimination against children born out of wedlock, and even in a few territories having *status of children* legislation, some of the legal discriminations are retained, such as in Jamaica[59] and in Belize.[60]

What does legitimate and illegitimate mean? A rhetorical question perhaps. Under the common law, children were legitimate if born in wedlock, and illegitimate if they were not. In view of current legislation in many countries, the traditional description of children as *illegitimates* or *bastards* has now been altered so that the terminology currently used in these jurisdictions tend to describe them as *in-wedlock* or *out-of-wedlock* children; *nuptial* or *ex-nuptial children*; *marital* or *non-marital children*.[61] The tendency now, in these countries, is to describe children by reference to the parents' status as married or unmarried, rather than by reference to the children's status as either legitimate or illegitimate. This move towards a more positive identification of the child is welcome as it must naturally have some ameliorating effect on the psychological conditioning of the child who is born outside of marriage. For the sake of the child, it is good for society to view him in a positive way, and to tell him so by avoiding the derogatory labels inflicted upon him by the common law.

The illegitimate child under the common law

The central disadvantages of illegitimacy included the mother's limited rights to claim maintenance for the child, and the fact that rules of construction interpreting family relationships excluded illegitimate children unless there was an express intention to the contrary.[62] This had the effect of excluding illegitimate children from benefitting under wills and statutes such as workmen's compensation legislation, and it also excluded the out-of-wedlock child from sharing upon the intestacy of the child's father.[63] Illegitimate children

59. See chapter 4, *infra*.
60. See chapter 4, *infra*.
61. See, however, the recent English decision of *Dawson v. Wearmouth* [1997] 2 FLR 629 where references to the term "illegitimate child" abound.
62. *Hill v. Crook* (1873) LR 6 HL 265.
63. See for example Anthony Dickey, *Family Law*, 3d ed. (Sydney: LBC Information Services 1997), 272, where he cites *Attorney-General (Vic) v. Commonwealth* 962) 107 CLR 529 on the legal consequences of illegitimacy in which Windeyer J. stated: "The common law expressed the result [of bastardy] by saying that a bastard was not of heritable blood. He could not be an heir; and no one could inherit through him: but he could acquire property;

therefore, traditionally, had no rights of inheritance from or through the father, but a right of inheritance from but not through the mother, provided she had no legitimate children. What is interesting about this situation, is that the law seemed less concerned with punishing the parents for their sexual indiscretions than it was with punishing unfortunate, helpless children. At common law, the child born out of wedlock was regarded as *filius nullius*[64] or a child of no one and as a result, was accorded none of the legal rights and duties flowing from the relationship of parent and legitimate child. Such a child in law, was a stranger, not only to his parents, but to all other relatives including brothers, sisters and grandparents.[65] This stringent position as obtained for centuries under the common law seems anachronistic in nature in today's changed social outlook but for children forced to submit to such a system, life proved indeed a harsh reality.

The legal position of the mother of an illegitimate child was the same as the position of both parents combined with respect to their legitimate children.[66] This means that the mother had *prima facie* right to custody of the illegitimate child as against the father.[67] The father of such a child had practically no rights in relation to the child. The mother alone in law could exercise parental responsibility for the child. She had the right to select the type of education the child was to receive as well as the religion in which the child was to be brought up. She had the right to control the child's whereabouts, to determine the place of residence of the child including changing its residence without the approval of the father, and she could also appoint a guardian for the child under her will. The rights of the father to and over the illegitimate child were almost nonexistent, unless the mother was found to be unfit.

At common law, neither the father nor the mother was liable to maintain an illegitimate child. It seems that the law then was unable to separate children's issues from marital issues and sought to award rights to children only if those children were the product of marriage.

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and he could have heirs of his own to inherit that property" (at p. 584). See too Lindy Willmott, *De Facto Relationships Law*, Chap. 12, "Legal Position of Ex-nuptial Child", (Sydney: LBC Information Services 1997), 327 *et seq.*

64. Blackstone, *Commentaries*, Vol. 1, 457–59.

65. For a more detailed study of the legal position of illegitimate children under the common law see P.M. Bromley, *Family Law*, Chapter XIX, p. 371 *et. seq*, 2d ed.; S.M. Cretney, *Principles of Family Law*, chapter 20, 577 *et seq*, 4th ed. (London: Sweet and Maxwell 1984) or other earlier editions. Latest editions of these publications do not deal with the subject as adequately as earlier editions as the common law has been abrogated to some extent, and in some cases, to a great extent, by various recent or relatively recent statutes.

66. *R v. New* [1904] 20 TLR 583, CA; *Re Carroll* [1931] 1 KB 317, CA.

67. *Barnardo v. McHugh* [1891] AC 388 (HL).

Today this attitude will be frowned upon, but even then, there was judicial awareness of the need for change. In *Re Lloyd*,[68] Maule J. asked the question, "How does the mother differ from a stranger?" As far as the law was concerned, there was no difference since the illegitimate child could not enforce any rights morally owed to him by either his mother or father.

However, not all was doomed, for if the father of the child adopted him as his own, then in these circumstances the father was liable to maintain the child. In *Hesketh v. Gowing*[69] Lord Ellenborough held that the father in this situation was liable for the expenses of a nurse spent in boarding, lodging and clothing the child, as well as for other necessaries supplied. This is reminiscent of the doctrine of acquiescence so that if the father gave up his right not to support his illegitimate child, and reliance was placed on the father's conduct, then it appears that the father would have been estopped from resorting to his original right.

The right of the illegitimate child to be maintained gradually evolved through statutory intervention, and, under Affiliation Acts in the various territories modelled on UK legislation, provision was made for the mother to apply for maintenance from the alleged father. Under these Acts however, rights of support through maintenance from the father were limited. The right was derivative and depended on the mother's ability and willingness to make a timely claim.[70]

Under the common law, rights of succession in respect of an illegitimate child were almost nonexistent. The illegitimate child had no right to participate or share on the intestacy of either mother or father, and conversely, neither parent had any right to succeed on the child's intestacy. Such a child had no right to take on the intestacy of a grandparent or brother or sister, whether such sibling was illegitimate or not, and conversely, these relations had no right to succeed on his intestacy.

In the construction of deeds and statutes, there was a presumption in favour of legitimate children, which of course disadvantaged children born out of wedlock, for example, in workman's compensation legislation, the definition of "dependents" and "child of a workman's family" would have included only children born in wedlock.

In the midst of such a discriminatory and unsatisfactory state of affairs, one might be driven to feel some degree of optimism in the

68. [1841] 3 Man. & G. 547.
69. [1804] 5 Esp. 131.
70. See chapter 8, *infra*.

knowledge that at least a testator could by express provision, leave some legacy or bequest behind for his illegitimate child. However, such an express intention, as reported by Cretney,[71] was often adversely affected by the following :

(a) Rule of construction – where words in a will, settlement, or other disposition referring to or denoting family relationships were employed, these were construed to refer to legitimate relations only, even in situations where the testator might have intended all his children to benefit including an out-of-wedlock child, so that relationships traced through an illegitimate line were excluded.

The often cited case supporting this rule is that of *Sydall v. Castings*,[72] where a company took out a group life insurance scheme for its employees. On the death of a member, the issue was whether or not an illegitimate child could benefit. It was held that the word "descendant" did not include an illegitimate daughter.[73]

(b) Rule of public policy – an illegitimate child who had been conceived after the making of a disposition could not benefit from it, however obvious it might have been that such a child was intended to benefit.[74]

To illustrate the point, if a male partner in a stable *de facto* relationship loved his children and assumed responsibility for them, both legally and morally, and made a settlement of money for the benefit of his children whereby he expressly extended the construction and meaning of the word "children" in order to negate the rule of construction, his illegitimate children who were born *after* the making of the disposition could not benefit although illegitimate children born before its date could benefit. It appears that the public policy rationale for the existence of this rule was that to allow the after-born illegitimate children to benefit would be "tantamount to encouraging immorality", which a court of law could not do.

(c) Rule of evidence – a gift to an illegitimate child who was conceived after the date of the will failed if the child was described by reference to the fact, rather than reputation, of paternity because this would involve an inquiry which the court would not undertake.[75]

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71. Op. cit., 604–605.
72. [1967] 1 QB 302.
73. See the Cayman Islands decision of *RHB Trust Co. Ltd. v. Butlin* [1992–93] CILR 219, where the rule of construction was applied to disinherit children who were expressly intended to benefit, discussed *infra*.
74. See for example *Re Hyde* [1932] 1 Ch. 95.
75. Cretney, op. cit., 605.

In the Cayman Islands, the common law discriminations described above have to some extent been ameliorated by Section 4 of the Property (Miscellaneous Provisions) Law[76] of the 1999 Revised Laws which provide that:

> There is hereby abolished as respects dispositions made after the 23rd November 1994, any rule of law that a disposition in favour of illegitimate issue not in being when the disposition takes effect is void as contrary to public policy.

Under the common law, it would appear then that if the illegitimate child was left without reasonable provision on the death of his mother or father, the child had no legal remedy. This was not only in relation to dispositions, but also in relation to statutory construction of words such as "child" or "dependent" which were construed as not extending to illegitimate children. In *Re Makein,*[77] M had died intestate and devolution of his estate was governed by the UK Inheritance (Family Provision) Act 1938 as amended by the Intestates' Estates Act. P, who was an infant and illegitimate son of M applied for provision out of the estate. It was held that an illegitimate son, although he might have been brought up as a member of the family, had no claim under the Acts.

Not only did the illegitimate child have no power to appear before the court and demand that his parents perform duties in relation to him, but additionally, the child's father had no *locus standi* before the court in a case where the father wished to exercise rights in relation to the child. The following cases clearly illustrate these deficiencies in the law.

In *Re Lewis,*[78] the putative father of a child applied for custody. The child's mother had left him with the father's stepmother who wanted to adopt the child and take him to the United States. The father agreed to the arrangement, but the child's mother objected. It was held that the father's application under the Barbados Infants Act 1958 failed as the court lacked jurisdiction to make an order in favour of a putative father.[79]

However, the stamp of disapproval over the out-of-wedlock child was not absolute. *Clarke v. Carey*[80] illustrates the Jamaican position before the coming into force of the Jamaica Status of Children Act

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76. No. 7 of 1994 (1999 Revision).
77. [1955] Ch. 194.
78. (1970) 15 WIR 520 (Barbados); see too *Finlayson v. Matthews* (1971) 12 JLR 401 (Jamaica).
79. *Re Lewis* is no longer good law in Barbados since the coming into force of the Status of Children Reform Act, 1979.
80. (1971) 12 JLR 637 (Jamaica).

1976. In this case a woman had two illegitimate children, a boy aged eight, and a girl aged four, who had been in the *de facto* custody of their father, a married man. The mother applied to the court for custody and a similar application had been made by the father under the Guardianship and Custody of Children Law (No. 69 of 1956, Jamaica). The mother's application was held to be competent, but that of the father was held not permissible under the law as the children were illegitimate. On appeal to the Jamaican Court of Appeal, the court examined the *prima facie* right of the mother of illegitimate children and circumstances in which the mother could be deprived of this right, and concluded that the welfare of the children overrode the mother's right. On the facts, the future of the children, if allowed to live with the mother, was uncertain. The mother was not employed, had no income, and lived at the home of her parents, which was overcrowded. On the other hand, the children were very happy and comfortable at the father's home. They attended school and were making good progress, each had their own room, and the father's wife was very attached to them. The court held that it was not in the interests of the children to remove them from the home of the father into the custody of the mother. Justice Smith in his judgement stated:[81]

> The authorities establish that the mother of an illegitimate child has, at least, a *prima facie* right to its custody . . . In *Re G (an infant)*[82] Lord Evershed, M.R., said that the mother's obligations existed at common law. He said [at p. 877] 'As the child was illegitimate, according to the common law of the land, the mother was, and is, the person responsible for the upbringing of the child.' Whether the right in the United Kingdom arose from obligations at common law or by statute there can be no doubt that the right exists. The position is exactly the same in Jamaica. The statutory obligation upon a mother to maintain her illegitimate child was first imposed by s. 1 of Law 31 of 1869, 'A Law to provide for the Maintenance by Parents and Step-Parents of children', and the provision is still in force in s. 3 of the Maintenance Law, Cap.232 . . . It would be very unfortunate indeed if the idea was put out in Jamaica that a well-to-do father can take away and deprive the mother of an illegitimate child of the custody of her child merely because he is financially better off than she is and better able to provide for the child's material welfare. A child's physical comfort is, however, an important consideration when deciding what is in the child's best interest. A child can be made comfortable in a poor home though he might be more comfortable in a rich one. And if the comfortable poor home is his mother's (in the case of an illegitimate child) it would be difficult, if not impossible, to justify an order removing him to a rich home. But if he is in a comfortable rich home from which it is sought to remove him care has to be taken to see that his general

81. See too *Watson-Morgan v. Grant* [1990–91] CILR 81.
82. [1956] 2 All ER 876.

> welfare is not prejudiced by such a removal. The evidence in this case shows that the children are in a suitable and comfortable home with all their material needs being met. This home is their father's. There is no evidence that living away from their mother has, at any stage, affected them in any way. The teachers say they are happy and seem to be enjoying a happy home life . . . In my judgement, after the most anxious consideration, the decision of the Master awarding custody to the mother is not justified on the evidence he had to consider. In my opinion, it will not be for the welfare of the children to remove them into the custody of the mother at this time. This is a decision reached with great regret. The father is, however, not being granted custody and it is open to the mother to reapply whenever she is settled and can offer proper accommodation to her children. Of course, the longer the children remain in their new environment the more difficult it will be to satisfy a court that it will be for their welfare to remove them from it.

It is interesting to note the case of *Minister of Home Affairs v. Fisher*[83] on the interpretation of the word "child" in a constitutional instrument. The Privy Council held that "child" meant child, whether legitimate or illegitimate. In this case the mother of four illegitimate children was Jamaican, and the four children had been born in Jamaica. She subsequently married a man of Bermudian nationality in 1972 and in 1975 she and the children took up residence with her husband in Bermuda. The children were all under 18 years. The Minister of Labour and Immigration in Bermuda ordered the children to leave Bermuda. The Supreme Court refused an application to quash the order and refused to grant a declaration that the children belonged to Bermuda, for the reason that the children were illegitimate. There was an appeal to the Court of Appeal of Bermuda which held that the children belonged to Bermuda pursuant to s. 11(5)(d) of the Constitution which declared that the child of a person married to a person having Bermudian status shall be deemed to belong to Bermuda. The Minister of Home Affairs appealed to the Privy Council on the ground that the presumption applied that *child* in the section meant legitimate child. It was held that the children were deemed to belong to Bermuda and that the presumption of legitimacy did not apply to the relevant section of the Constitution.

The rule that an illegitimate child could not take on the intestacy of its parents was modified to allow the illegitimate child to take on the intestacy of its mother. But this was on the proviso that the mother had no legitimate children, and although the illegitimate child could take *from her*, he could not succeed *through* her.

In Guyana, for example, statutory effect was given to the right of the illegitimate child and the right of its mother to succeed on the

83. [1980] AC 319 (Privy Council, on appeal from Bermuda).

intestacy of the other. Section 11 of the Guyana Legitimacy Act[84] provides that:

> (1) Where, after the commencement of this Act, the mother of an illegitimate child, such child not being a legitimated person, dies intestate as respects all or any of her property, the illegitimate child, or if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate.
>
> (2) Where, after the commencement of this Act, an illegitimate child, not being a legitimated person, dies intestate in respect of all or any of his property, his mother if surviving shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent and if his mother does not survive him then such legitimate and illegitimate children of his mother as survive him and the persons entitled to succeed then on intestacy shall be entitled to take any interest therein to which they would have been entitled if all such children and the child had been born legitimate.

SOCIAL REALITY

Some of the problems encountered by illegitimate children were highlighted by Gloria Cumper thus:[85]

> . . . family life too often tended to be unstable and unsatisfactory. Offered in support of this view was the very high percentage of children born out of wedlock . . . The family matters of poor persons were dealt with in the Resident Magistrate's Court . . . The bulk of these matters were brought . . . under the provisions of the Maintenance and Bastardy (later Affiliation) Laws . . . [In] any six months period . . . these applications would number two and three thousand, with affiliation claims outnumbering those for maintenance of legitimate family members . . .The strict rules governing the right to make application under the Affiliation Act, reinforced the link between poverty and birth out of wedlock, and made both seem discreditable . . . Hearings in affiliation orders were lumped together to be heard at the end of the week, and the determination of paternity for the purpose of making an affiliation order was often disposed of without any recognition of the consequences for either the children or the adults involved . . . [Also brought to public attention were] the hardships suffered by such children who, by reason of the circumstances of their birth, were prevented from succeeding to the property of a father who had died intestate, even though paternity was never in doubt. Conflict was especially intense when the property was family land upon which they had lived, and probably worked, all their lives . . . The discriminations suffered by the illegitimate child under the law were easy to

84. Laws of Guyana, Cap. 46:02.

85. Gloria Cumper, "Planning and Implementing the Family Court Project, Jamaica", *Working Paper No. 27* (Mona, Jamaica: ISER, University of the West Indies 1981).

> identify. It was especially easy to observe that the majority of children in need or in trouble were born out of wedlock. This could only be expected since the percentage of such births has always been high, and is even now about 75 percent. But the equation in law between illegitimacy and poverty, with the one tending to reinforce the other, argued the need for reform of the law.

Eileen Boxhill summed up the position of the out-of-wedlock child and the various concessions made through the passage of time thus:[86]

> The child born out of wedlock, or the illegitimate child, to use the nomenclature assigned to him, was *filius nullius*, meaning child of no one. The recognition of the mother for certain purposes – mainly custody, maintenance and succession – marked a retreat from this rigid stance. In this vein also were the statutory provisions for the legitimation of an illegitimate child where his parents marry after his birth, the registration of putative fathers and the maintenance of an illegitimate child by the putative father.

Legislation in various territories has now abolished the concepts of legitimacy and illegitimacy. In Trinidad and Tobago, for example, the Status of Children Act 1981,[87] Section 3 (1)(a) expressly provides that the status and the rights, privileges, and obligations of a child born out of wedlock are identical in all respects to those of a child born in wedlock.

In Barbados, the Status of Children Reform Act, Section 3 provides that:

> the distinction at common law between the *status of children* born within or outside of marriage is abolished, and all children shall . . . be of equal status; and a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside of marriage.

In Jamaica, the Status of Children Act 1976, Section 3(1) provides that:

> the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other and all other relationships shall be determined accordingly.

EFFECT OF *STATUS OF CHILDREN* LEGISLATION

How far has the law in territories with *status of children* legislation come, in equating the legal rights of the child born out of wedlock

86. Eileen Boxhill, "The Reform of Family Law as it Affects Women", in E. Leo Rhynie, B. Bailey, C. Barrow (eds.), *Gender: A Multi Disciplinary Perspective* (Kingston: Ian Randle 1997), 92.

87. Laws of the Republic of Trinidad and Tobago, Chap. 46:07. See Appendix B.

with those of the child born in wedlock? It would appear that to a large extent, the old common law discriminations have become extinct.[88]

In *Re Renard Brandon Silochan,*[89] the applicant applied to the court for a declaration of paternity of her infant son. She claimed that the biological father of the child was her husband's brother-in-law. The applicant's husband resisted the application as he was very attached to the child, and indicated his unwillingness to take a blood test or to have the boy take one. The husband claimed that the application in effect, was an application to "de-legitimize" the boy and applied by summons for an order to have the court appoint the attorney-general or other proper person as *guardian ad litem* of the boy so that the boy could be separately represented in the paternity proceedings. It was held, dismissing the husband's summons, that it was in the interest of the child to discover his biological father, and that since the Status of Children Act had removed the legal disabilities of children born out of wedlock, there was no legal disadvantage or disability from the process of "de-legitimation". In her judgement, Barnes J. observed that:[90]

> The Status of Children Act Chap. 46:07 or to use its long title, an act to remove the legal disabilities of children born out of wedlock, provides in Section 3 (1)(a) 'The status and the rights, privileges and obligations of a child born out of wedlock are identical in all respects to those of a child born in wedlock.' It follows therefore that there is no legal disadvantage or disability from the process of 'de-legitimization'. . .The interest of the child will be to discover his biological father and have him recognized by the law.

PERPETUATION OF THE OLD DISCRIMINATIONS

Not all countries of the Commonwealth Caribbean have enacted *status of children* legislation and relatively recent decisions coming out of some jurisdictions reveal that the common law rule of construction is still applicable. In *RHB Trust Co. Ltd. v. Butlin,*[91] for example, the trustees of two family settlements applied to the Grand Court for a direction on the meaning of the words "child" and "issue" appearing in the settlements. One of the named beneficiaries in both settlements had a child born out of wedlock. In one case, the settlement referred to the beneficiaries and "their issue" and in the other case the settlement made reference to "together with the children and remoter

88. See chapter 4, *infra.*
89. *Application by Anna Silochan for Declaration of Paternity* (unreported) 23 May 1996, HC, T&T (no. 1236 of 1994).
90. At 9–11 of judgement.
91. [1992–93] CILR 219 (Cayman Islands).

issue through all degrees of the person specified". The beneficiaries in both cases agreed that the out-of-wedlock child should be treated as a beneficiary in each case. The court held that the *prima facie* meaning of the words "child" and "issue" at common law excluded illegitimate children or issue claiming through illegitimate children. As there had been no legislation in the Cayman Islands reversing this common law presumption, the court had no power to do so independently. Although the matter was not contested, nevertheless the court felt that it was obliged to consider the effect on the affairs of other families who were entitled to assume that the common law rule of construction still applied. The court thus directed that no illegitimate child of a beneficiary could be included within the class of beneficiaries provided for in the settlements. Harre J. stated:[92]

> For this court to direct that in the context of a family settlement the words 'children' and 'issue' do not under Cayman law have their *prima facie* meaning at common law would in my judgment be wrong. Although the direction asked for is specific to two settlements it must have application in a wider context and place other families in a position which they may contemplate with dismay. If that is to be done it is a matter for the legislature.

Thus, while in the region generally, the prevalence of out-of-wedlock births has resulted in a general social acceptance of the out-of-wedlock child, and while little social stigma attaches to this class of children, nevertheless, in countries which have not yet expressly abolished the legal discriminations between the in- and out-of-wedlock child, it is suggested that the main reason for this may be due to the fact that attitudes regarding the issue remain divided. Additionally, abolishing legal discriminations between in- and out-of-wedlock children would mean overhauling major aspects of family law as they relate to maintenance, succession, custody and so forth. In the Bahamas, for example, property still passes *primogeniture*, that is, to the eldest male child on intestacy, subject to the wife's dower rights. In such a case, legal discriminations between the in- and out-of-wedlock child cannot be completely abolished unless parliament also adopts the intention to abolish the right of the eldest legitimate male child to inherit on intestacy. It is not surprising then that Article 14(1) of the Constitution of the Bahamas[93] treats out-of-wedlock children as not being the lawful children of their fathers but merely as offspring of their mothers. Article 14(1) provides that:

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92. Ibid, 224.
93. Statute Law of the Bahamas 1987, Vol. I.

> Any reference in this chapter to the father of a person shall, in relation to any person born out of wedlock other than a person legitimated before 10th July 1973, be construed as a reference to the mother of that person.

Christine Barrow has rightly argued that illegitimacy has traditionally been viewed from the mother's perspective and is generally linked to the lower class. She writes:

> Illegitimacy has been viewed from the perspective of the mother and while it is true that the father is generally also lower class and, in the case of co-residential common-law unions, easily identified, illegitimacy is also the result of relationships across class. The structure of illegitimacy in these cases is such that it is the father of the child that is usually of higher status. In virtually all cases the child lives with the mother or one of her kin with the result that, in surveys which focus on household composition, the father remains invisible and illegitimacy is assumed to be confined to the lower class.[94]

As an illustration of the legislative disregard to the *equality* which ought to exist between the various classes of children, the Bahamas Sexual Offences and Domestic Violence Act 1991[95] enables applications under the Act to be made "by a party to a marriage"[96] on behalf of a child living with the applicant. Where therefore in a marriage situation, a child is sexually abused or is the subject of domestic violence, a married applicant has the right to bring an action against the aggressor. In the situation where the parties are cohabiting and are not legally married, if a child suffers from the same ills, his or her parent who is the spouse in that common law relationship is not allowed to bring an action to protect that child under the act. In this case, what must be resorted to is the criminal law, or civil law of tort, which may prove inadequate in dealing with the specific ills involved. At this point, Demerieux's observations on *equality* seem appropriate. She speaks of equality as operating between two important mediums. The first she describes as *formal equality* which "demands that no account be taken of certain factors in the regulation of access to social benefits and goods" and the other medium is *substantive equality* which is "used to justify positive action to equalize conditions in order to make equality an actuality."[97] While notions of equality may bring us into the realm of philosophy, which is beyond the scope of this work, nevertheless, the modern law

94. Barrow, *Family in the Caribbean (Themes and Perspectives)*, (Kingston: Ian Randle 1996), 175.
95. No. 9 of 1991. For more on domestic violence, see chapter 12, *infra.*
96. See Sections 31 and 32.
97. Margaret Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (Cave Hill, Barbados: Faculty of Law 1992), 417.

relating to children should reflect present ideals of justice which is rapidly becoming the norm for many nations, especially in view of the ideals set forth in the UN Convention on the Rights of the Child. Interestingly enough, in relation to succession, as far back as 2084–2081 BC, Article 170 of the Code of Hammurabi decreed equality for all classes of children. It was provided that "If a man whose spouse has borne him children, and whose female slave has borne him children, and the father in his lifetime has said to the children of the female slave "my children", and has counted them with the children of his spouse, and after the father has gone to his fate; then the children of the spouse and the children of the female slave shall share the possessions of the paternal house equally."[98]

In view of the current trend amongst many legislatures of the region to award equal legal rights to both in- and out-of-wedlock children, it is thus recommended that countries which have not yet done so, abolish the unnatural yet firmly held fiction that an out-of-wedlock child is merely the offspring of its mother. There is no real basis for legally discriminating against a child with exclusion from all of the important things of life such as exclusion from his family, exclusion from a name, and exclusion from his right to inherit because his parents were sexually irresponsible. In view of the fact that countries in the region have ratified the UN Convention on the Rights of the Child and have therefore formally indicated a commitment to acknowledging and preserving children's rights, it is now time that they live up to this commitment by declaring within their domestic law that all children, regardless of their birth status, are entitled to the same rights.

98. Cited by Fraser in "The Law and the Illegitimate Child", in *Fambli, the Church's Responsibility to the Family in the Caribbean*, edited by Lilith Haynes (World Council of Churches, CARIPLAN 1972).

Chapter 2

The Presumption of Legitimacy

. . . in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child.

– Lord Chief Justice, Court of Common Pleas[1]

Introduction

Because of the harsh approach of the common law towards children born out of wedlock, the presumption of legitimacy consequently emerged to protect children who were born in circumstances in which it might have been probable that the child was born in wedlock, although there might have been some suspicion or uncertainty surrounding the birth.

Under the common law, a child is considered to be legitimate if his parents were married to each other at the time of the child's conception, or at the time of the child's birth.[2] This presumption is reflected in the maxim *pater est quem nuptiae demonstrant* which means simply that if a child is born to a married woman, her husband is in law, deemed to be the child's father unless or until the contrary is proved, thus the presumption of legitimacy.[3] The presumption serves the useful purpose of bestowing the status of

1. *Banbury Peerage Case* (1811) 57 ER 62.
2. See Coke on Littleton, 1628 p. 244 (a) "A child is legitimate if its parents are married at the time of its birth"; if "the issue be born within a month or a day after marriage . . . the child is legitimate", Co. Litt. 123(b); *In Re Leman's Will Trusts* (1946) 115 LJ Ch. 89, it was held that a child is also legitimate if at the time of conception its parents were married, although the marriage had ended before the child's birth.
3. For a comprehensive study of the common law presumption, see P.M. Bromley, *Family Law*, 2d ed., chapter XV (Butterworths 1962), 279, *et seq.*

legitimacy upon a child in circumstances in which it is only fair to assume the mother's husband to be the father of the child. Nevertheless, the presumption also applies to confer legitimacy upon a child in circumstances which may be suspicious or questionable but which the common law felt should be construed in favour of the child rather than against it, and therefore left it open in cases of doubt for the presumption to be rebutted if the case could be made out that in fact the husband was not the child's father.

STATUTORY PRESUMPTIONS

This presumption of legitimacy applies in territories of the region which have not yet enacted *status of children* legislation or which have not otherwise modified the common law position by statute.[4] In territories with *status of children* legislation the common law presumption has been replaced by statutory provisions which provide for presumptions of *paternity* or presumptions of *parenthood.* These presumptions extend the common law presumption by providing for additional situations in which a man may be presumed to be a child's father, so that the statutory presumption does not only apply in a situation where the parties are married, but also applies in situations where the parties may be unmarried. Under the Barbados Status of Children Reform Act these situations are more numerous than under the legislation existing in other territories having *status of children* legislation,[5] and a presumption is created for example, where a man, by his conduct, implicitly and consistently acknowledges that he is the child's father.

The peculiar position which obtains in St. Lucia is worth noting. Here statute, in the form of the Civil Code,[6] has created certain presumptions in favour of the legitimacy of a child conceived during marriage. The relevant provisions are as follows:

> 186. A child conceived during marriage is legitimate and is held to be the child of the husband.
>
> A child born on or after the one hundred and eightieth day after the marriage was solemnized, or within three hundred days after its dissolution, is held to have been conceived during marriage.
>
> 187. The husband cannot disown such a child even for adultery, unless its birth has been concealed from him; in which case he is allowed to set up all the facts tending to establish that he is not the father.
>
> 188. Neither can the husband disown the child on the ground of his impotency either natural or caused by accident before the marriage. He

4. See chapter 4, *infra.*
5. These presumptions are dealt with in chapter 4, *infra.*
6. Laws of St. Lucia, Chap. 242.

> may nevertheless disown it if, owing to impotency that did not exist at the time of the marriage, to his distance from his wife, or any other cause, the fact of his being the father is a physical impossibility.

COMMON LAW PRESUMPTION

The common law presumption of legitimacy applies to children who may be born under a variety of circumstances. Firstly, it applies to a child who is born after the death of the mother's husband so long as the child is born within the normal gestation period. In this case, the child will be considered legitimate and the father of the child will be presumed to be the mother's deceased husband. In *Re Heath*[7] where the child was born some eight months after the mother's husband died, it was held that there was a presumption that the deceased husband was the father. However, in this case the presumption was rebutted and the child declared to be the legitimate child of B, a man whom the mother had been living with before the death of the husband and who (B) had cared for the child as his own and had subsequently married the mother. The child was held to have been legitimated by the marriage of the mother and B and therefore entitled, after B's death, to the estate of B's sister who died intestate, the child being held to be the legitimate issue of B.

In *Re Overbury*[8] the mother's husband had passed away. Six months later, the mother married S. Two months after the marriage, the mother gave birth to a baby. S's name was placed as the child's father on the birth certificate. Several years later, the child died intestate and the issue to be determined was whether the child was the child of the mother's previous husband, or whether her second husband, S, was the father. It was held that since the child was born within the normal period of gestation after the death of the mother's previous husband, the child was the legitimate offspring of the previous husband.

Secondly, the presumption of legitimacy applies to a child who was conceived before the marriage of the mother and the alleged father. This principle is derived from *Gardner v. Gardner*[9] where it was held that if the presumption of legitimacy was raised by the mother's pregnant condition at the time of her marriage to the alleged father, then it could not be rebutted by merely showing that the mother had had sexual intercourse with someone else before the occurrence of the marriage. Lord Cairns L.C., in adopting the judgment of Lord Gifford in the Court of Session, stated:

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7. [1945] 1 Ch. 417.
8. [1955] 1 Ch. 122.
9. [1877] 2 AC 723.

> Where a man marries a woman who is in a state of pregnancy, the presumption of paternity from that mere fact is very strong . . . still further where the pregnancy is far advanced, obvious to the eye, or actually confessed or announced . . . to the intended husband, a presumption is reared up which, according to universal feeling, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome.

Thirdly, the presumption of legitimacy applies to a child born after the granting of a decree of dissolution of marriage, provided it is born within the normal gestation period. This principle is illustrated by the case of *Knowles v. Knowles*.[10] Here the husband and wife divorced each other. A *decree nisi* was granted in May of the relevant year. The decree was made absolute in July. A child was born in April of the following year. It was held that the husband, then the ex-husband, was the child's father.

REBUTTAL OF PRESUMPTION OF LEGITIMACY

The presumption of legitimacy may be rebutted in a variety of ways. At common law, the standard of proof which had to be satisfied was the criminal law standard of proof beyond a reasonable doubt.[11] This common law standard was altered in England by Section 26 of the Family Law Reform Act 1969, which substituted the civil law standard of proof, being on a balance of probabilities. The Status of Children Acts of the region generally adopt the balance of probabilities test for proof of paternity although Section 5 of the Grenada Status of Children Act 1991 retains the standard of proof beyond a reasonable doubt.[12]

On the common law standard of proof beyond a reasonable doubt, the New Zealand case of *Ah Chuck v. Needham*[13] is helpful. Here, a wife had given birth to a child who possessed Asian features. Both the husband and the wife were non-Asians. At the time of the child's conception, the wife had been living with her husband, but had been associating with a Chinese man. On the evidence presented to the court, the absence of sexual relations between the husband and the wife had not been proven, and the court held that the child was the legitimate child of the wife's husband, despite the child's physical characteristics. The case illustrates the difficulty of establishing proof beyond a reasonable doubt.[14]

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10. [1962] 1 All ER 659.
11. See *F v. F* [1968] 1 All ER 242.
12. See chapter 4, *infra*.
13. [1931] NZLR 559.
14. See too *Francis v. Francis* [1960] P 17; *Watson v. Watson* [1954] P 48. See also Anthony Dickey, *Family Law*, 3d ed. (Sydney: LBC Information Services 1997), 267.

ABSENCE OF SEXUAL RELATIONS

The common law presumption of legitimacy may be rebutted by the tendering of evidence to show that there was an absence of sexual relations between the parties at the relevant time. This is a question of fact. In the *Banbury Peerage Case*[15] it was stated that the presumption of legitimacy may be rebutted by the opposing party providing proof that the husband was impotent or providing proof of the fact that intercourse did not take place between the husband and the wife at such a time as to enable the child to be the product or issue of that intercourse. In such a case, if this evidence is accepted, the child will be held not to be the child of the husband, and would therefore be considered illegitimate. In this case the Lord Chief Justice of the Court of Common Pleas stated:[16]

> . . . the fact of the birth of a child from a woman united to a man by lawful wedlock is generally, by the law of England, *prima facie* evidence that such child is legitimate . . . in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question . . . such *prima facie* evidence of legitimacy must always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife . . . the physical fact of impotence, or of non-access . . . may always be lawfully proved.

Proof of the absence of sexual intercourse however is not a concrete guarantee that the presumption will be rebutted. In *L v. L*[17] a marriage between H and W had not been consummated due to H's psychological attitude in sexual matters. W was artificially inseminated and gave birth to a child. It was held that the presumption of legitimacy was not rebutted in spite of the fact that no sexual intercourse took place.

In *Plowes v. Bossey*[18] the issue for determination was the status of a child born to a mother and allegedly, her husband, who was mentally unstable. Here the husband had been a patient of a lunatic asylum for over a period of two years before the child was born. The attendants had been instructed never to leave the husband and his wife alone during her visits, but the wife gave evidence that during one of her visits she had met her husband on the grounds of the asylum, and that they had left the premises of the asylum and stayed at a friend's house nearby where sexual intercourse had taken place

15. (1811) 57 ER 62.
16. Ibid, 63.
17. [1949] 1 All ER 141.
18. (1862) 31 LJ Ch. 681.

between them. It was held that the evidence of access was reasonable and that the presumption of legitimacy had not been rebutted. The child was therefore the legitimate child of the husband.

In *Preston-Jones v. Preston-Jones*[19] the husband had petitioned for divorce on the ground of the wife's adultery. The evidence was that the husband did not have access to his wife for a period of 360 days to 186 days (that is, for a period of about a year to six months) before the birth of the child. The court held that this was adequate evidence to rebut the presumption that the child was the legitimate child of the husband.

In the *Aylesford Peerage Case*[20] a wife had left her husband and went to live with her lover in Paris. One year later she and the husband entered into a separation agreement. The husband and the wife never resumed cohabitation but they subsequently met in London, after which, a child was born to the wife. The meeting between them might have been at a time when the child was conceived. The issue for determination was whether the child was the legitimate child of the husband or whether it was the product of the wife's adulterous affair. Evidence was tendered by third parties, being friends and servants, that there was no reasonable opportunity for sexual intercourse between the husband and the wife when they met in London, and that it was improbable and unlikely that the husband would have shared any degree of intimacy with his wife knowing that she was having an adulterous affair with another man. It was decided that the presumption of the child's legitimacy was rebutted by this evidence, which was also strengthened by the fact that attempts were made to conceal the birth of the child and that the wife's lover had made arrangements for the birth and care of the child and had been supporting and maintaining the child by sending cheques to the child's nurse.[21] Although the decision had the effect of imposing illegitimate status on the child, this is a case in which it would have been unwise to rely on the presumption of legitimacy given the weight of the evidence.

SCIENTIFIC EVIDENCE

The presumption may also be rebutted by the use of scientific evidence, as for example, blood test, or sterility test.[22] It is not, however, in every circumstance that a court will order a child or possible father

19. [1951] 1 All ER 124, HL.
20. (1855) 11 AC 1, HL.
21. For more on this case see Bromley, op. cit., pp. 285–86.
22. See for example *Francis v. Francis* [1959] 3 All ER 206; see too relevant legislation pertaining to blood tests in countries having *status of children* legislation, chapter 4, *infra*.

to be tested, and the jurisdiction to do so is generally discretionary and depends upon the special facts of each case.

In *Leong v. Leong*[23] the petitioner husband had filed for dissolution of marriage on the ground of irretrievable breakdown of the marriage. He alleged that one of the four children born to the respondent wife was not his. The court ordered blood tests to be carried out pursuant to the Status of Children Act 1981 to ascertain whether the petitioner was or was not excluded from being the father of the child in question. A doctor designated under Section 17 of the act had carried out tests on the petitioner, the co-respondent, and the child. The doctor's findings showed that under one system of tests the petitioner could be excluded as the true genetic father of the child as the child and the co-respondent possessed certain gene complexes which the petitioner did not possess. However, under another system, it was found that the petitioner could not have been excluded as a possible father. The doctor's evidence nevertheless suggested that the first system was the most conclusive. The court accepted the results of the first system that the petitioner had been excluded, and the petition for dissolution was granted.[24]

It should be noted that blood tests cannot establish paternity in a positive way. They can only determine whether paternity is possible. Thus, if the blood groups are compatible, the party on whom it is sought to impose responsibility for the child, may still not be the father of the child.

According to Hayes:[25]

> it is unfortunate that in accordance with current medical knowledge blood tests can only provide conclusive evidence of paternity in a negative sense, that is they can prove that a man could not be the father of a particular child. The test can only indicate that a man might well be the child's father, how likely this is will depend upon whether any unusual characteristics are present in the blood.

The English Law Commission's report on illegitimacy summarized the importance of the use of blood tests thus:[26]

> . . . human blood exhibits certain characteristics which can be classified into groups. These characteristics are transmitted from one generation to another in accordance with recognized principles of genetics. A comparison of the characteristics of a child's blood with that of his mother and a particular man

23. (Unreported), 10 April 1985, HC, T&T (No. 272 of 1982).
24. The power of the court to order blood tests under provisions of *status of children* legislation is further discussed in chapter 4, *infra*.
25. "The Use of Blood Tests in the Pursuit of Truth", 87 LQR 86-93, at 86.
26. Law Com. No. 118, *Family Law: Illegitimacy*, paras 5.2–5.7.

> may show that the man *cannot* be the father. It cannot show strictly that he *is* the father but merely that he *could be* the father. However, if, for instance, it is known that at the material times the mother had had intercourse only with H (her husband) and X, and the blood test excludes H but not X, then X must be the father . . . The value of blood tests for establishing, and not merely eliminating, the paternity of a particular man is increasing: it has been estimated that by using a combination of blood group systems there is already at least a 93 per cent chance of excluding a man wrongly alleged to be the father of the child . . . . As we have seen, blood tests have a value both in disproving and in tending to prove that a particular man is the father of a child. Blood test evidence can thus have considerable weight in determining paternity and it has been generally accepted that it is desirable to ascertain the truth about a child's paternity . . . Nevertheless, their impact should not be exaggerated; there will inevitably be cases in which satisfactory and cogent scientific evidence about paternity will not be available, and even more cases in which blood test evidence is only of value in conjunction with other evidence.

In two cases decided by the House of Lords, some fundamental principles were laid down as to the considerations a court should give attention to, in deciding whether or not to order blood tests. In these cases, namely, *S v. S* and *W v. Official Solicitor*[27] the issue in both cases related to the legitimacy of a child, which in both situations, the husband claimed was not his. The court had to determine whether or not blood tests should be ordered in the circumstances. The House of Lords laid down the relevant guidelines as follows: on a trial of an issue as to the legitimacy of a child, it was in the best interests of the child and also of justice that the court should have before it all the best evidence available, which undoubtedly included modern scientific evidence as provided by blood tests which could be used to resolve the issue once and for all; the interests of a child were best served if the truth was ascertained. Lord Reid was of the view that the court ought to permit a blood test of a young child to be taken unless it was satisfied that such a course would be against the child's best interest. He specified young child as he felt that as soon as a child was able to understand such matters it would not be wise to subject the child to such a course against the child's will. He further stated that the court had to protect the child, but that the court was not protecting the child by banning a blood test on some vague and shadowy conjecture that it may turn out to be to the child's disadvantage, since such a course may equally well turn out to be for the child's advantage, or at least, may do the child no harm.

In *S v. S*, H was granted a divorce on the ground of W's adultery

27. [1972] AC 24, heard together.

with the co-respondent. W had applied to the Magistrate's Court for an affiliation order against the co-respondent. W's application was adjourned pending the outcome of the legitimacy issue. It was held by the Court of Appeal that blood tests should be ordered as this would go towards establishing which of two identifiable men was the child's father. On appeal to the House of Lords, this decision was affirmed.

In *W v. Official Solicitor* the husband had obtained a *decree nisi* on the ground of the wife's adultery with the co-respondent. The co-respondent however had disappeared before the hearing of the petition. The court had to decide whether or not to make an order for blood tests. The effect of an order for such a course to be taken, might have shown that the husband was not the child's father, and at the same time, would have given the child no indication as to the true identity of his biological father. The Court of Appeal therefore refused to order the child to be tested. On appeal to the House of Lords, this decision was reversed.

In both cases, the ultimate objective to be achieved in adjudicating upon the paternity issue, was to determine the practical issue of maintenance for the child, so that the decisions to order blood tests in both cases were justified on the principle that justice demanded that only the true father, namely the biological father, be required to maintain the child in question. Nevertheless, whether or not a court will order blood tests, to a large extent, depends upon the peculiar circumstances of each case.

In an earlier Court of Appeal decision, *B v. B & E*,[28] the court refused to order blood tests on the basis that the husband was entitled to rely on the presumption of legitimacy. Here the husband and the wife had a child after five years of marriage. Three years after the birth, the wife left the husband and went to live with the co-respondent. A dissolution of the marriage was obtained by the husband, and the wife then married the co-respondent, after which she applied for custody. The husband, who by this time was her ex-husband, also wanted custody of the child. The wife claimed that the child's real father was the co-respondent and not her ex-husband. The Judge in Chambers ordered the child to be blood tested. The co-respondent consented to a blood test, but the ex-husband refused to submit to a test on himself, and appealed against the order that the child be tested. The Court of Appeal allowed the ex-husband's appeal. Lord Denning M.R. held that the ex-husband was entitled to rely on the presumption of legitimacy, and since his refusal to submit

28. [1969] 3 All ER 1106.

to a test was reasonable, no adverse inference was to be drawn against him.[29]

How does this case differ from *Re Renard Brandon Silochan*?[30] Here the wife claimed that the husband was not the child's father, but that the co-respondent was. The wife applied for a declaration of paternity and the husband refused to be tested and was unwilling for the child to be tested. The husband believed the boy to be his and had become very attached to him. The Trinidadian High Court held that it was in the interest of the child to discover his biological father and no mention was made of any possibility of the husband being able to rely on the presumption of legitimacy at common law, nor on any of the presumptions of parenthood established by the Status of Children Act. It appears that the difference between these two cases is the fact that Trinidad and Tobago have abolished the concept of illegitimacy whereas the UK has not, so that in Trinidad and Tobago, while an order for blood tests to be carried out might result in the "de-legitimation" of the child, in view of the Status of Children Act, there is no longer any disadvantage in being "de-legitimized", an argument which the court accepted in the local case.

What seems to be clear from the cases on blood tests however, is that there are no hard and fast principles which apply to every case, but that each case should be determined based on its special facts and circumstances. Some cases seem to say that the overriding consideration is that the truth should prevail as this is necessarily in the best interest of the child and in the best interest of justice. Others indicate that at times, the best interest of the child is not necessarily served by the child knowing the truth. In *Re F*[31] the wife gave birth to a child in circumstances in which it might have been possible that another man, X, might have been the father and not the husband. The husband had accepted the child as his own and was willing to raise the child with the wife as their child. X applied to the court to have the issue of paternity determined. The court refused to order blood tests to be taken thus holding in effect that not knowing the truth was in the best interest of the child.[32]

A decision not to order blood tests is always subject to criticism. At the time when the paternity issue is to be determined by the court all relevant parties are usually identifiable. If an order is not made, then later on if the child stumbles upon the suspicious circumstances surrounding its birth, this alone may cause trauma to the child, and

29. See too *O v. L* [1995] 2 FLR 930; *Re H* [1996] 2 FLR 65; *K v. M* [1996] 1 FLR 312.
30. *Application by Anna Silochan for Declaration of Paternity* (unreported) 23 May 1996, HC, T&T (no. 1236 of 1994).
31. [1993] 1 FLR 598.
32. See too *Re JS* (A Minor) [1980] 1 All ER 1061 CA.

quite apart from this, the relevant parties may not all be available at this later time for a court to determine the issue once and for all.[33]

Although the results of blood tests do not offer positive proof of paternity, nevertheless they are generally relied upon as a means of establishing paternity in the Commonwealth Caribbean. While DNA tests or genetic fingerprinting is a more accurate method of establishing paternity as these can result in positive findings of paternity, this is not widely employed, and quite possibly, due to the expense involved, has not become the general method resorted to in paternity disputes in the region. It is hoped that such a method will become publicly available in the region since, if one of the main considerations in determining a paternity issue is to get to the truth, then it is submitted that the interest of justice would be better served if the whole truth is pursued.[34]

33. See Fortin J. "*Re F*: The Gooseberry Bush Approach" 57 *Modern Law Review* (1994), 296.
34. On DNA testing, see P.M. Bromley and N.V. Lowe, *Bromley's Family Law*, 8th ed. (Butterworths 1992), 274; S.M. Cretney, *Principles of Family Law*, 6th ed. (London: Sweet and Maxwell 1997), 631–32); Dickey, *Family Law*, 3d ed., 297. Some local pieces of legislation now provide for scientific or medical tests other than blood tests, or specifically, for DNA testing. See Grenada Status of Children Act 1991, s.12(1) and Belize Families and Children Act 1998, s.41.

Chapter 3

Legitimation by Statute

Once the parents are married the child acquires the status of legitimacy as fully as a child born legitimate. The only difference between a child born before and one born after marriage is that in the former case, in order to prove legitimacy, there must be evidence of parenthood whilst both parties were unmarried, whereas in the latter case, there is a presumption of legitimacy.
– Denning J.[1]

Introduction

Why talk about the presumption of legitimacy and legitimation by statute when *status of children* legislation in the region has abolished the distinction between legitimate and illegitimate children? The answer necessarily has to be because not all territories have such legislation, as for example, the Bahamas, and some having such legislation still retain discriminatory provisions against children born out of wedlock, as for example, Jamaica. Many of the territories of the region, including some having *status of children* acts, possess legislation pertaining to the legitimation of children under statute so that no discussion of the law relating to children is complete without an examination of these provisions. Because the common law discriminations against the out-of-wedlock child were harsh and almost complete, it was necessary for the law, through the intervention of statute, to differentiate between children born to void or voidable marriages, or children who were the issue of parties who subsequently married, or children who were legally adopted, from children who were born out of wedlock generally, whether through adulterous affairs, casual sexual encounters or even within non-

1. *Millard v. Millard & Addis* [1945] 2 All ER 525 at 527–28.

marriage unions in which the parties might have had long lasting commitments. In the former situations, statute intervened to legitimize such children.

Legitimation by statute therefore, governed by the legitimacy or legitimation acts of the region, may be described as the "forerunners" of the *status of children* acts, and represent the first real statutory attempt to alleviate the unfortunate condition of the illegitimate child. However, while the legislation offered protected legal status to some classes of children, there were several others who remained unprotected and who continued to be subject to the old common law discriminations.

How does legitimation by statute work? It is necessary to examine this statutory procedure in respect of both void and voidable marriages. In *De Reneville v. De Reneville*[2] Lord Greene M.R. distinguished between the two terms thus:

> A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.

VOID MARRIAGES

For these marriages, the relevant parties would have gone through some form of marriage ceremony, but were later prohibited from satisfying the description of husband and wife due to some legal impediment, as for example, if either of the parties was already married, or if they were within the prohibited degrees of consanguinity. In these situations, one or both parties might have lacked capacity to contract the marriage, or the marriage ceremony itself might have been formally defective so that the marriage was void *ab initio* and was neither a marriage in fact nor in law. Under the common law rule, children born pursuant to such a marriage were illegitimate. While other legal systems recognized the legitimacy of such children in a situation where one or both parties to the void marriage were unaware of the invalidity, English law did not. The resulting consequence of this rigidity in the law, was that it often worked inconvenience and hardship on children who were therefore declared to be illegitimate. By statutory intervention, however, under Section 2 of the UK Legitimacy Act 1959, legal recognition was given

2. [1948] 1 All ER 56, at 60, CA.

to the child in these circumstances. The provision, which was subsequently adopted in West Indian legislation, reads:

> The child of a void marriage, whether born before or after the commencement of this act, shall be treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid.

Section 6 of the Jamaica Legitimation Act, for example, gives statutory relief to children born of a void marriage. It provides that:

> (1) Subject to the provisions of this Section, a child of a void marriage whether born before or after the 19th March, 1962, shall be treated as a legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid.
> (2) This Section does not affect any rights under the intestacy of a person who died before the 19th March, 1962, and does not affect the operation or construction of any disposition coming into operation before that date.

Section 4 of the Bahamas Legitimacy Act[3] similarly provides that:

> the child of a void marriage, whether born before or after the commencement of this act, shall be treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage, if later) both or either of the parties believed that the marriage was valid.

On the provision generally, it is to be noted that the burden of proof is on the person asserting legitimacy.

VOIDABLE MARRIAGES

A voidable marriage is one that is not void *ab initio* and unlike a void marriage, a decree is needed to annul the voidable marriage. Such a marriage is initially a valid marriage, which later becomes voidable because of some legal ground which makes it so, such as for example, the impotence of the husband. Children born during such a marriage were illegitimate. Under the common law, if a decree of nullity was obtained where the marriage was voidable, this had a retrospective effect and thereby de-legitimized children born during such a marriage. This rule naturally disadvantaged various parties, and

3. Statute Law of the Bahamas 1987, Chap. 116.

especially in cases where the marriage had been annulled because one party was of unsound mind or mentally incompetent or was suffering from a communicable venereal disease. In such a case, the wife might have become pregnant and given birth to a child before the unfortunate impediment was discovered or disclosed. In the UK the Matrimonial Causes Act 1937 provided that in these circumstances any child of the marriage would be legitimate in spite of an annulment of the marriage. The legislation, however, was incomplete and unfortunately did not deal with the situation where a child might have been born although the marriage had not been consummated, as children are sometimes born due to pre-marital intimacy, *fecundation ab extra*, and by artificial insemination. Many countries of the region had adopted the changes brought about by the UK legislation.

In Antigua, for example, statutory provision[4] relating to the legitimation of children born of a voidable marriage was enacted in Section 16(2) of the Matrimonial Causes Act which provided that:

> Any child born of a marriage avoided pursuant to paragraphs (b) or (c) of the last foregoing subsection shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided.

Paragraphs (b) and (c) of the previous subsection read:

> (b) that either party to the marriage was at the time of the marriage of unsound mind or subject to the recurrent fits of insanity or epilepsy; or (c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form.[5]

Statutory provision may also be found in Belize.[6] Section 143 of the Supreme Court of Judicature Act provides that:

> (1) . . . a marriage shall be voidable on the ground . . . (b) that either party to the marriage was at the time of the marriage of unsound mind or a mental defect within the meaning of the Ordinance relating to unsoundness of mind, or subject to recurrent fits of insanity or epilepsy; or (c) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form . . . (2) Any child born of a marriage avoided pursuant to paragraphs (b) or (c) of subsection (1) shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided.[7]

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4. Laws of Antigua, Chap. 268.
5. The Matrimonial Causes Act has been repealed by the Divorce Act 1997.
6. Laws of Belize, Chap. 82.
7. Section 153 of the Belize Families and Children Act 1998 (No. 17), has repealed the Belize Legitimacy Act, Chap. 139.

Inadequacies of the legislation were highlighted in a number of cases. In *Dredge v. Dredge*[8] the parties were married in March of the relevant year and a child was born in September. The husband then subsequently applied for a decree of nullity on the ground of nonconsummation of the marriage. The court granted the decree based on this ground even though this had the effect of bastardizing the child.

In *Clarke v. Clarke*[9] H and W were married in 1926 and in 1930 a child was born. The parties lived as husband and wife until 1940. H thereafter applied for a decree of nullity on the ground of nonconsummation of the marriage. Although medical evidence suggested that conception might have occurred in spite of nonconsummation due to the unusual occurrence of *fecundation ab extra*, the court nevertheless granted the decree of nullity in spite of the effect that this had on the legal status of the child.

In *L v. L*[10] H and W were married and like the two cases before, the marriage had not been consummated. W had become artificially inseminated with H's seed and a child was subsequently born. W later applied for a decree of nullity which was granted in spite of the delegitimation of the child. The unfortunate effects of the legislation could only be removed by statutory intervention.

In other territories of the region, statute provides that children of the marriage are legitimate in all voidable marriage situations, following the UK Law Reform (Miscellaneous Provisions) Act, 1949, Section 4(1) which was re-enacted in the UK Matrimonial Causes Act 1965, Section 11, and again re-enacted in the UK Matrimonial Causes Act 1973, Section 16. This provision remedied the anomaly resulting from the earlier legislation which had the effect of de-legitimizing children born from pre-marital intimacy, *fecundation ab extra*, and artificial insemination in the voidable marriage situation by declaring that children were to be legitimate in all voidable marriage situations.

The Bahamas Matrimonial Causes Act[11] Section 24(2), reflects the improved legislation which provides that:

> where a decree of nullity was granted on or before 31 July, 1971, in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if by the decree the marriage had been dissolved and not annulled, shall be deemed to be the legitimate child of the parties.

8. [1947] 1 All ER 29.
9. [1943] 2 All ER 540.
10. [1949] 1 All ER 141.
11. Statute Law of the Bahamas 1987, Chap. 111; See too Cayman Islands, Matrimonial Causes Law, 1976/9 s.12(2); UK Matrimonial Causes Act s.16, and Schedule 1, s.12.

LEGITIMATION BY SUBSEQUENT MARRIAGE

Legitimation could also be achieved, in English law, from the passing of the UK Legitimacy Act 1926, by the subsequent marriage of the parties. But this was only if neither of them was married to any other person at the time of the child's birth (not conception).

Section 3(1) of the Bahamas Legitimacy Act[12] provides that where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of the act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in the Bahamas, render that person, if living, legitimate from the commencement of the act, or from the date of the marriage, whichever last happens. Section 3(2) further provides that nothing in the act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born unless the parents of such illegitimate person marry one another on or after the 1st day of January 1966.[13]

Section 2 of the Jamaica Legitimation Act[14] also makes provision for legitimation by subsequent marriage and provides that:

> Any child born before the marriage of his or her parents whose parents have intermarried or shall hereafter intermarry shall be deemed on the marriage of such parents to have been legitimated as from the date of such marriage and shall be entitled to all the rights of a child born in wedlock.

In *Newbold v. A.G.*[15] W who was married to H, had a son by X. The marriage between W and H was subsequently annulled on the ground of H's inability to consummate the marriage, and W then married X. The court held that the marriage of W and X legitimated the son. This was a curious decision, since the Legitimacy Act provided that no one could be legitimated under the statute if either parent was at the time of his birth married to a third person. The child was nevertheless held to be legitimate as the effect of the decree of nullity was that W was regarded as never having been married to H.

In later UK legislation, namely, Section 1 of the Legitimacy Act 1959, the provision for legitimation by marriage was extended to cases where either or both parents were married to a third party when the child was born. This provision was also adopted by Commonwealth Caribbean jurisdictions.[16]

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12. Statute Law of the Bahamas 1987, Chap. 116.
13. For other territories with similar provisions, see s. 3(2) Legitimacy Act British Virgin Islands, Chap. 271; s.3(2) Legitimation Act, Dominica, Chap. 37:02; s.3(2) Legitimation Act, Grenada, Chap. 169; s.3(2) Legitimacy Act, Montserrat, Chap. 298; s.3(2) Legitimacy Act, St. Kitts-Nevis, Chap. 324; Legitimation Act, St. Vincent, Chap. 170.
14. Laws of Jamaica, Cap. 217.
15. [1931] All ER 377.

EFFECTS OF LEGITIMATION: PERSONAL RIGHTS AND OBLIGATIONS/PROPERTY RIGHTS

The obvious effect of the process of legitimation is that the child who would otherwise have been illegitimate, is now considered in law to be legitimate. Legitimated children therefore have the same legal rights as children who were born legitimate, such as the right to maintenance, the right to inherit on the intestacy of a parent, and further, any legal claims that could be made by or in respect of a legitimate child, for example, claims for compensation under fatal accidents legislation, can be made by or in respect of a legitimated child.

Under the Guyana Legitimacy Act,[17] for example, Section 5 provides that:

> Subject to this act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest in the estate of an intestate or under any disposition in like manner as if the legitimated person had been born legitimate.[18]

Section 6 further provides that:

> Where a legitimated person or a child or remoter issue of a legitimated person dies intestate in respect of all or any of his property, the same persons shall be entitled to take the same interests therein as they would have been entitled to take if the legitimated person had been born legitimate.

In relation to rights to maintenance, Section 8 guarantees these rights to the legitimated child. The section provides that:

> A legitimated person shall have the same rights, and shall be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate, and, subject to this act, the provisions of any act relating to claims for damages, compensation, allowance, benefit, or otherwise by or in respect of a legitimate child shall apply in like manner in the case of a legitimated person.

In the case of *C v. C*[19] a wife had applied for and obtained a maintenance order on behalf of a child who had been legitimated. The husband appealed the decision on the ground that a legitimated child was not a "child of the marriage" within the meaning of the UK

16. See for example, s.3 Legitimacy Act, Guyana, Cap. 46:02; s.2 Legitimation Act, Jamaica (1961-18); s. 3(2) Legitimacy Act, Bahamas, Chap. 116.
17. Laws of Guyana, Cap. 46:02.
18. See for example, *King and King v. Lezama* (unreported) 16 June 1998, HC, T&T (No. CV998 of 1997).
19. [1947] 2 All ER 50.

Summary Jurisdiction (Separation and Maintenance) Act. It was held that the court had jurisdiction to make the order.

Unless otherwise provided by statute, claims to property by children legitimated by subsequent marriage can be made only to interests which accrue after the date of legitimation. It is of course open to the person making a disposition to express a contrary intention than that prescribed in legitimacy or legitimation statutes and thus exclude legitimated children who would otherwise take, or include those who would otherwise be excluded. Where entitlement to any property rights depend upon seniority of the children, legitimated persons rank as if they were born on the respective dates of their legitimation, and if more than one child was legitimated on the same day, they rank in order of seniority.[20]

REGISTRATION PROCEDURE FOR LEGITIMATION

The various regional statutes on legitimacy and/or legitimation make provision for the registration of legitimated children. In the Bahamas, for example, the Schedule to the Legitimacy Act,[21] Section 1, provides that the Registrar General may, on production of such evidence as appears to him to be satisfactory, authorize at any time the re-registration of the birth of a legitimated person whose birth is already registered under the Births and Deaths Registration Act.

The Schedule to the Guyana Legitimacy Act[22] lays down the conditions for re-registration thus:

> 2. The Registrar General may, on production of such evidence as appears to him to be satisfactory, authorize at any time the re-registration of the birth of a legitimated person whose birth is already registered under the Registration of Births and Deaths Act, and such re-registration shall be effected in such manner and at such place as the Registrar General, with the approval of the Minister, may by regulations prescribe:
> Provided that the Registrar General shall not authorize the re-registration of the birth of any such person in any case where information with a view to obtaining such re-registration is not furnished to him by both parents, unless –
> (a) the name of a person acknowledging himself to be the father of the legitimated person has been entered in the register in pursuance of Section 31 of the Registration of Births and Deaths Acts; or
> (b) the paternity of the legitimated person has been established by an affiliation order or otherwise by a decree of a court of competent jurisdiction; or

20. For further details on legitimacy and legitimation, see P.M. Bromley, *Family Law*, 2d ed. (Butterworths 1992), chapter XV.
21. Statute Law of the Bahamas 1987, Chap.116.
22. Laws of Guyana, Cap. 46:02.

(c) a declaration of the legitimacy of the legitimated person has been made under Part II of the Matrimonial Causes Act, as amended by this act.

Section 3 of the schedule further provides that:

> It shall be the duty of the parents of a legitimated person, or, in cases where re-registration can be effected on information furnished by one parent and one of the parents is dead, of the surviving parent, within the time hereinafter specified, to furnish to the Registrar General information with a view to obtaining the re-registration of the birth of that person, that is to say –
> (a) if the marriage took place before the commencement of the act, within six months of such commencement;
> (b) if the marriage takes place after the commencement of this act, within three months after the date of the marriage.

Section 5 deals with the effect of a default of the parents to furnish the necessary information and provides that such a failure on the part of the parents or either of them shall not affect the legitimation of the child in question.

LEGITIMATION BY ADOPTION

Adoption statutes in the region make provision for children to be legitimated by adoption. In the Bahamas, Section 11 of the Adoption of Children Act[23] provides that:

> upon an adoption order being made all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage, shall be extinguished and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was born to the adopter in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

There is a proviso to this provision, which states that:

> provided that in any case where two spouses are the adopters, such spouses shall in respect of the matters aforesaid and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and

23. Statute Law of the Bahamas 1987, Chap. 117.

> mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother respectively.

Section 12(1) deals with property rights of adopted children and provides that:

> the provisions of this and Section 13 shall have effect for securing that adopted persons are treated as children of the adopters for the purposes of the devolution or disposal of real and personal property.

REPEAL OF LEGITIMACY/LEGITIMATION ACTS

Some territories of the region which have *status of children* legislation have expressly repealed these acts, for example, in Antigua, Section 20 of the Status of Children Act 1986; in Barbados, the Third Schedule to the Status of Children Reform Act, 1979; and in Trinidad & Tobago, Section 20 of the Status of Children Act 1981, have all expressly repealed these acts.[24]

For territories in which there is no express repeal of the acts, one might argue that there has been an implied repeal, but only of provisions in these acts, the content of which has been specifically dealt with by *status of children* legislation. Where there is an obvious inconsistency or absurdity, the *status of children* legislation, being the later legislation, should prevail. If the *status of children* legislation in the particular jurisdiction has not touched on issues contained in the legitimacy/legitimation acts where there has been no express repeal, then it is to be presumed that those provisions are still valid.

For territories which have not yet enacted *status of children* legislation, the impact of the legitimacy/legitimation acts is still very significant in terms of children's rights, which in these countries depend to a large extent on whether the child's legal status is legitimate or illegitimate. Even for countries which have enacted *status of children* legislation expressly repealing the legitimation acts, it appears that the latter acts may still be relied upon in appropriate cases. In *King and King v. Lezama,*[25] the plaintiffs J. King and W. King, who were wife and husband, brought an action against the defendant, who was the widowed husband of J. King's mother. The claim was two-fold, the relevant limb for purposes of family law,

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24. However, the provisions of these acts are still presently relied upon in situations where the right of a plaintiff falls to be determined according to the law at the time when these Acts were in force, as was the case in *King and King v. Lezama* (unreported) 16 June 1998, HC, T&T (No. CV998 of 1997).
25. Ibid.

being that J. King was entitled to two-thirds of the deceased's estate by virtue of Section 11(1) of the Trinidad and Tobago Legitimation Act and also by virtue of the provisions of the Administration of Estates Ordinance. The mother of J. King had died in 1973 and the present action was brought in 1998. J. King had been the illegitimate child of the deceased and Section11 (1) of the Legitimation Act gave a right to an illegitimate child of a mother dying intestate to succeed to her property as if born legitimate, provided that there was no surviving legitimate issue. Since on the facts the deceased had died intestate without leaving legitimate issue, it was held that her daughter J. King was therefore entitled to two-thirds of her estate. There was no indication in the judgment of the court that the Legitimation Act had been repealed by Section 20 of the 1981 Status of Children Act. While the decision appears to be a correct one, nevertheless, no mention was made of the latter act. One may, however, opine that the reason why the Legitimation Act was relied upon was because the mother had died in 1973, when the right to J. King would have first accrued, at which time the Legitimation Act would have been law. Yet no reason was offered as to why the claim was being made some 25 years later, nor did the court request one.

Chapter 4

Status of Children Legislation

. . . in the context of law, policy does not require the recognition of the distinction between legitimate and illegitimate children. Once that distinction disappears there is no need to differentiate between parents of such children. An illegitimate child is no longer filius nullius – *the child of no one.*
– Georges J.A.[1]

INTRODUCTION

In the early and middle twentieth century, the legitimacy acts and other legislation enacted in the United Kingdom, and subsequently followed in the Commonwealth Caribbean region, imposed some degree of reform of the law relating to the child born out of wedlock. These acts however advantageously affected only a limited number of children who were formally held to be illegitimate, while it had no impact on the status of the majority of such children.

The 1970s and early 1980s witnessed sweeping legislative changes throughout the Commonwealth Caribbean region which represent one of the most significant developments in recent times in the law relating to children. Jamaica pioneered the movement with their 1976 Status of Children Act which was followed by the enactment of similar legislation in other territories. The legislation attempted to equate the rights of the child born out of wedlock with those of the child born in wedlock. Under this legislation which has been enacted in several states of the region,[2] the common law

1. *Watson-Morgan v. Grant* [1990-91] CILR 81, 103.
2. These include: the Law Reform (Illegitimacy) Ordinance 1982, Anguilla; Status of Children Act 1986, Antigua; Status of Children (Reform) Act 1979, Barbados; Families and Children Act 1998, Belize; Status of Children Act 1991, Grenada; Children Born Out of Wedlock (Removal of Discrimination) Act 1983, Guyana; Status of Children Act 1976, Jamaica; Status of Children

position regarding the status of children born out of wedlock has been drastically reformed so as to enable the law to take judicial notice of the out-of-wedlock child and to recognize such a child as equally and as positively as it has recognized the in-wedlock child. Further, the enactment of the legislation also demonstrates the modern sensitivity of the law to social reality which no doubt has a positive influence on the growth of West Indian jurisprudence. According to Henriques,[3] "I would say that illegitimacy, such as it is, is in fact the norm in the Caribbean rather than the other way around", so it is indeed laudable that Parliament has given effect to the need to legally recognize the out-of-wedlock child.

Grady Miller[4] has ascribed the reason for the eventual legal protection of the out-of-wedlock child as based on necessity, stating that:

> Children born without the benefit of parental marriage were in many cases treated as unwanted and unaccounted for and only through necessity appeared to gradually gain the protection of the law.

But while necessity may have played an important role in the process,[5] this was not the only reason. The passing of Status of Children Acts resulted more from an awareness on the part of not only lawmakers, but also of society, strongly influenced by world trends, of the need to end discrimination in democratic societies. The effects of the passing of these laws were seen as bringing "'half' siblings closer together" and of strengthening families so that the reformed laws would more closely reflect the structure of the communities within the legal system.[6]

Prior to the time when *status of children* legislation began to be enacted in the region, the Commonwealth Caribbean through its colonial inheritance of the English system, seemed to have legally adopted the position that a union created by marriage was the only

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Act 1983, St. Kitts, Nevis; Status of Children Act 1980, St. Vincent; Status of Children Act 1981, Trinidad and Tobago.

3. "Sociological Excursus of Research on the Family in the Caribbean", in *Fambli: The Church's Responsibility to the Family in the Caribbean*, edited by Lilith Haynes (World Council of Churches, CARIPLAN 1972), 63 at 65.
4. "Illegitimacy and Survivorship: The Case Against High Technology Births", *Caribbean Law Review* 7, no. 2, 630 (Dec. 1997).
5. In Antigua, for example, during the debates before the passing of the Status of Children Act, it is reported that illegitimate children had been excluded from attending high schools in the country, and that the status of illegitimacy had proved an obstacle and embarrassment to people who attempted to secure travel documents to travel and work overseas. See Mindie Lazarus-Black, *Legitimate Acts and Illegal Encounters: Law and Society in Antigua and Barbados* (Washington, DC: Smithsonian Institution Press 1994), 228.
6. See Lazarus-Black, ibid, pp. 227–42.

social organization deserving of recognition as a family unit. As a consequence of this, the law did not recognize the social trends of numerous common law and visiting relationships nor the children of such unions, who were viewed as bastards. Thus the child of such a union, being *filius nullius* or the child of no one, was not embraced by the law in the way in which the child born in wedlock was. Mindie Lazarus-Black has identified the reasons for this and some of the consequences flowing from it in the following terms:

> This jural model conceived of marriage as a contractual agreement bestowing specific rights and duties . . . English kinship began with a contractual agreement but was thereafter traced in blood. Law emphasized the father's line, legitimacy, and primogeniture. Kinship . . . equated bastard children with criminals and aliens. The crucial importance of the jural model is that power over persons and things was placed in the hands of legitimate men. Fathers and husbands were awarded power; mothers, wives, and bastards were not. The jural model of kinship validated and perpetuated a pragmatic set of political and economic relationships. Theoretically and practically, women's and bastard children's inferiority was related to and legitimized by their overall relation to property.[7]

The legal implications for the categorization of children as legitimate and illegitimate meant that various privileges and advantages were attached to legitimacy while the converse was true for illegitimacy. *Status of children* legislation however has made fundamental inroads into the straight and narrow path of the common law, the consequences of which have enabled the out-of-wedlock child not only to claim entitlement to maintenance, but also to family property on the death of a parent. The legislation has attempted to remedy the obvious inadequacies of the common law, and realistically, to herald the recognition by the law and by society, of social reality as it obtains in the Commonwealth Caribbean.

CONTENT OF THE LEGISLATION

An examination of the various acts in question reveal common threads in the legislation of the various jurisdictions. All children, for example, whether born in or out of wedlock, are now supposedly equal; there are statutory presumptions of paternity or parenthood; the courts are empowered to make declarations of paternity, and to make orders for blood tests to be carried out in the hope of establishing paternity; there are provisions dealing with inheritance, and the abolition of the common law rule of construction in favour

7. Ibid, 60.

of children born in wedlock. The cumulative effect of all of these provisions is to remove both the legal and social barriers which existed between illegitimate and legitimate children. However, in spite of the similarities, some jurisdictions retain certain discriminatory provisions against children born out of wedlock, which will be examined in due course.

EQUALITY OF STATUS

The first important impact of the legislation is the provision for equality of status between children born in and out of wedlock. This is the primary objective of the legislation, being the eradication of the distinction in the legal status of the child born in and out of wedlock. The statutes thereby accord to all children, or purportedly so, equal rights and privileges in all things, despite their birth status.

Section 3(1) of the Jamaica Status of Children Act for example, provides that:

> Subject to subsection (4) and to the provisions of sections 4 and 7, for all the purposes of the law of Jamaica 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.

Section 3(1) of the Trinidad and Tobago Status of Children Act 1981 provides that:

> Notwithstanding any other written law or rule of law to the contrary for all the purposes of the law of Trinidad and Tobago – (a) the status and the rights, privileges and obligations of a child born out of wedlock are identical in all respects to those of a child born in wedlock; (b) save as provided in this Act, the status and the rights and the obligations of the parents and all kindred of a child born out of wedlock are the same as if the child were born in wedlock; but this provision shall not affect the status, rights or obligations of the parents as between themselves.

The Barbados provision of equality is found in Section 3 of the Status of Children Reform Act 1979. This provides that:

> For the purposes of the laws of Barbados the distinction at common law between the status of children born within or outside of marriage is abolished, and all children shall, after the commencement of this Act, be of equal status; and a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside of marriage.

In comparing these three "equality" provisions, while the Trinidad and Barbados provisions seem to provide for absolute equality of status, the Jamaica provision is made *subject* to the content of other provisions in the Act, even though the marginal note to the Jamaica Section specifies "all children of equal status." One can reasonably ask therefore whether or not there is in effect no equality of status in Jamaica, or, whether there can be equality if equality is conditional.

In Guyana, the Children Born Out of Wedlock (Removal of Discrimination) Act 1983[8] has attempted to remove the legal discriminations against children born out of wedlock. Its provisions have repealed the Bastardy Act[9] and has amended various other Acts such as the Evidence Act,[10] the Civil Law of Guyana Act,[11] the Maintenance Act,[12] the Infancy Act,[13] and the Legitimacy Act.[14] The 1983 Act does not expressly state[15] that the legal distinctions between children born in and out of wedlock are abolished. However, the amended Infancy Act now defines "infant" in Section 1A as "any person who is a minor, whether born in wedlock or out of wedlock" so that one would assume that the old common law construction of the term "infant" and like terms such as "child', "minor", "heir", "dependent", and so forth, would have been abolished by implication. This view is buttressed by the Guyana Constitution[16] which provides in Section 30 that:

> Children born out of wedlock are entitled to the same legal rights and legal status as are enjoyed by children born in wedlock. All forms of discrimination against children on the basis of their being born out of wedlock are illegal.

PERSONS AND PROPERTY SUBJECT TO THE ACTS

The acts apply to persons born before or after the commencements of the acts. However, the distribution of the estate of an intestate who dies before the commencement of the acts is not affected by the provisions.

In Jamaica, Section 3(3) provides that:

> Subject to subsection (4), this Section shall apply in respect of every person, whether born before or after the commencement of this Act, and whether

8. No. 12 of 1983.
9. Laws of Guyana, Cap. 46:03.
10. Laws of Guyana, Cap. 5:03.
11. Laws of Guyana, Cap. 6:01.
12. Laws of Guyana, Cap. 45:03.
13. Laws of Guyana, Cap 46:01.
14. Laws of Guyana, Cap. 46:02.
15. But the 1980 Constitution does in s. 30, quoted *infra*.
16. No. 2 of 1980.

> born in Jamaica or not, and whether or not his father or mother has ever been domiciled in Jamaica.

Transitional provisions are found in Section 4 which provides *inter alia* that:

> all dispositions made before the commencement of this act shall be governed by the enactments and rules of law which would have applied to them if the act had not been passed.

In Trinidad and Tobago, Section 4 provides that:

> (1) This act does not affect rights which became vested before its commencement, and
> (2) Save as provided in Subsection (1) this act applies to persons born and instruments executed before as well as after its commencement.

In Barbados, Section 6 provides that:

> This act applies to all children whether born before or after the commencement of this act and to all dispositions and instruments made after such commencement.

It appears from a comparison of these provisions that while the acts are retrospective in the sense that they give legal rights to persons who under the previous law would not have had them because of their being born out of wedlock, nevertheless, the acts are not retrospective in respect of dispositions and instruments made before their commencements or in respect of rights which accrue before their commencements.

This is illustrated by the decision in *Re Schuler's Estate, Setram v. Powell & Another.*[17] In this case A died intestate in 1982. He was survived by a brother and a sister. A also had an out-of-wedlock child, S. The issue was whether S was entitled to A's estate due to the abolition of the distinction between legitimate and illegitimate children in the Trinidad and Tobago Status of Children Act 1981. It was held that since the act was brought into force in March 1983, it did not affect the rights which became vested before its commencement. Therefore, A's brother and sister were entitled to his estate and S was held not to be A's next of kin so that S was entitled to nothing.

17. (1985) 37 WIR 371 (Trinidad and Tobago).

PRESUMPTIONS OF PATERNITY OR PARENTHOOD

The Jamaica and Trinidad acts provide for presumptions of *parenthood,* while the Barbados act speaks of the presumption of *paternity.* There appears to be no difference between the two concepts, except perhaps, one of semantics.

The Jamaica and Trinidad[18] provisions are found in Section 6(1) of their respective acts. The Jamaica Section reads:

> (1) Subject to Subsections (2) and (3), a child born to a woman during her marriage, or within ten months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of his mother and her husband, or former husband, as the case may be.
> (2) Subsection (1) shall not apply if, during the whole of the time within which the child must have been conceived, the mother and her husband were living apart under an oral or written agreement for separation, or under a decree or order of separation, or *decree nisi* of divorce, made by a competent court or authority in Jamaica or elsewhere.
> (3) Subsection (1) shall not apply where a child is born within ten months after the dissolution of the marriage of its mother by death or otherwise, and after she has married again, and in such case there shall be no presumption as between the husband of the mother and her former husband that either is the father of the child, and the question shall be determined on the balance of probabilities in each case.

The comparable but more extensive Barbados provision is found in Section 7 of the Status of Children Reform Act which provides that:

> (1) Unless the contrary is proven on the balance of probabilities, there is a presumption that a male person is, and shall be recognised in law to be, the father of a child in any one of the following circumstances –
> (a) the person was married to the mother of the child at the time of its birth;
> (b) the person was married to the mother of the child and that marriage was terminated by death or judgment of nullity within 280 days before the birth of the child or by divorce where the *decree nisi* was granted within 280 days before the birth of the child;
> (c) the person marries the mother of the child after the birth of the child and acknowledges that he is the natural father;
> (d) the person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child or the child is born within 280 days after they ceased to cohabit;
> (e) the person has been adjudged or recognized in his lifetime by a court of competent jurisdiction to be the father of the child;
> (f) the person has by affidavit sworn before a Justice of the Peace or a Notary Public or other document duly attested and sealed together

18. See Appendix B for contents of Trinidad provision.

with a declaration by the mother of the child contained in the same instrument confirming that person is the father of the child, admitted paternity, but such affidavit or other document shall be of no effect unless it has been recorded in the Registration Office;

(g) the person has acknowledged in proceedings for registration of the child, in accordance with the law relating to the registration of births that he is the father of the child;

(h) the mother of the child and person acknowledging that he is the father of the child have signed and executed a deed to this effect in the presence of an attorney-at-law but such a deed shall be of no effect unless it is notarized and recorded in the Registration Office prior to the death of the person acknowledging himself to be the father;

(i) a person who is alleged to be the father of the child has given written consent to that child adopting his name in accordance with the law relating to the change of name; or

(j) a person who is alleged to be the father of the child has by his conduct implicitly and consistently acknowledged that he is the father of the child.

(2) Where circumstances exist that give rise to presumptions of paternity in respect of more than one father, no presumption shall be made as to paternity and no person is recognized in law to be the father.

The treatment of the presumption of paternity under the Barbados legislation is more complete than it is in the Jamaica or Trinidad legislation. In all the instances identified in the Barbados Section above, there is a presumption of paternity. In Jamaica and Barbados, certain items which might be similar to a presumption under the Barbados section, are not referred to as presumptions, but merely constitute *evidence* or *proof of* paternity.

In Jamaica and Trinidad, Section 7 of the respective Acts provides for *recognition* of paternity. The Trinidad provision states *inter alia* that the relationship of father and child shall be recognized if (a) the father and the mother of the child were married to each other at the time of his conception or birth or between those times; or (b) paternity has been registered in a register of birth. The Jamaica Section is somewhat different in that it provides for recognition of paternity specifically for *succession* purposes and provides *inter alia* that the relationship of father and child will be recognized *only* if (a) the father and mother of the child were married to each other at the time of its conception or at some subsequent time; or (b) paternity has been admitted by or established during the lifetime of the father. If the purpose in recognizing paternity under the section is for the benefit of the father, there is an additional requirement that paternity be admitted or established during the lifetime of the child or prior to its birth.

As to what constitutes evidence or proof of paternity in the Jamaica and the Trinidad acts, Section 8 of the respective acts lays down the necessary guidelines.[19] Section 8 of the Jamaica Act provides that:

> (1) If, pursuant to Section 19 of the Registration (Births and Deaths) Act or to the corresponding provisions of any former enactment, the name of the father of the child to whom the entry relates has been entered in the register of births (whether before or after the commencement of this Act), a certified copy of the entry made or given in accordance with Section 55 of that Act or sealed in accordance with Section 57 of the said Act shall be *prima facie* evidence that the person named as the father is the father of the child.
> (2) Any instrument signed by the mother of a child and by any person acknowledging that he is the father of the child shall, if executed as a deed or by each of those persons in the presence of an attorney-at-law or a Justice of the Peace or a Clerk of the Courts or a registered medical practitioner or a minister of religion or a marriage officer or a midwife or the headmaster of any public educational institution as defined in the Education Act be *prima facie* evidence that the person named as the father is the father of the child.
> (3) An affiliation order within the meaning of the Affiliation Act shall be *prima facie* evidence of paternity in any subsequent proceedings, whether or not between the same parties.
> (4) Subject to Subsection (1) of Section 7, a declaration made under Section 10 shall, for all purposes, be conclusive proof of the matters contained in it.
> (5) An order made in any country outside Jamaica declaring a person to be the father or putative father of a child, being an order to which this Subsection applies, pursuant to Subsection (6), shall be *prima facie* evidence that the person declared the father or putative father, as the case may be, is the father of the child.
> (6) The Minister may from time to time, by order, declare that Subsection (5) applies with respect to orders made by any court or public authority in any specified country outside Jamaica or by any specified court or public authority in any such country.

The Barbados legislation deals with the void marriage situation and provides in section 8 that for the purposes of the presumption of paternity referred to already, where a man and a woman, in good faith, go through a form of marriage that is void, they shall be deemed to be married for the period during which they cohabit and the presumption of paternity would apply if the 280 days stipulation in Section 7(1)(b) takes effect.

For comparative purposes, the differences in the way in which the legislation of the three territories treat the way in which paternity may be established are to be stressed. In Trinidad and Jamaica,

19. See Appendix B for contents of Trinidad provision.

certain items which are proof of or evidence of paternity, are treated as presumptions of paternity in Barbados. While in Trinidad and Jamaica, there is a presumption of paternity in a situation where the child is born to a woman and her husband during or within ten months of the marriage, in Barbados the presumption of paternity is extended beyond the marriage situation to cases where the child's mother is *cohabiting* with the man at the time of the child's conception. Also, in Barbados, there is a presumption where the man, by his *conduct* implicitly and consistently acknowledged that he is the child's father. In the Jamaica and Trinidad legislation, there are no comparable provisions.

However, Section 5(2)(i) of the Grenada Status of Children Act 1991[20] is similar to the Barbados presumption by providing for a presumption of paternity where:

> a person who is alleged to be the father of the child has by his conduct implicitly and consistently acknowledged that he is the father of the child.

The provisions from the two territories diverge however in so far as the standard of proof required to establish paternity is concerned. Section 5(2)(i) closes with a proviso which states that:

> Provided that where an application is made to the court under this paragraph after the death of the alleged father, the application must be proven beyond a reasonable doubt.

It would seem that the presumption of paternity or parenthood relating to the birth of a child where the male person was married to the mother of the child at the time of its birth or where the marriage was terminated by death or judgment of nullity within 280 days (in Barbados) or 10 months (in Trinidad and in Jamaica) before the birth of the child or by divorce where the *decree nisi* was granted within 280 days (in Barbados) or 10 months (in Trinidad and in Jamaica) before the birth of the child, that such a presumption represents a codification of the common law presumption of legitimacy. In territories with *status of children* legislation this common law presumption of legitimacy is thus now called a presumption of paternity or parenthood. In territories without *status of children* legislation, the common law presumption is still applicable in these jurisdictions.[21]

In Guyana, the Children Born out of Wedlock (Removal of Discrimination) Act 1983 does not expressly set out presumptions of

20. No. 39 of 1991.

21. See chapter 2, *supra*.

paternity. However, the amended Infancy Act does this by implication in the new Section 1A(b) which provides that the term "father" – in relation to an infant who is born out of wedlock, means –

(i) the man who has been adjudged to be the father of the infant by a court of competent jurisdiction; or

(ii) if there is no such man, the man who has acknowledged the infant to be his child, and has contributed towards the maintenance of the infant, before he exercises or seeks to exercise in respect of the infant any rights or functions conferred on the father of an infant.

BALANCE OF PROBABILITIES TEST

In Jamaica, Barbados and Trinidad and Tobago, the balance of probabilities test is adopted for proof of paternity. This statutory enactment represents a change from the old common law standard of proof beyond a reasonable doubt for establishing paternity. In Grenada however, Section 5 of the Status of Children Act 1991 retains the standard of proof beyond a reasonable doubt.

The case of *Jeffers v. Noel*[22] highlights the meaning of *balance of probabilities* for purposes of the legislation. Here the court declared that the relationship of father and children existed pursuant to the Trinidadian legislation and made a maintenance order in favour of the children in question. As to the burden of proof in this case, while the legislation provides for the civil standard, that is, proof on a balance of probabilities, Justice Shah stated, "In my opinion however, that to 'satisfy' the court the applicant/mother must prove her case better than, say, a 51 percent weight of the evidence, the standard must be higher."[23]

The judge further stated, that, "in any case, corroboration was not necessary or even required" in this case,[24] and pointed out that it was open to the court to act on the uncorroborated evidence of the spouse.

In the *Application of Garcia*[25] the applicant sought a declaration of paternity pursuant to Section 10 of the Trinidad and Tobago Status of Children Act. Section 22 of the Trinidad Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981 also makes provision for paternity orders to be made, but by the Magistrate's Court. Section 23 of the latter act provides that the magistrate shall not make a finding of paternity based on the evidence of one witness only unless that evidence is corroborated by some other material evidence. The

22. (Unreported)15 June 1994, HC, T&T (No. 1494 of 1991).
23. Ibid, at page 3 of the judgment.
24. Ibid, at page 7 of the judgment.
25. (Unreported) 11 October 1993, HC, T&T (No. 3259 of 1992).

Status of Children Act, however, contains no requirement of corroboration which would seem to suggest that it would be easier to get a declaration from the High Court than it would from the Magistrate's Court. Nevertheless, Justice Shah who again gave the judgement in this case re-emphasized that the burden of proof was more than a 51 percent chance of establishing paternity. At the end of the day, since blood tests did not rule out the man as being the father, and since the court accepted that both parties had shared some degree of intimacy at the appropriate time, the court made an order that the relationship of father and child existed between the man and the child.

In the *Application of Span nee Phillip*[26] the court had to decide whether to make a declaration of paternity against an alleged father then deceased. The standard of the evidence to be tendered and accepted was the main issue for the court. Sealey J. introduced the requirement of corroboration for purposes of the Status of Children Act and stated:[27]

> It seems, therefore, that one should have the evidence of the applicant corroborated, and that the need for it has not been abolished by the absence of the word 'corroboration' from the Status of Children Act. This is more so when one considers that in many cases, as in this, the other person who can answer the questions of the applicant or who might counter any allegation which she might make is dead. The onus placed upon the applicant to satisfy this court is quite high indeed.

It was held in this case that the applicant had not satisfied the court that the deceased was the father and the application was therefore dismissed.

Again, in the *Application of Cummings,*[28] where the plaintiff had applied for a declaration of paternity in respect of a man then deceased, which if successful, would have enabled her to share in his estate, the application was refused, as the court felt that there was no corroboration of her evidence. Gopeesingh J. proceeded with the utmost caution and at the end of the day, refused to grant the application sought. He stated:[29]

> . . . before the Court could feel satisfied that the applicant has sufficiently proven her case on a balance of probabilities, the Court must feel that it is reasonably safe, in all the circumstances of the case, to act on the evidence before the Court. I think that this is especially so when, as in this case, the person alleged to be the father of the applicant is not alive at the time the

26. (Unreported) 24 June 1993, HC, T&T (No. 2697 of 1987).
27. Ibid, p. 3 of judgement.
28. (Unreported) HC, T&T (No. 1414 of 1985).
29. Ibid, pp. 6–7 of judgement.

> application for the declaration of paternity is filed or heard, and because of the difficulty of rectifying statements allegedly made by him against his interest, but which statements are admissible in evidence under one of the exceptions to the rule against admitting hearsay evidence and which were in fact admitted in the instant matter. In determining whether the applicant, in this matter, has discharged this onus of proof which rests upon her I think it is now well settled that there must be corroboration of some material particular.

In assessing the evidence presented to the court, the learned judge continued:[30]

> . . . in determining whether the applicant has proven her case to the satisfaction of this Court, the Court must consider the evidence as a whole and in particular the evidence of the applicant's mother . . . with respect to the relationship, if any, which existed between herself and the deceased prior to around the time of conception of the applicant and subsequently and to consider whether there is any evidence from an independent source which shows a probability that her evidence is true and that in considering what weight is due to such evidence, it should be borne in mind, at all times, that caution should be exercised in such deliberations.

Based on the above reasoning, the application was refused.

Blood Tests

A perusal of the acts under examination reveal common provisions relating to blood tests. These tests are employed so as to ascertain whether the results show that a person is or is not excluded from being the father of a child. The court may give directions for tests to be done on the mother of the child, the child himself, the alleged father, or any other person who might be the father, such as a co-respondent in the specific proceedings before the court.[31] Where a person tampers with blood samples or proffers another child and not the child named in the direction for the taking of a sample, the legislation prescribes for criminal penalties. Where the court gives directions for blood tests to be done and parties refuse to submit to them, the court may draw such inferences as appear proper or appropriate in the circumstances, and where the consent of a young child is unreasonably withheld by the person having care or control of that child, the court may direct that a blood sample may be taken in the absence of consent. Sections 11–15 of the Jamaica Act, for example, make specific provision regarding the powers of the court

30. Ibid, p. 10 of judgement.

31. See chapter 2, *supra*, for guidelines and circumstances in which the court will order blood tests to be carried out.

in relation to the issue of blood tests. Section 11(1) and (2) effectively gives the court the power to give a direction for the use of blood tests, and to vary or revoke such a direction. The legislation provides that:

> 11(1) In any civil proceedings in which the paternity of any person (hereinafter referred to as "the subject") falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of the subject and for the taking, within a period to be specified in the direction, of bloods samples from the subject, the mother of the subject and any party alleged to be the father of the subject or from any, or any two, of those persons.
>
> (2) A court may at any time revoke or vary a direction previously given by it under this section.

Section 11 (3), (4) and (5) sets out the responsibilities of the person carrying out the blood tests. It provides that:

> (3) The person responsible for carrying out blood tests taken for the purpose of giving effect to a direction under this Section shall make to the court by which the direction was given a report in which he shall state –
>
> (a) the results of the tests;
>
> (b) whether the person to whom the report relates is or is not excluded by the results from being the father of the subject; and
>
> (c) if that person is not so excluded, the value, if any, of the results in determining whether that person is the subject's father;
>
> and the report shall be received by the court as evidence in the proceedings of the matters stated therein.
>
> (4) Where a report has been made to a court under Subsection (3), any party to the proceedings may, with the leave of the court, or shall, if the court so directs, obtain from the person who made the report a written statement explaining or amplifying any statement made in the report, and that statement shall be deemed for the purposes of this Section to form part of the report made to the court.
>
> (5) Where a direction is given under this Section in any proceedings, a party to the proceedings shall not be entitled to call as a witness the person responsible for carrying out the tests taken for the purpose of giving effect to the direction, or any person by whom anything necessary for the purpose of enabling those tests to be carried out was done, unless –
>
> (a) within fourteen days after receiving a copy of the report he serves notice on the other parties to the proceedings, or on such of them as the court may direct, of his intention to call that person; or
>
> (b) the court otherwise directs;
>
> and where any such person is called as a witness the party who called him shall be entitled to cross-examine him.

Section 11(6) makes provision for the financial cost of taking and

testing blood samples and Section 11(7) extends the application of Subsection (6) to proceedings under the Affiliation Act. The provision reads:

> (6) Where a direction is given under this Section the party on whose application the direction is given shall pay the cost of taking and testing blood samples for the purpose of giving effect to the direction (including any expenses reasonably incurred by any person in taking any steps required of him for the purpose), and of making a report to the court under this Section, but the amount paid shall be treated as costs incurred by him in the proceedings.
> (7) In this Section civil proceedings include any proceedings under the Affiliation Act.

Section 12 deals with the issue of consent to the taking of a blood sample including the issue of consent in relation to minors and persons suffering from mental disorders. It provides that:

> 12(1) Subject to the provisions of Subsections (3) and (4) and without prejudice to Section 13, a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under Section 11 shall not be taken from that person except with his consent.
> (2) The consent of a minor who has attained the age of sixteen years to the taking from himself of a blood sample shall be as effective as it would be if he were of full age; and where a minor has by virtue of this Subsection given an effective consent to the taking of a blood sample it shall not be necessary to obtain any consent for it from any other person.
> (3) A blood sample may be taken from a person under the age of sixteen years, not being such a person as is referred to in Subsection (4), if the person who has the care and control of him consents.
> (4) A blood sample may be taken from a person who is suffering from mental disorder and is incapable of understanding the nature and purpose of blood tests if the person who has the care and control of him consents and the medical practitioner in whose care he is has certified that the taking of a blood sample from him will not be prejudicial to his proper care and treatment.

Where a person fails to submit to directions of the court in relation to blood testing, Section 13 enables the court to draw such inferences as may appear proper in the circumstances. The section provides that:

> (1) Where a court gives a direction under Section 11 and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances.
> (2) Where in any proceedings in which the paternity of any person falls to

be determined by the court hearing the proceedings there is a presumption of law that that person is born in wedlock, then if –

(a) a direction is given under Section 11 in those proceedings; and

(b) any party who is claiming any relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any step required of him for the purpose of giving effect to the direction,

the court may adjourn the hearing for such period as it thinks fit to enable that party to take that step, and if at the end of that period he has failed without reasonable cause to take it the court may . . . dismiss his claim for relief notwithstanding the absence of evidence to rebut the presumption.

(3) Where any person named in a direction under Section 11 fails to consent to the taking of a blood sample on himself or from any person named in the direction of whom he has the care and control, he shall be deemed for the purposes of this Section to have failed to take a step required of him for the purpose of giving effect to the direction.

Finally, Section 14 makes a person liable to criminal conviction if he proffers the wrong child or impersonates another in relation to blood testing. It provides that:

> 14 If for the purpose of providing a blood sample for a test required to give effect to a direction under Section 11 any person impersonates another, or proffers a child knowing that it is not the child named in the direction, he shall be liable on summary conviction in a Resident Magistrate's court . . .

The Trinidad provisions dealing with blood tests are similar although not identical to the Jamaican provisions and these are contained in Sections 13 through 17 of the Trinidad Status of Children Act.[32] Some acts, such as the Grenada Status of Children Act 1991, make provision for scientific or medical tests other than blood tests to be ordered by the courts. Section 12(1) of the act provides that:

> Where an application is made to the court to determine the parentage of a child, the court may give directions that such persons as the court specifies shall undergo such scientific or medical tests other than blood tests, legally and medically relevant to determining the issue of parentage, and the court may give directions that the results thereof shall be submitted in evidence.

The Belize Families and Children Act 1998 also makes provision for tests other than blood tests to be carried out. Section 45(2) empowers the minister to make regulations:

32. See Appendix B. For applicable Barbados provisions, see Sections 15 and 16 of the Status of Children Reform Act.

(a) providing for DNA analysis and the circumstances when such analysis may be made;
(b) providing that DNA analysis shall not be carried out except by such person and at such places (whether within or outside Belize) as may be appointed by the Minister;
(c) prescribing the manner in which DNA analysis is to be carried out;
(d) regulating the charges that may be made for the taking of DNA analysis and for the making of a report to the court;
(e) providing that DNA analysis shall not be done without consent;
(f) making provision where there is failure to comply with a direction to undertake a DNA analysis;
(g) prescribing the form of the report to the court of a DNA analysis.

WHO MAY APPLY FOR DECLARATION OF PATERNITY

Section 10 of the Jamaica Act provides that any person who, being a woman, alleges that any named person is the father of her child, or, any person who alleges that the relationship of father and child exists between himself and any other person; or any person who has a proper interest in the result and who wishes to have it determined whether the relationship of father and child exists between two named persons, may apply to the court for a declaration of paternity. If it is proved to the satisfaction of the court that the relationship exists, the court may make a declaration of paternity, even if the father or the child, or both of them are dead.

The Trinidad provision, found in section 10 of the Trinidad Act embraces the content of the Jamaica provision but includes an additional ground which allows a person, who alleges that he is the father of an unborn child, to apply.

Section 9 of the Barbados Act simply provides that any person having an interest in a child may apply to the court for a declaration that a male or female person is recognized in law to be the father or mother, as the case may be, of that child. What is unique about this provision is that Section 9(3) allows a person to apply for an order that the relationship of mother and child is established. In the West Indian context this may prove quite a useful provision since there are numerous cases of mothers going abroad in 'search of a better life' and leaving their children with relatives and friends for extended periods. Some of these children may be raised as children of their adoptive caretakers and it is not inconceivable that they may wish at some later stage to have their real mothers identified, for purposes of succession or otherwise. The provision might also prove useful, for example, in a situation where one woman might have contracted with another woman to bear her child – in this case, who is to be the mother identified by law? It would appear that local cases interpreting

the provision have not yet come up for determination, although the importance of being able to establish maternity has been canvassed in some non-regional decisions.[33]

As to who is to be regarded as a proper party to proceedings under the Acts, in the *Application of Nancoo*[34] the court interpreted the words of Section 10(1) of the Trinidad and Tobago Status of Children Act. The words "a person having a proper interest in the result" were examined and the court adopted a broad approach to "permit the involvement of anyone who might assist the court to arriving at a just decision". In this case, the applicant had applied for a declaration of paternity in respect of an alleged deceased father. The application was supported by the mother and others. Two other persons applied to be joined in the proceedings which the court allowed. A motion was then filed to have that joinder set aside, which Best J. refused to do.

LEGAL EFFECT OF DECLARATION OF PATERNITY

What is the legal effect of a declaration of paternity? Legally, it is proof that a man is the father of a specific child. It means that the man, who has now been legally identified, has a responsibility to support the child, and that the child can claim an interest in the man's estate upon his death. What is lacking however in the legislation of these territories is that the Acts do not deal with the specific rights of a putative father in relation to the child. The rights of the father of a child born within lawful wedlock are obvious since such a father is a natural guardian of the child and able automatically to exercise parental rights over the child, but in relation to the rights of a putative father, there is still some uncertainty. Once paternity is admitted or established during the lifetime of the child or prior to its birth, for example in Jamaica, under Section 7(1)(b), the father has rights for succession purposes on the death of the child, but the legislation does not deal with the rights of a putative father as to care and control, as to the child's upbringing, or whether his consent is needed for certain courses of action intended by the mother in relation to the child, for in the vast majority of situations the putative father and the mother of the child may not be living under the same roof. Thus, some obvious questions emerge: where there is a declaration

33. See *Slingsby (by his* guardian ad litem*) v. Attorney General and Others* (1916) 33 TLR 120 where the issue of a child's maternity arose in a situation where it was alleged that a woman had fraudulently claimed to be the child's mother; see too *R v. Jenkins ex parte Morrison* [1949] VLR 277 where the issue of the maternity of a child was relevant in circumstances in which babies might have been allocated to incorrect mothers in hospital after birth. For further details, see A. Dickey, *Family Law*, 3d ed. (Sydney: LBC Information Services 1997), 283–87.

34. (Unreported) 22 June 1993, HC, T&T (No. S-1725 of 1992).

of paternity in favour of a putative father, does the putative father have the right to insist that the child bear his surname? Can the mother of the child select the school that the child is to go to without consultation with or without the consent of the putative father? Does the putative father have equal rights to the custody of the child? If the mother of an out-of-wedlock child decided that she wanted to give up that child for adoption, does the putative father have a right to object in a situation where there is a declaration of paternity in his favour? Can the mother of a child take the child out of the jurisdiction without the consent of the putative father in a case in which there is a declaration of paternity in his favour? Since the legislation does not specifically provide for answers to these questions, these issues are to be resolved by the courts in their interpretation of the provisions of the act, together with the provisions of other relevant legislation and/or common law doctrines.

While *status of children* legislation itself does not deal specifically with the issue, in some countries other legislation contained in specific acts may give rights to the putative father. In Trinidad and Tobago, for example, in Section 6 of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981, provides in effect, that once paternity has been established, both parents will be regarded as the child's guardians regardless of whether the child has been born in or out of wedlock.[35]

ABOLITION OF OLD RULE OF CONSTRUCTION

The Acts have expressly abolished the common law rule of construction in favour of children born in wedlock. Section 3(2) of the Trinidad Act reads:

> The rule of construction whereby in any will, deed, or other instrument words of relationship, in the absence of a contrary expression of intention, signify relationship derived only from wedlock is abolished.[36]

The effect of this provision is that on the death of a parent, the out-of-wedlock child of that parent is entitled to take equally as any other child. The child can now take where in former cases he would have been excluded, as for example where the words "child", "issue", "heir" or "dependent" would have been held to refer only to legitimate children.[37] As a result, it has been necessary to amend a number of acts to reflect the changed position. These include amendments to

35. For more on rights of the putative father, see chapter 6, *infra*.

36. See too Jamaica s. 3(2); Barbados s. 5.

37. This is subject in Jamaica, to the provisions of Section 3(4) of the Status of Children Act 1976.

adoption acts, workmen's compensation acts and registration of births acts to name a few.

Re McConney[38] and similar decisions ruling against the out-of-wedlock child are no longer good law in territories having *status of children* legislation. However, since the legislation abolishes the rule of construction "in the absence of a contrary intention," this means that a testator can still exclude out-of-wedlock children or grandchildren by leaving property, say, to "all my children born within wedlock," or, to "all of my grandchildren born in wedlock". If this course was adopted, then out-of-wedlock children would be excluded in spite of the existence of *status of children* legislation. The question therefore remains as to whether the statutory provision abolishing the rule of construction should be amended so as to prevent persons from overriding the intent of the act.

It is of significance too, that the provision abolishing the old rule of construction deals with a "will, deed, or other instrument". Nothing is mentioned here of the abolition of the rule in relation to intestacy. But several cases decided since the coming into force of the legislation indicate that abolition of the rule applies equally to intestacy.[39]

RETENTION OF DISCRIMINATORY PROVISIONS

In comparing and contrasting the various pieces of legislation, unlike Trinidad and Barbados, the Jamaica legislation expressly retains discriminatory provisions against children born out of wedlock in Section 3(4) of the act. It provides that:

> Nothing in this section shall affect or limit in any way any rule of law relating to –
> (a) the domicile of any person;
> (b) the citizenship of any person [this subparagraph has been deleted by the Citizenship (Constitutional Amendment) Act 1993;[40]
> (c) the provisions of the Children (Adoption of) Act which determine the relationship to any other person of a person who has been adopted;
> (d) the construction of the word heir or of any expression which is used to create an entailed interest in real or personal property.

Be reminded that the Jamaican Status of Children Act 1976 opens with a preamble which states that it is "an act" to remove the legal disabilities of children born out of wedlock . . ." The content of Section 3(4), however, in no way lives up to the spirit of the preamble nor to

38. (1976) 27 WIR 52 (Barbados).
39. See chapter 9, *infra*.
40. No. 6 of 1993.

the act in general, thus the object of the act to some extent remains unfulfilled. The act has therefore transformed the position of the out-of-wedlock child only in a limited way, so that the discriminatory provisions unfortunately, negate any absolute conviction or belief that no adverse consequences flow for the child from the nonmarital status of the child's parents.

The negative effect which this would have on the rights of the out-of-wedlock child undoubtably beckons the need for further reform in Jamaica, as well as in those countries in which discrimination still continues, in spite of the reformed legislation.[41]

JUDICIAL INTERPRETATION OF THE LEGISLATION

Interpretation of *status of children* legislation by the courts have to some extent been favourable, both to the out-of-wedlock child as well as to the father of such a child. The case of *G v. P*,[42] for example, decided that the putative father of a child, had the right to insist that the surname of the child in question not be changed. In this case X was the putative father of a child who had been registered at birth under X's name. The mother subsequently married P and wished the child to adopt P's surname. X applied to the court for an order that the child should retain X's surname. The court considered the provisions of the Status of Children Act and concluded that it was in the best interests of the child to retain X's surname. In the recent Trinidadian decision given in *The Application of Sharon Lee Garcia*[43] however, the local court arrived at a different conclusion as it had failed to take note of the existence and effect of the Status of Children Act 1981, and in effect held by implication that although there was a declaration of paternity in favour of the putative father, he had no right to insist that the child bear his name.

In *McM v. C* (No.1)[44] the court dealt with the issue of the residence of a child born out of wedlock, and held that the mother no longer had the unilateral right to change the residence of the child without the consent of the putative father. In this case X was the putative father of the child in question. The mother had formed a relationship with D and removed the child to another city to reside. On the issue of whether the mother had the right to do this, the court looked at the provisions of the Children (Equality of Status) Act and the Status of Children Act (Vic. Aust.) and ruled that the rights and obligations of

41. There are also discriminatory provisions to be found in the Belize Families and Children Act 1998, Section 33(6); and St. Vincent, Section 3(4) Status of Children Act 1980.
42. [1977] VR 44.
43. (Unreported) 17 April 1997, HC, T&T (No. 2768 of 1994), discussed *infra*.
44. [1980] 1 NSWLR 1.

the mother and father of an ex-nuptial child had been equated to the rights and obligations of the parents of a legitimate child so that the mother could not unilaterally change the ordinary residence of the child unless the putative father consented.

In a number of cases, it has been established that the putative father now has parental rights and rights relating to custody vis-à-vis his child, as was held in the Trinidad case of *Durity v. Benjamin*[45] where custody of a little girl was given to the putative father as against the mother.

In *Gorey v. Griffin*[46] the ex-nuptial child in question was in the custody of the mother. The putative father applied for access under the Infants' Custody and Settlements Act. Previously, this Act was held to apply only to in-wedlock children, and the issue was whether a putative father could apply under it in view of the Children (Equality of Status) Act 1977. It was held that in so far as the latter Act made the ex-nuptial child the legal child of its putative father, it also altered the status of the putative father so that the putative father could apply under the provisions of the Infants' Act.

In *Douglas v. Longano*[47] the ex-nuptial child had been in the custody of its mother. The putative father applied for access, allegedly, under the Marriage Act. The issue was whether the Marriage Act applied to both nuptial and ex-nuptial children having regard to the Status of Children Act. It was held that the father's application could succeed as the latter Act empowered the court to make applications in respect of both classes of children.

Status of children legislation has also had a significant impact on the rights of the out-of-wedlock child to inherit his deceased parent's property. This is adequately highlighted in chapter 9 herein.

ASSESSMENT OF THE LEGISLATION

It would appear that for the most part, statute bolstered by case law, has significantly improved the case for the child born out of wedlock. As Basdeo Persad-Maharaj J. stated in another context in one local decision ". . . it seems to me and I so hold that there is equality of parental rights as there are no illegitimate children once paternity is established in accordance with the Act."[48] This statement aptly summarizes the position of the out-of-wedlock child – so long as paternity is established, he will suffer none of the former discrimi-

45. (Unreported) 30 July 1993, HC, T&T (No. 1596 of 1993).
46. [1978] 1 NSWLR 739.
47. [1981] FLC 91-024 (p. 245).
48. *Durity v. Benjamin* (unreported) 30 July 1993, HC, T&T (No. 1596 of 1993), p. 24 of judgment.

nations linked to illegitimacy. Thus, while the status of children acts in the region do have their various drawbacks, nevertheless, the rights of the child born out of wedlock have been greatly enhanced and the fact of reform is beyond dispute. The plight of the out-of-wedlock child however is by no means relieved entirely, and the situation far from ideal, so that it is hoped that in time more legislative reform will be effected to remedy current injustices. For the present, it is not entirely true to say that no adverse consequences accrue to the child born outside of marriage. The legal position of the parents in relation to each other still plays a very significant role in the way in which the child of such parties is viewed by the law and by society. Yet, as children are vulnerable and incapable of surviving without adults, it is with the protection of children the law should be more concerned and not with the status of their parents. There is thus no moral basis for discriminating against one group of children and receiving another group with open arms. In many Constitutions of the region, there is guaranteed protection from discrimination of various kinds. We may remind ourselves that in Guyana, this protection is guaranteed by Section 30 of the Constitution[49] which provides that:

> Children born out of wedlock are entitled to the same legal rights and legal status as are enjoyed by children born in wedlock. All forms of discrimination against children on the basis of their being born out of wedlock are illegal.

Protection from discrimination is also reflected in Article 2 of the United Nations Convention on the Rights of the Child which provides, inter alia, that no child should be discriminated against on the basis of that child's birth status. The article reads:

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth* or other status.[50]

The Commonwealth Caribbean region has ratified the convention and on this basis it is hoped that their respective Constitutions will also be amended to recognize this fundamental principle.

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49. No. 2 of 1980.
50. Emphasis supplied.

Chapter 5

Parental Rights and Duties

The expression 'parental rights' is clearly a loose way of describing the conglomeration of rights, powers, liberties and (perhaps) duties which a parent has with respect to his child . . . parental claims have no independent weight but are relevant only as evidence as to what course is best for the child.
– J.M. Eekelaar[1]

Introduction

Sir Hugh Wooding illustrated the importance of caring for children when he wrote that "The hearts of young children are delicate organs. A cruel beginning in this world can twist them into curious shapes. The heart of a child can shrink so that forever afterward it is hard and pitted as the seed of a peach. Or again, the heart of such a child may fester and swell until it is a misery to carry within the body, easily chafed and hurt by the most ordinary things."[2] It is for this reason that adults are fixed with legal responsibility for the upbringing of children. This primary responsibility rests with the child's parents. In the introduction to the Children Act 1989 (UK) it is emphasized that "the duty to care for the child and to raise him to moral, physical and emotional health is the fundamental task of parenthood." This statement is applicable to the Commonwealth Caribbean region irrespective of whether or not the UK act is in force in our countries, as it is a statement merely reflective of common sense than of law, for as noted by Blackstone, the most universal relation in nature, is that relation which exists between a parent and a child.[3]

1. "What are Parental Rights", 89 LQR 210 (1973).
2. "Reactions" in *Fambli: The Church's Responsibility to the Family in the Caribbean*, edited by Lilith Haynes (World Council of Churches, CARIPLAN 1972), 144 at 145.

The Cayman Islands Children Law 1995 defines parental responsibility in Section 5 as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property." This is also the definition found in Section 3 of the UK Children Act 1989, and the term "parental responsibility" has in the UK, as well as in more recent Commonwealth Caribbean legislation, replaced the use of other terms, such as parental *rights and duties*, which were felt to be ambiguous and confusing.[4] Countries with older legislation continue to embrace the concept of parental rights and duties.

What is the rationale for the existence of parental rights and duties, or for the imposition of parental responsibility by the courts and the legislature? It must be because a child or minor does not have full legal capacity, nor is he mature enough mentally or psychologically, as a result of which he suffers from various disabilities or incapacities. Thus, according to Stephen J. in *Re Shonahan, ex parte Plummer*[5] it is because the law regards minors as incapable of making responsible choices for themselves that it entrusts to others the legal power to make those decisions and carry them out.

Of course the issue is not entirely about the inability of minors to make responsible choices since babies and very young children are not only unable to make choices, but they do not at this age understand what a choice is, and are also physically unable to do anything for themselves. Thus the need for parental commitment to

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3. (1765) Bk. I, Chap. 10, cited by B.M. Dickens in "The Modern Function and Limits of Parental Rights", 97 LQR 462 (1981).
4. The 1989 UK Children Act made some significant changes to English child law which most of the Commonwealth Caribbean have not yet adopted. The concept of parental rights was replaced by the term "parental responsibility" which includes parental rights. Academic opinion is that the changed terminology was intended to reflect current developments in the common law as seen through *Gillick* [1986] AC 112 (discussed *infra*). Under the act, married parents and unmarried mothers have automatic parental responsibility for their children, but the father of an out-of-wedlock child does not, although he may apply for it or he can obtain it through agreement with the child's mother. Parental responsibility may also be granted to a non-parent through a *residence order*, or on a state authority through a *care order*. The act further replaced concepts such as custody and access with the concepts of *residence and contact* (called *section 8* orders, among others). Where the court makes a *section* 8 order, the welfare of the child is paramount, although the court is constrained to refer to a number of factors as highlighted by the act. The act generally encourages persons to settle their disputes privately; it strengthens the legal position of the non-custodial parent, and it provides the court with a non-interventionist approach to family disputes, which is directed to make orders only if it would be better for the child than not making an order at all. (Extracted in summary form from John Dewar, "The Family Law Reform Act 1995 [cth] and the Children Act 1989 [UK] Compared: Twins or Distant Cousins?", *Australian Journal of Family Law* 10, no. 1, 18 at 19–21). See too P.M. Bromley and N.V. Lowe, *Bromley's Family Law*, 9th ed. (Butterworths 1998), Chap. 12; A. Bainham, *Children: The Modern Law*, 2d ed. (Bristol: Family Law, Jordan Publishing 1998), Chap 2.
5. [1980] 55 ALJR 71, 75.

ensure that at this early stage the child prospers physically, and psychologically.

PERSONS HAVING PARENTAL RIGHTS AND DUTIES

At present, in many jurisdictions, this depends on the state and development of child law in the particular jurisdiction under examination. At common law, the father's rights to legitimate children were superior to those of the mother. In relation to the child born in wedlock, parental responsibility vested in the father. He had the right to possession of the child, which was enforceable by the writ of *habeas corpus*. He had the right to custody, care and control, except where his conduct endangered the child's life, or physical or moral health. He was entitled to the services of the child, had the power to determine religious and secular education, and he also had the power to discipline the child by use of reasonable corporal punishment.

In England, by statutory intervention, equal rights were given to both parents in respect of the legitimate child.

Commonwealth Caribbean territories receiving relevant UK legislation via the reception doctrine or enacting it specifically would thereby confer on the mother the same rights as belong to the father, as far as the child born in wedlock is concerned. In Trinidad and Tobago, for example, Section 4(1) of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981 provides that:

> In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows a father, and the rights and authority of mother and father shall be equal and exercisable by either without the other.

For the out-of-wedlock child, parental rights and duties traditionally vested in the mother. Today, in view of recent legislation, parental rights and duties vest in both parents, provided paternity is established. This is reflected, for example, in Section 6(2) of the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981 which provides that:

> the mother of a minor born out of wedlock shall be the sole guardian of the minor unless and until the paternity of the minor has been registered pursuant to the Births and Deaths Registration Act, or established by any of the modes specified in Section 8 or 10 of the Status of Children Act 1981.

In Barbados, the rights of the putative father in relation to the out-of-wedlock child is linked to cohabitation with the mother in so far as

it satisfies the description of a "union other than marriage"[6] under the Family Law Act. If no such union exists, the father is not automatically entitled to exercise parental rights, unless there is a declaration of paternity in his favour.[7]

Apart from the rights of biological parents, others having and able to exercise parental rights, would include parents of adopted children, and guardians or custodians having all or some of the parental rights or duties.

It is significant to note that in Trinidad and Tobago, for the purposes of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981, the word "minor" means any person under the age of eighteen years, and includes any child, whether born within or out of wedlock. The explanatory note to the Bill, before the Act came into force, states that "Clause 4(1) is derived from Section 1(1) of the Guardianship Act, 1973 [UK] since an important consequence of abolishing legal distinctions between children born in wedlock and those born out of wedlock would be that the parents of children born out of wedlock like the parents of the children born in wedlock, should prima facie have equal rights and duties." Whereas before the Act came into force, the father of a minor born out of wedlock had no rights of guardianship over his child, the note continues to explain that "Clause 6 seeks to make it quite clear that the father of a minor whether born in wedlock or out of wedlock would unless the court had deprived him of his rights, have the right to guardianship simply by virtue of his fatherhood."

The Trinidad case of *Durity v. Benjamin*[8] illustrates the operation of equality of parental rights over the out-of-wedlock child provided for by legislation. In this case, the issue was whether the custody of a female child born out of wedlock should vest in the mother or father of the child. Here the father was resident in Canada and wanted to take the child out of the jurisdiction. There was evidence that the paternal grandmother had been looking after the child for various periods, and that the father throughout his residence abroad had kept in regular contact with the child and had maintained her. Counsel for the mother argued that because the child was born out of wedlock, that the mother was in law entitled to custody as of right. Basdeo Persad-Maharaj J. reviewed the case law authorities and legislation on the subject and stated:

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6. This union is created by law where there is cohabitation for a period of at least five years.
7. See chapter 6, *infra*.
8. (Unreported) 30 July 1993, HC, T&T (No. 1596 of 1993).

> it seems to me and I so hold that there is equality of parental rights as there are no illegitimate child[ren] once paternity is established . . . [9] It is the welfare of the child that I must consider and not what the parents want.[10]

Custody was granted to the father, with reasonable access to the child's mother.

COMPOSITION OF PARENTAL RIGHTS AND DUTIES

Bromley and Lowe[11] have indicated in a list, what parental responsibility, at least, comprises. Included among others, with some adjustment, are the following :

- providing a home for the child
- having contact with the child
- determining and providing for the child's education
- determining the child's religion
- disciplining the child
- providing medical care
- obtaining of passport for the child
- administering the child's property
- protecting and maintaining the child
- representing the child in legal proceedings
- burying or cremating a deceased child
- appointing a guardian for the child where necessary
- consenting to the adoption of the child where necessary
- consenting to the marriage of the child where necessary

Eekelaar lists some of the parental rights and duties as including the right to possession of the child, the right to visit the child, the right to determine the child's education, the right to determine the child's religious upbringing, the right to discipline the child, the right to choose medical treatment, the right concerning the child's name, the right to consent to marriage, the right to services,[12] and the right to determine nationality and domicile.[13]

RIGHTS AND DUTIES LAID DOWN BY STATUTE

For the most part, parental rights, duties and obligations are today contained in various acts of parliament which regulate the way in

9. Ibid, p. 24 of judgment.
10. Ibid, p. 50 of judgment.
11. Bromley and Lowe, *Family Law* (8th ed.), 301.
12. This parental right to domestic services has gradually diminished and it appears cannot now be enforced against the child but may be enforced against a third party.
13. J. Eekelaar, "What are Parental Rights?", 89 LQR 210.

which children are to be protected, maintained and brought up. These statutory provisions are to be found in the various education acts, maintenance acts, immunization acts, children acts, infants acts, and family law acts of the region, to name a few. Insofar as the legislation stipulates what the rights of parents are in this context, at the same time, it lays down various duties, which seem to be the flip side of the same coin. Some of these rights and duties will be examined so as to give some idea as to the nature of the law's concern for children, for while some of the duties of parenthood may reflect a merely moral responsibility on the part of parents to perform positively for the benefit of their children, nevertheless parents sometimes neglect to do so, in which case legislation may impose penalties for a failure to act reasonably. Some of the more important of these rights and duties are highlighted separately.

CUSTODY, CARE AND CONTROL

Parents or guardians have the right to custody and care and control of their children. No one may deprive them of such a right unless the law allows such a deprivation. With this right, comes a whole bundle of rights which allows the parent or guardian to exercise almost absolute control of the child, subject of course to the state's or the courts' scrutiny, in cases of dispute. In Trinidad and Tobago, for example, this right to custody is laid down by Section 4(1) of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981, and the right may be enforced by writ of *habeas corpus.*[14]

EDUCATION

Section 77 of the Trinidad and Tobago Education Act,[15] imposes a burden on the parent to ensure the education of the child. It provides that "it shall be the duty of the parent of the child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability and aptitude, by regular attendance at a school". By virtue of this provision, the parent no longer has the right not to cause his child to be educated.

In Barbados, Section 41 of the Education Act[16] also places a duty upon parents to ensure the education of their children. The section provides that the parent of every child of compulsory school age is to ensure that the child receives full time education suitable to the

14. See for example, *Ex Parte B (an infant)* (1985) 36 WIR 198; *Re Husbands* [1968] *Law Reports of Guyana* 224.
15. Laws of the Republic of Trinidad and Tobago, Chap. 39:01.
16. Laws of Barbados, Cap. 41.

child's age and ability by regular attendance at a public or private school. The 1995 Education (Amendment) Act[17] defines compulsory school age as meaning from five years of age to 16 years of age.[18] Section 41 of the Education Act also indicates the circumstances in which a child may be exempt from compulsory attendance at school, that is, if the child is receiving special education; receiving instruction at home in a manner and to a standard satisfactory to the minister; is unable to attend due to illness, danger of infection, sudden or serious illness of a parent, or other sufficient cause; due to religious observance; is suffering from physical or mental handicap which makes him incapable of being educated by ordinary methods of instruction; or the principal of the school has granted permission for the child to be temporarily absent from school for good and sufficient reason. Under Section 61, where a child of compulsory school age fails to attend regularly at school, the parent will be guilty of an offence and liable on conviction to be fined. The 1990 Education Amendment Act[19] also amends the Education Act in Section 13 by providing that a school attendance officer upon written authorization, may enter school premises and make such enquiries as are necessary to determine whether Sections 41 and 61 are being complied with. The officer may also stop any child who appears to be of compulsory school age and is not at school and question such child as to his age, name and address, school at which he is registered, reason for absence from school, and any other relevant matter.

RIGHT TO ADMINISTER PUNISHMENT

Most jurisdictions have legislative provision empowering the parent or guardian to administer reasonable corporal punishment to the child, where necessary. In Trinidad and Tobago, for example, Section 22 of the Children Act,[20] provides for the right of a parent to administer reasonable punishment to a child or young person. What is reasonable is for the court to determine if the issue becomes the subject of legal controversy. This power is also granted to persons to whom parental responsibility is delegated, such as schoolteachers in academic institutions.[21]

17. No. 23 of 1995.
18. Section 2.
19. No. 21 of 1990.
20. Laws of the Republic of Trinidad and Tobago, Chap. 46:01.
21. See for example *Mayers v. The A.G. of Barbados et al.* (unreported) 27 July 1993, HC, B'dos (No. 1231 of 1991).

DUTY TO MAINTAIN

A child's right to be maintained is provided for by law.[22] Section 13 of the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981, is an example of one legislative provision on the subject. Under this act, the right to maintenance may be enforced in the Magistrate's Court, or in the High Court, depending on the particular provision being invoked. The interpretation section of the act defines maintenance as including education.

Section 51 of the Barbados Family Law Act is another example of statutory provisions relating to the maintenance of a child. It reads:

> The parties to a marriage, or union other than marriage are liable, according to their respective financial resources, to maintain the children of the marriage or of the union who are unmarried and have not attained the age of 18 years.

The interpretation section defines maintenance as "the provision of money, property and services, and includes in respect of a child, provision for the child's education and training to the extent of the child's ability and talents".

In Belize, the 1998 Families and Children Act gives an extended definition of maintenance in Section 5 which provides that:

> (1) It shall be the duty of a parent, guardian or any person with custody of a child to maintain that child, and in particular that duty gives a child the right to
> (a) education and counselling;
> (b) immunization;
> (c) balanced diet;
> (d) clothing;
> (e) shelter; and
> (f) medical attention.

DUTY TO PROTECT CHILD

The duty to protect emerges out of the common law as well as various statutory provisions, and consists of a broad duty to protect the child from various harms.[23] The Belize Families and Children Act expressly imposes on the parent by virtue of Section 5(2), a duty to protect the child from discrimination, violence, abuse and neglect.

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22. In relation to children born out-of-wedlock, however, this right is dependent upon paternity being established. See chapter 8, *infra*.
23. See chapter 12, *infra*, "Care and Protection of Children".

PENALTIES FOR FAILURE TO OBSERVE DUTIES

Legislation imposes criminal sanctions for the failure of the parent to observe his or her responsibilities towards the child. Section 29 of the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981 for example, provides that every father or mother of a minor who neglects to maintain the minor, being able wholly or in part to do so or who deserts the minor is liable, on summary conviction, to a fine or to imprisonment. Section 30 provides that every person having the custody of a minor who misapplies moneys paid for the support of the minor, or who withholds proper nourishment from the minor, or who in any manner ill treats the minor is liable, on summary conviction, to a fine or to imprisonment.

Additionally, under the general law, a parent's wilful or negligent conduct which causes harm or death to the child will be punished. In *Gibbins and Proctor,*[24] for example, where a failure to feed the child resulted in the death of the child, the child's father and the woman with whom he was living were convicted of the murder of the child.

THE WELFARE PRINCIPLE

Although the duties and obligations of the parents do not go without rewards, nevertheless, the way in which the rights over the child are exercised are subject to scrutiny by the state, and more specifically by the courts of law.

Traditionally, the legal apparatus sought to protect the parent's relationship with his child. In *Re Agar-Ellis*[25] it was laid down that:

> When by birth a child is subject to a father, it is for the general interest of the particular infant, that the court should not, except in very extreme cases, interfere with the decision of the father but leave him the responsibility of exercising that power which nature has given him by birth of the child.

However, the nineteenth and early twentieth centuries saw the growth of the welfare principle, under which the court, exercising its equitable jurisdiction became increasingly prepared to intervene in the parent-child relationship, a jurisdiction derived from the prerogative power of the State as *parens patriae.* This concept was developed specifically for the protection of children, and through the passage of time, equity adopted the view that the welfare of the child was the first consideration which prevailed over all others. Much has been done in this area to protect the child in cases where the exercise

24. [1918] 13 Cr. App. Rep. 134.
25. [1883] 4 Ch. D. 317.

of parental rights might be harmful or injurious to the child, or simply put, not in the child's best interest. In other words, there are legal limits to the exercise of parental authority over the child.

In *R v. Gyngall*[26] Lord Esher M.R. stated :

> The court is placed in a position by reason of the prerogative power of the Crown to act as supreme parent of the child, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate and careful parent would do. The court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do. The court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right . . . The court must exercise this jurisdiction with great care, and can only act when it is shown that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but – I will not say 'essential', but – clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded; but . . . where it is so shown, the court will exercise its jurisdiction accordingly.

The Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981 has given effect to the rule, in Section 3, that the welfare of the minor is the first and paramount consideration.

Section 43(1)(a) of the Barbados Family Law Act, also gives effect to this principle. It reads:

> In proceedings in respect of the guardianship or custody of, or access to, children of a marriage or union, the court shall regard the welfare of the children as the first and paramount consideration.

According to Bainham, the welfare principle endows the courts with a broad discretion to determine their own view of an individual child's best interests and to make appropriate orders. An unfortunate byproduct of this process he says, is that they have seldom been concerned to provide guidance on the legal limits of parental authority.[27] Nevertheless, although no clear statement has been handed down to apply in all cases as to how far a parent may go in exercising his or her powers over the child in question, the judicial

26. [1893] 2 QB 232 at 241–42.

27. A. Bainham, "The Balance of Power in Family Decisions", 45(2) CLJ 262 at 269 (July 1986).

yardstick applicable in every case is the welfare of the child or the best interest of the child. Rights of parents are therefore not unlimited or unqualified but are qualified and are not truly rights in the strict sense of the word. As Dickens observed:

> A 'right' is taken for the present purpose to refer to a parental discretion to act regarding a child in a way others have a co-relative duty to permit, or a duty to forbear from preventing. By 'others' bound by this duty or forebearance are meant particularly officers of different levels of government and of quasi-public child protection and welfare agencies . . . While such public and quasi-public officers may be required to tolerate an exercise of parental rights . . . the children regarding whom such rights are exercised may not necessarily be bound by a duty of tolerance or compliance. They may at times lawfully resist the impositions and constraints upon them by which parents seek to make their rights effective.[28]

It is thus no longer proper to speak entirely in terms of parental rights, since regardless of the rights or wishes of the parents, a court may refuse to sanction these if they are contrary to the child's best interests or welfare. *Right* therefore in this context, refers to a limited right which is subject to judicial scrutiny.

CHALLENGES TO PARENTAL AUTHORITY

There are various specified instances in which the rights of the parent in relation to the child will be challenged by a third party, by the state, by one parent against the other or even by the child himself, and in appropriate cases the court will interfere to regulate, vary, alter, or even take these rights away from the parent(s) or guardian(s) in whom they are vested. While, for example, a parent may have the right to custody, care and control of the child, and while the parent may exercise these rights behind closed doors, the parent's right is not absolute as this right, like all others, is subject to scrutiny. In *Batson v. Batson,*[29] for example, a father was denied custody of his daughter because he smoked marijuana in her presence and even taught her how to roll the marijuana cigarettes. Thus while a parent is in a position by virtue of his guardianship, to influence his child, he is not allowed to influence the child to the child's detriment. In this case the court, in reaching its decision, took into consideration, according to Permanend J:

> [the child's] likely exposition to the danger of moral corruption by example and encouragement.[30]

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28. B.M. Dickens, "The Modern Function and Limits of Parental Rights", 97 LQR 462 (1981).
29. (Unreported) 25 March 1987, HC, T&T (No. 710 of 1981).
30. Ibid, p. 7 of judgment.

This decision is in complete agreement with dicta of Georges J. in *Milne v. Milne*[31] where it was stated that:

> It is clear from the recent cases that the emphasis is not on the 'rights' of the parents to custody but on the 'right' of the child to be placed in the environment which will be most conducive to its welfare. It is the duty of the Court to assess all relevant circumstances and arrive on the balance at the decision which serves that end.[32]

In *Quesnel v. Quesnel*[33] after a divorce from her husband, the mother of a young boy was granted custody of him and took him to Tobago for a holiday. She stayed at a hotel with friends whose moral attitudes were suspect. While the facts of the case as presented in the judgment did not indicate that the mother *herself* had engaged in 'immoral' conduct or activity, Braithwaite J. seemed to have adopted the position that the mother's *exposure* of the child to the unacceptable behaviour of her friends was sufficient evidence of the mother's failure to protect the child from harmful influences. This was of serious concern to him, which he described as indicating:

> an element of irresponsibility and instability in her personality which, I think, must operate against her suitability to have the unconditional custody of the child of the family.[34]

On the mother's wishing to take the child to live with her in Canada, the Judge, alluding to the possible moral corruption of the child, continued:

> In a large foreign country, the respondent would have a clear field, so to speak, for the development of what I have found to be tendencies towards an unconventional and adventurous life – certainly not a life which, in my judgment, a young child should share.[35]

In the final analysis, custody of the child was given to its grandmother with access to both parents.

The above cases illustrate the point that the moral corruption of children by parents is not a right which the parents possess in relation to the child, and the court is prepared to intervene in order to prevent the child from being further corrupted. However, it seems, from interpreting the law to be had from another decision, that the court

31. (Unreported) 10 July 1974, HC, T&T (No. 2162 of 1973).
32. Ibid, p. 7 of judgment.
33. (Unreported) 26 July 1979, HC, T&T (No. M-179 of 1977).
34. Ibid, pp. 11–12 of judgment.
35. Ibid, p. 14 of judgment.

will be prepared to allow the "moral corruption" of a child if the child is the one initiating the "corruption" and if the child is old enough or mature enough to understand the nature and consequences of its actions in cases in which, in the court's view, the corruption need not necessarily be harmful to the child. In this situation, the parent has no right to intervene in the exercise of the child's right to make decisions for himself.[36]

THE *GILLICK* DECISION

In the case of *Gillick v. West-Norfolk and Wisbech Area Health Authority*[37] the issue was whether a doctor could give contraceptive advice to a girl under 16 years of age, without the consent of the parent. The Court of Appeal took the traditional view and held that until the child reached the age of majority, that child had no independent capacity to consent to such treatment, and unless the parent consented to it, then such a course taken by the doctor could very well amount to a tort against the child. Mrs Gillick and all of the mothers that she figuratively represented, were thus avenged by the Court of Appeal. However, the Court of Appeal decision was reversed by the House of Lords, which held that a child acquired the capacity to have lawful dealings, including the ability to consent to receiving such medical advice, even if the child was still within his or her minority provided of course that the child had the requisite emotional maturity and understanding necessary to enter into the particular transaction in question.

The case is authority for the proposition that parental rights over a child terminate when the child achieves maturity, providing that the transaction in question which the court is called upon to uphold is in the best interest of the child. Thus, although a child is still in her minority, and still under the care and custody of her parents, the right of the parent to have access to all information affecting the child must give way to the right of the child to have information which is of interest to the child, notwithstanding the non-consent of the parent. In this particular case, the doctor's professional decision to provide this contraceptive information must therefore take priority over the parent's refusal for the child to have it. In such a situation, the court will allow the parental right in relation to the child to be usurped.

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36. This is of course just an opinion which one might be tempted to adopt as a result of the decision in *Gillick, infra.*

37. [1985] 3 WLR 830; see J. Eekelaar, "The Eclipse of Parental Rights", 102 LQR 4, for a discussion of this case.

The House of Lords in this case acknowledged that the powers which parents had over children existed only in so far as they, the parents, could perform their responsibilities towards their children. As such, it has been put forward that the case, in undermining parental control over their children, represents the destruction of the concept of parental *rights* which has been replaced with the concept of parental *responsibility*. It is therefore one of the more significant decisions affecting the parent-child relationship, because prior to this decision, references to children's "rights" either in English case law or statute law, were minimal. Children previously were forced to live up to the old concept of the child as some lesser form of life who "should be seen but never heard". The case thus invited a re-examination of the concept of parental rights. It championed the right of the child to privacy, and the right of the "mature" child to make decisions for himself, even if those decisions conflicted with and challenged parental rights. To maintain a balanced view, however, it has been suggested that *Gillick* did not erode parental rights, but that the welfare principle had eroded it long before the case was decided.

However, the decision in *Gillick*, which in effect is, that a child of sufficient maturity has the right to consent to medical treatment, can be rationalized on the basis that medical care is a necessary, which at common law, a child could contract for.[38] In *Zouch v. Parsons*[39] Lord Mansfield commented:

> Miserable must the condition of minors be; excluded from society and commerce of the world; deprived of necessaries, education, employment and many advantages; if they could not do binding acts. Great inconvenience must arise to others if they were bound by no act.

Yet the court's interference in the parent-child relationship in *Gillick* may be criticized on a number of grounds. Since the case did not deal with a serious issue such as an abortion to be performed on a young girl, or a question of consent to medical treatment, such as a blood transfusion, should it have been a case requiring the court's intervention? The case concerned an issue which might easily have been left to the parent's discretion. If the parent had been informed about the contraceptive treatment, perhaps the parent might have been successful in dissuading the child from engaging in sexual relations, for if the child and/or the doctor could be supported by the State in a decision not to inform the parent, then if the child contracted a venereal disease or even HIV/AIDS, the child would

38. See chapter 1, *supra*.
39. [1765] 3 Burr 1794.

automatically become a burden on the parent and not on the state. If, as a parent, one has a duty to maintain a child until that child attains the age of 18, is it reasonable that the child, and more so the mature child who is the beneficiary of that maintenance, should have a corresponding duty to respect its parent and at least to make some effort to confide in that parent?

It has also been said that the decision undermined the intention of the UK Parliament with regard to the provisions of the Sexual Offences Act, which makes it an offence for a person to have sex with a girl under 16, since in providing the girl with contraceptive advice, this would be an indirect encouragement of sexual activity by her. However, it has also been suggested that the decision should be narrowly interpreted and limited to its own special facts. Dickens has made the important point of noting that when a child achieves maturity, this indicates a successful discharge of parental responsibility. He states that:[40]

> The modern function of parental rights is to prepare children and adolescents for maturity, and as minors come to achieve maturity and to exercise autonomy, this may be seen not as a limitation or defeat of parental control, but as a successful discharge of parental responsibility.

Another argument against the decision is that it is difficult, if not impossible, to reconcile *Gillick* with the existence of legal disabilities which prevent even the "mature" child from entering into contracts or validly selling or leasing real property, from exercising the powers of a trustee or executor, or from making wills. The relevant question is whether these disabilities should also be relaxed to take account of the *Gillick* competent child. There is at present no indication that the courts are prepared to do this.

Professor Peiris[41] summarizes the whole issue of whether or not the case should be taken as representing a challenge to parental authority as merely being a challenge "posed in recent times by social developments – in particular, the greatly facilitated access to means of contraception."[42] He notes that what is in need of change is not necessarily the granting of rights to children which should be exercised by parents, but rather one had to appreciate the changed circumstances brought about by the modern environment. He concludes by saying that:

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40. B.M. Dickens, op. cit., 485.
41. G.L. Peiris, "The *Gillick* Case: Parental Authority, Teenage Independence and Public Policy", *Current Legal Problems* 93, no. 122 (1987).
42. Ibid, p. 116.

> while parental preference remains in the generality of cases almost an infallible pointer to the child's welfare, estrangement of a child after puberty from parental affection and confidence is today an increasingly widespread phenomenon which the law needs to address. In these cases where evaporation of the security and reassurance cementing the relationship between parent and child is a *fait accompli*, it is no more than a stark concession to reality for the law to recognize that the coercive implementation of a single, albeit important, parental decision at a time when the recalcitrant minor is approaching majority status, entails no worthwhile gain either in terms of the minor's own interests or from the point of view of a self-sustaining relationship with her parents. In this hinterland between infancy and adulthood the modern law has come into its own by developing a controlled principle of self-determination which underlines individual discrimination and experience as the key to wisdom.

Yet it must be remembered that *Gillick competent* children are not always allowed by the courts to make their own decisions. Although the mature child has the right, following Gillick, to consent to medical treatment, conversely, he should also have the right to refuse such treatment. But the courts nevertheless retain the power to override the child's refusal, again, on the basis that to do so would be in the best interest of the child.[43]

COMMONWEALTH CARIBBEAN PERSPECTIVE

Cases bearing similar facts to those in *Gillick* have not yet come before our courts for determination, so there is very little to go on if one were to engage in an enquiry as to how such an issue might be determined by our local courts.[44] While English decisions are highly persuasive, it is nevertheless open to our local courts not to follow them. In Trinidad

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43. See *Re W* [1993] Fam. 64. See too S.M. Cretney and J.M. Masson, *Principles of Family Law*, 6th ed. (London: Sweet and Maxwell 1997), 593, *et seq.* on "The Retreat from *Gillick*".

44. Although there are cases in which the child has expressed a contrary intention from what the parent in question wished, and the courts have given effect to the child's wishes. These are mainly cases dealing with custody issues such as *Haloute v. Adamira* (B'dos) and *Clarke v. Bushell* (B'dos) discussed in chapter 10, *infra*, on custody. Interestingly enough, *Gillick* has been approved by the High Court of Australia as a correct statement of the common law on the nature and extent of parental powers, which lessens as the child matures – see *Secretary, Department of Health and Community Services v. JWB and SMB* (1992) 15 Fam LR 392 where Deane J. stated (at p. 441) that "The most important influence in making it inevitable that the extreme view of parental authority would yield to the common law's traditional recognition of the gradual development of the legal capacity of a young person to decide things for herself or himself has, however, undoubtedly been the social fact of the increasing independence of the young. In times when it is not unusual for fifteen and sixteen-year-olds to be supporting themselves as members of the workforce, to insist upon complete parental authority up until the age of eighteen would be to propagate social anachronism as legal principle . . . the extent of the legal capacity of a young person to make decisions for herself or himself is not susceptible of precise abstract definition . . . legal capacity varies according to the gravity of the particular matter and the maturity and

and Tobago, however, the constitutional arguments in favour of such a decision as that handed down by *Gillick* is the strongest in support of its application.

Section 4(c) of the Trinidad and Tobago constitution provides *inter alia* that:

> It is hereby recognized and declared that . . . there have existed and shall continue to exist, without discrimination . . . the right of the individual to respect for his private . . . life.

The constitution does not say that the "individual" referred to is to be defined as an "adult". The provision does not say that a child is not an individual for the purposes of protection of the fundamental rights and freedoms set forth. This argument for recognizing the right of the child to make important decisions affecting him has been adopted in the United States, where in *Re Gault,*[45] for example, Fortas J. stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone". Thus in the United states a child's right to privacy has been held to exist in view of due process clauses of the Fifth and Fourteenth Amendments. This has been held by the courts to include the right to make personal decisions relating to things such as contraception, procreation and marriage.

In the case of *Carey v. Population Services International*[46] a New York statute making it a crime for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 was held by the Supreme Court to be unconstitutional. In the case of *Planned Parenthood of Central Missouri v. Danforth*[47] a Missouri statute made it a requirement that parent(s) consent to abortions to be performed on unmarried females under the age of 18 years, unless it was certified by a licensed physician that the procedure was required to save the life of the mother. The court's ruling was that the statute could not be upheld.

It appears therefore that in the United States, in relation to the issues arising in the cases highlighted above, a very liberal approach has been adopted by the courts in their interpretation of children's rights.[48] Is this the path the Commonwealth Caribbean should

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understanding of the particular young person. Conversely, the authority of parents with respect to a young person of less than eighteen years is limited, controlled and varying." See, H.A. Finlay, R.J. Bailey-Harris and M. Otlowski, *Family Law in Australia,* 5th ed. (Butterworths 1997), 374–76.

45. (1967) 387 US 1, 13.
46. (1977) 431 US 678.
47. (1976) 428 US 52.
48. For a more detailed discussion of the US position see A. Bainham, "The Balance of Power in Family Decisions"; A. Bainham, *Children: The Modern Law,* 79–80. Bainham is the source of the US view adopted herein.

take?[49] One might want to argue that neither *Gillick* nor the American position ought to apply because England and America both have societies and cultures much different from our own. This may be true, but it is also true that sexual activity amongst children, wherever they happen to live, is a reality and that the law should be prepared to deal with this reality.[50]

OTHER CASES OF CONFLICT

Another often cited case supporting the view that there are limits to the exercise of parental responsibility is *Re D (a minor)*[51] where the wishes of a mother and whatever parental claim she felt she had to her 11-year-old daughter were swept aside in favour of what the court felt was in the best interest of the child. In this case the child was handicapped and the mother was afraid that she might possibly be seduced and perhaps give birth to an abnormal baby. Having sought professional advice, the mother made arrangements for her daughter to be sterilized. A social worker became informed of the mother's intention, intervened and brought proceedings for the child to be made a ward of the court. The issue was whether or not the operation should be allowed to take place. The court held that it was not in the girl's best interest for her to be irrevocably deprived of a woman's basic human right to childbearing. The operation was therefore not performed.[52]

This case is a difficult one. In a situation like this, where a mother who is healthy and normal is able to assess for herself how difficult and complicated it might be to raise a handicapped child, to watch that child grow from a baby onwards knowing that she will never be normal, how even more difficult it would be for an abnormal and handicapped child or woman to raise a child of her own if that child is also handicapped. In this situation, the court has judicially pronounced that the mother's choice or rights in the matter are

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49. It should be noted that in many Commonwealth Caribbean countries, the respective chapters in constitutions dealing with the protection of fundamental rights and freedoms (the Bill of Rights) are non-justiciable and confer no enforceable rights. See for example, *Girard et al v. Attorney-General* (unreported) 17 December 1986, HC, St. Lucia (Nos. 371 and 372 of 1985); T. S. Robinson, "Protection of Funda(men)tal Rights and Freedoms in the Caribbean: Locating Women in Caribbean Constitutions", 23–25, unpublished manuscript (1999), Lecturer-in-Law, UWI, Cave Hill, Barbados.
50. On the subject of parental responsibility and current trends in Australia see Peter Nygh, "The New Part VII: An Overview", *Australian Journal of Family Law* 10, no. 1 (March 1996), 4; John Dewar, "The Family Law Reform Act (cth) and the Children Act 1989 (UK) Compared: Twins or Distant Cousins?".
51. [1976] Fam. 185.
52. See too *Re B (a minor)* [1987] 2 All ER 206 at 214 for circumstances in which a court would be prepared to allow the sterilization of a child.

irrelevant. It is not, however, in every case of conflict that the rights of the parent will be superseded.

In *Re K (a minor) (wardship: adoption)*,[53] for example, the Court of Appeal refused to suspend or supersede the parental right to custody of the child in question. In this case the parties to the marriage in question had experienced a number of personal disappointments and setbacks. Their marriage was a difficult and unstable one, and they had two older children to care for as well as the child in question. The father had a criminal record and was addicted to gambling; the mother was a drug addict and had been receiving treatment for heroin addiction. She became pregnant with the child in question at a very taxing time in the marriage and had consequently made a private arrangement to have the child cared for by foster parents. The child was consequently handed over when she was six weeks old, but the mother changed her mind a few months later and wanted the child to be returned to her. The foster parents made the child a ward of the court, were granted interim care and control, and later granted care and control with a view to adoption. Both the mother and the father, as well as the local authority appealed the judge's decision. The Court of Appeal allowed the appeal. Butler-Sloss L.J.'s reasons vindicate the right of the parent where both this right and the interest of the child coincide. He stated:

> The mother must be shown to be entirely unsuitable before another family can be considered, otherwise we are in grave danger of slipping into social engineering. The question is not: would the child be better off with the plaintiffs? but: is the natural family so unsuitable that, as Fox L.J. said, 'the welfare of the child positively demanded the displacement of the parental right?' . . . Once the judge found that this mother genuinely wanted her child back and was a mother who cared properly for the other two children, not to give her at least an opportunity to try to rehabilitate the family was to deprive the child of any chance of her own family.

The judge looked at the suitability of the foster parents, and continued:

> The plaintiff husband is now 55 and the wife is 47. They are childless . . . They are quite simply outside the age group which would ordinarily be considered suitable as adopters of a baby . . . It is not only a question of physical fitness but also the generation gap . . . The plaintiffs want no further contact with the natural parents and this knowledge of the address is, to say the least, most unsatisfactory for the child's future welfare.

53. [1991] 1 FLR 57.

The decision echoes the sentiments of the Guyanese court in *Re Husbands*[54] in which Crane J. cited Fitz Gibbon L.J. in *Re O'Hara*:[55]

> Where a parent . . . is able and willing to provide for the child's material and moral necessities . . . the court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and so to hold . . . that 'the best place for a child is with its parent'.

Nevertheless, where a parent fails to perform his or her duties towards the child, the court may order the child to be adopted thus permanently taking away the rights of the biological parent in relation to the child. In *Saunders v. Saunders*[56] a female child born to an unwed mother had been abandoned by the mother who left the child at the maternity ward of the hospital. The child's grandmother assumed care and control of the child and she was allowed to later adopt the child which was considered to be in the child's best interest. An order for adoption meant that all the rights and duties that the biological mother might have had in relation to the child were forever extinguished. The court was of the view that the mother's abandonment and neglect amounted to the offence of cruelty under Section 17 of the Children and Young Persons' Act.

Another decision which illustrates the willingness of the courts to entirely deprive a parent of his or her parental rights to a child is *Re S (a minor)*[57] in which the mother of a male illegitimate child had placed him with foster parents when he was six months old. After he had been with the foster parents for some four and a half years, the court allowed the child to be adopted by the foster parents as it accepted that the mother had consistently disclaimed any responsibility for him. By this time the child had become completely reliant and dependent on the foster parents and the fact that adoption would have conferred legitimate status on him were factors which weighed heavily in favour of the foster parents being allowed to adopt.

ASSESSMENT

The various cases referred to illustrate that both in England, as well as in the United States, where the interests of children do not coincide with the interests of the parents, the courts are prepared to further the cause of the child, with the proviso that such a course must be in the best interest of the child. There seems therefore to have been in recent

54. [1968] *Law Reports of Guyana*, 224.
55. (1900) 2 IR 232.
56. (Unreported) 26 February 1993, HC, Bahamas (No. 307 of 1990).
57. [1987] 3 Fam 98.

times a substantial decline in the strength of parental rights. While the courts have not provided clear and detailed answers as to what exactly is the limit of parental responsibility, the final statement on the issue of parent-child conflict seems to be that the court has a very broad discretion to determine this issue, and to decide the matter from the child-oriented viewpoint, if this course is in the best interest of the child. Further, each case is to be decided on its own particular facts, and the welfare of the child is the crucial yardstick in all cases. While the welfare principle gives the court a broad discretion to determine in its own view what is best for the child, the court nevertheless must balance two competing interests, namely:

(1) respect for the rights and wishes for the parent, and
(2) promotion of the best interest of the child.

The evidence from judicial decisions would seem to suggest that the first principle has given way to the second principle.

Exactly how far the courts are prepared to go in mitigating parental rights in favour of the child's best interest and welfare is illustrated through the adoption cases which indicate that they are prepared to sever parental rights completely and permanently if in the interest of the child. Legally, the parent has to live with this, and can do nothing to reverse such a decision, once appeals are exhausted.[58] This is but one illustration of the erosion of parental rights by the welfare principle. However, there remains a number of areas in which parents do have unlimited control. In the field of tort, for example, the parents of a child have unlimited power to institute proceedings against a motorist who knocks down his child, or to defend the child against dangers or potential dangers threatened by third parties. In the Trinidadian cases of *Francis v. Swamber* and *Collins v. Swamber*,[59] for example, both consolidated and heard together, two infants were knocked down by the defendant on their way home from school.The children were able to sue by their parents as *best friend* and recover compensation from the defendant. The issue of parent-child conflict in such a case could hardly arise, unless the will of the child and the will of the parent clashed on an important issue. It is in circumstances of the latter type that the issue of parental rights

58. For further reading, see B.M. Dickens, "The Modern Function and Limits of Parental Rights" 462; J. Eekelaar, "The Emergence of Children's Rights", 6 *Oxford Journal of Legal Studies* (1986), 161; J. Eekelaar, "Parental Responsibility: State of Nature or Nature of the State?" (1991) *Journal of Social Welfare and Family Law* 37; C.G. Hall, "The Waning of Parental Rights", *Cambridge Law Journal* (April 1972), 248.
59. Unreported) 20 February 1997, HC, T&T (Nos. 585 and 843 of 1996).

become relevant. In such cases, Lord Denning's dictum in *Hewer v. Bryant*[60] becomes significant:

> The common law can, and should, keep pace with the times. It should declare, in conformity with the recent report on the Age of Majority . . . that the legal right of a parent to the custody of a child ends at the eighteenth birthday, and even up till then, it 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.

60. [1969] 3 All ER 578 at 582.

Parental responsibility is not automatically vested in any person other than each married parent or the unmarried mother. Should it be? One candidate is the unmarried father . . . the issue of giving unmarried fathers automatic parental status had been fully canvassed and rejected.
– P.M. Bromley and N.V. Lowe[1]

Chapter 6

Out-of-Wedlock Children and the Legal Position of the Putative Father

Introduction

At a public seminar hosted by the Barbados Child Care Board on the rights of the child held in 1998 at the Sherbourne Conference Centre, fathers of young children were extremely vocal in their claims that the law appeared hesitant to recognize or to enforce their parental rights to children, especially the rights to access and custody. For fathers of out-of-wedlock children this seemed an even more difficult feat. One man, who was the father of a young child, dominated the first part of the session by telling of his experience in the courts and was convinced that the law was not on his side. The issue here is not whether putative fathers in general should be given automatic parental rights as are possessed by the mother, but whether putative fathers who are recognized by law, by, for example, having a declaration of paternity granted in their favour, or those who are recognised in affiliation proceedings for purposes of maintaining their children, should be granted rights which are similar to those possessed by the mother. An objective examination of the legal position of such fathers would go some way in determining the reasonableness or unreasonableness of that man's convictions.

1. *Bromley's Family Law*, 8th ed. (Butterworths 1992), 329.

The cause of the *putative father* who wishes to have a normal relationship with his out-of-wedlock child seems to be an ongoing one. For several decades now, courts of law have been engaged in defining these rights, in redefining them, but unfortunately, making no clear or precise statement as to what these rights in fact are. While several jurisdictions of the Commonwealth Caribbean have in force *status of children* legislation[2] expressly abolishing the legal distinction between children born in wedlock and children born out of wedlock, this legislation has not given automatic parental rights to fathers of children born out of wedlock. In many instances, rights of the putative father remain to be determined by the courts based on judicial interpretation of this and other legislation, as well as common law doctrines, which at times, can result in unsatisfactory decisions, from the point of view of the putative father.

In assessing the rights of the putative father, it is necessary to review the law's position on these rights, and to look at both the historical as well as some modern developments, which will include an examination of case law as well as statutory provision on the subject. This examination will show that while rights of the putative father at common law were almost nonexistent, nevertheless, there has been a recent trend to award rights to the putative father based on an interpretation of current legislation. However, in spite of these developments, the courts are still inclined to exercise a degree of caution, and in one recent Trinidadian case,[3] seems to have set the clock back somewhat.

HISTORICAL SETTING

As early as 1883 at the time of the decision in *R. v. Nash*[4] and as late as 1931 in *Re Carroll*,[5] the rule was laid down and then firmly established that *prima facie*, the mother had the right to custody of an illegitimate child. Conversely, in *Re C*[6] it was confirmed that the father *prima facie*, had no right to custody of an illegitimate child, as against the mother. Thus, since the mother had both actual and legal custody of the child, she had the right to select the type of secular education the child was to receive, as well as the right to determine the religion in which the child was to be brought up.[7] While a father could appoint a testamentary guardian for his legitimate child, he

2. See chapter 4, *supra*.
3. *Application of Sharon Lee Garcia*, discussed *infra*.
4. [1883] 10 QBD 454, CA.
5. [1931] 1 KB 317, CA.
6. [1956] *The Times*, 14th December.
7. See P.M. Bromley, *Family Law*, 2d ed. (Butterworths 1962), 373.

could not appoint a testamentary guardian for his illegitimate child and in *Re A*[8] it was held that the mother of an illegitimate child possessed such a power.

Parental rights in relation to children include the following rights which may be exercised automatically by both parents in relation to a child born in wedlock, but only by the mother of a child born out of wedlock:[9]

- the right to determine the child's education
- the right to determine the religion of the child
- the right to custody, care and control, physical possession, and contact with the child
- the right to discipline the child
- the right to consent to medical treatment in relation to the child
- the right to claim compensation from anyone committing a tort against the child
- the right to appoint a testamentary guardian for the child
- the right to apply for a passport for the child
- the right to consent to the child's marriage if the child wishes to marry under the age of majority
- the right to protect the child.[10]

Some of the discriminations against the father of a child born out of wedlock as noted by Cretney, include the following:[11]

a. he has no automatic rights to guardianship, custody or access, even where an affiliation order has been made against him
b. even if he is awarded custody, he cannot obtain maintenance for the child from the mother, whatever her means
c. his agreement to the child's adoption is not required unless he has already been granted custody or has become the child's guardian by a court order or by appointment under the mother's will
d. his consent to a change of the child's name is not required unless he has become the legal guardian of the child by a court order or under the mother's will
e. his consent to the marriage of the child during the child's minority is not

8. [1940] 164 LT 230.
9. For a more detailed study of *parental rights* see chapter 5, *supra.*
10. For additional information on parental rights, the following references are useful: J. Eekelaar, "What are Parental Rights?" 89 LQR 210; J. Eekalaar, "The Eclipse of Parental Rights" 102 LQR 4; A. Bainham, "The Balance of Power in Family Decisions", *Cambridge Law Journal* (July 1986), 262; C.G. Hall, "The Waning of Parental Rights", *Cambridge Law Journal* (April 1972), 248; P.M. Bromley and N.V. Lowe, *Bromley's Family Law*, 8th. ed., p. 297, *et seq.* See too chapter 5, *supra.*
11. S.M. Cretney, *Principles of Family Law*, 4th ed. (London: Sweet and Maxwell 1984), 614–15.

> required unless he has been granted custody of the child by a court order or has become the child's guardian under the mother's will.

Although Cretney was here referring to the status of the putative father in England, it is well established that Commonwealth Caribbean jurisdictions have followed the English law on matrimonial causes and other family law issues, and it is by now rhetorical to add that the region has also as a consequence of colonialism and colonization, adopted the common law of England.[12] Nevertheless, some jurisdictions in the region have opted to break away from the English tradition in this area of the law, and have enacted *status of children* legislation,[13] similar to New Zealand and Australian models. One would therefore think that because the legal distinctions and discriminations between children born in and out of wedlock have been abolished, that certain consequences would naturally flow out of this for the benefit of the father of an out-of-wedlock child. However, case law interpreting his rights since the coming into force of the legislation has been unsettled, resulting in no clear principles, so that in some instances, the discriminations highlighted by Cretney, seem to apply today as it did decades ago.

SOME RECENT TRENDS

In the early 1980s, there was much discussion and debate in English quarters about the suitability of abolishing the status of illegitimacy in England. In 1982 a report on the subject was published by the Law Commission, which felt that it would not be possible to abolish illegitimacy and at the same time preserve the rules which vested automatic parental authority in the mother of an out-of-wedlock child, but not in the father. The Commission listed several reasons as to why it was not ideal to vest automatic rights in the father:[14]

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12. For further details, see K. Patchett, "Reception of Law in the West Indies" [1973] *Jamaica Law Journal* (April), 17.
13. These include: Anguilla Law Reform (Illegitimacy) Ordinance 1982; Antigua Status of Children Act 1986; Barbados Status of Children (Reform) Act 1979; Belize Families and Children Act 1998; Grenada Status of Children Act 1991; Guyana Children Born out of Wedlock (Removal of Discrimination) Act 1983; Jamaica Status of Children Act 1976; St. Kitts, Nevis Status of Children Act 1983; St. Vincent Status of Children Act 1980; Trinidad and Tobago Status of Children Act 1981.
14. Law Com. No. 118, "Family Law: Illegitimacy," para. 4. 26; see too Law Commission 157, "Family Law: Illegitimacy" (Second Report), para. 3.3 where it was reported that "owing to the widely varying extent to which unmarried fathers in fact assume responsibility towards their children, it would not be in the best interests of the children if fathers were automatically to enjoy full parental status". But see Hayes, Reports of Committees, *Law Commission Working Paper* no. 74: Illegitimacy, 43 MLR 299, "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

> (a) . . . to confer 'parental rights' on fathers could well result in a significant growth in the number of mothers who would refuse to identify the father of their child. Mothers would be tempted to conceal the father's identity in order to ensure that in practice he could not exercise any parental rights. If this were to happen, it would detract from the desirable objective of establishing, recognizing and fostering genuine familial links.
> (b) . . . to confer rights on the father might well be productive of particular distress and disturbance where the mother had subsequently married a third party, who had put himself in loco parentis to the child . . .
> (c) . . . to confer 'rights' on the father of a child born outside marriage could put him in a position where he might be tempted to harass or possibly even to blackmail the mother at a time when she might well be exceptionally vulnerable to pressure.
> (d) . . . the experience of countries which have sought to abolish the discrimination affecting those born outside marriage is generally against automatically conferring 'parental rights' on the father of an illegitimate child. In most of those countries the father does not have the full range of parental rights unless he has obtained a court order . . .
> (e) . . . if all fathers automatically possessed parental authority over their illegitimate children, practical difficulties would be encountered where the child was in the care of [the state] . . . The result might therefore be either that the father would, contrary to its best interests, take the child out of care, or alternatively that long-term planning for the child's future would be delayed until the father's rights had been terminated. In such cases the child might well suffer.

While England has not abolished the status of illegitimacy,[15] as was noted earlier, several jurisdictions in the Commonwealth Caribbean have done so. The Trinidad and Tobago Status of Children Act,[16] for example, declares in Section 3(1) that:

> Notwithstanding any other written law or rule of law to the contrary for all purposes of the law of Trinidad and Tobago –
> (a) the status and rights and privileges and obligations of a child born out of wedlock are identical in all respects to those of a child born in wedlock;
> (b) save as provided in this Act, the status and the rights and obligations of the parents and all kindred of a child born out of wedlock are the same as if the child were born in wedlock; but this provision shall not affect the status, rights or obligations of the parents as between themselves.

It is to be noted that Section 3(1)(b) declares that the status, rights and obligations of the *parents* of an out-of-wedlock child are the *same*, so that one could assume from this that the mother no longer has a superior claim to a child born out of wedlock over the putative father.

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ignored. Furthermore the effect of giving rights to fathers is not tested against the welfare principle".

15. For further details see Bromley and Lowe, *Bromley's Family Law*, 8th ed., pp. 286–87.
16. No. 17 of 1981. See Appendix B and chapter 14, *supra*.

However, the father's rights are not automatic. Before he can be said to possess these rights, and before he can exercise them, he must first prove that he is actually the child's father. The act specifies how this may be done. There is provision for the father to apply for a declaration of paternity, which may be granted by the court on a balance of probabilities.[17] The court may consider certain items specified in the act[18] which amount to evidence of paternity, for example, if a certified copy of an entry in the Register of Births is produced with the father's name entered on it; if an instrument is signed by the mother and person acknowledging paternity, and is executed in accordance with the provisions of the act; or if a declaration of paternity is made outside of the jurisdiction. Additionally, there is provision for the taking of blood tests, which may prove conclusively that a man is not the father of the child, or that he is not excluded from being the father. After considering any one or more of these items, or any other evidence available to the court, if a declaration is made in favour of the putative father, then theoretically he should be able to exercise any of the rights in relation to the child which the mother alone could exercise previously.

Section 6(2) of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act,[19] provides *inter alia*, that:

> . . . the mother of a minor born out of wedlock shall be the sole guardian of the minor unless and until the paternity of the minor has been registered pursuant to the Births and Deaths Registration Act or established by any of the modes specified in Section 8 or 10 of the Status of Children Act.

As a consequence of this provision, which provides for equality of parental rights so long as paternity is established, the putative father of a child becomes a joint guardian with the mother and so may legally exercise any of the rights which both parents of a child born in wedlock traditionally exercised.

JUDICIAL CONSIDERATION OF THE POSITION OF THE PUTATIVE FATHER INCLUDING INTERPRETATION OF *STATUS OF CHILDREN* LEGISLATION

The Barbadian case of *Re Lewis*[20] decided before the coming into force of the Barbadian Status of Children (Reform) Act 1979, illustrates the disadvantage to the putative father (and possibly to the child and

17. Except under the Grenada Act, op cit., *supra*, which retains the common law standard of proof beyond a reasonable doubt for establishing paternity.
18. See Sections 6–10 of the Status of Children Act (Trinidad and Tobago), Appendix B.
19. Laws of the Republic of Trinidad and Tobago, Chap. 46:08.
20. (1970) 15 WIR 520.

other third parties who might have been directly involved in the child's upbringing), of not having an automatic right to the custody of his child. In this case the putative father of a child applied for custody of the child. The child's mother had left the child with the putative father's stepmother who wanted to adopt the child and take him to the United States. The father agreed to the arrangement, but the child's mother objected. The mother had not played an active role in the child's life and the father felt that the child would be better off with the stepmother in the US. It was held that the father's application under the Infants Act 1958 failed as the court had no jurisdiction to make an order in favour of a putative father.

Since the putative father had no *locus standi* before the court in relation to his child, the court could entertain no applications on his behalf. However, if the man was adjudged putative father in *affiliation* proceedings, then the courts were obliged to recognize his existence, and in appropriate circumstances, might even make an order for access to or custody of the child.[21] But even then, this discretion was exercised with great caution.

In the Trinidad case of *White v. Springle*[22] S was adjudged putative father of a child in affiliation proceedings. The child was a boy of 11 years who had gone to live with his father and his father's wife. The father thereafter applied for custody and his application was successful. The child's mother appealed. It was held, allowing the appeal, that the mother had a *prima facie* right to custody of an illegitimate child, and for the father to have custody, it must be clearly shown that it would be detrimental to the welfare of the child for him to remain in the custody of his mother. Thus although the father was recognized by the law for the purpose of imposing upon him a duty to maintain the child, he nevertheless had no automatic right to custody of the child or to exercise parental rights in relation to him.

In *Phillips v. Alkins*,[23] decided one year later, the court reached the same conclusion. In this case X was adjudged putative father of a child in affiliation proceedings. Custody was given to the father's

21. Affiliation proceedings are those in which the mother of an out-of-wedlock child is able to apply for maintenance from the man alleged to be the father. Some jurisdictions in the Commonwealth Caribbean still have Affiliation or Maintenance Acts in force providing for this, as for example, the Bahamas, Jamaica, and Barbados, while others, such as Trinidad and Tobago, have a single act providing for maintenance of both in- and out-of-wedlock children, namely, the Family Law (Guardianship of Minors, Domicile and Maintenance) Act, although claims on behalf of out-of-wedlock children are made under different sections of the act while those relating to in-wedlock children are made under others. See chapter 8, *infra*.

22. [1966] 10 WIR 152 (Trinidad and Tobago).

23. [1967] 13 WIR 486 (Trinidad and Tobago).

sister as the child's mother was held to be unfit due to having had three different unions with men for whom she had various children. The mother appealed the order relating to custody. It was held, allowing the appeal, that it was not shown that it was detrimental to the welfare of the child to remain in the custody of the mother, who it was held, had the *prima facie* right to custody.[24]

These cases illustrate that under the old law, it was assumed that even where paternity had been established and the putative father was obligated to contribute towards the maintenance of the child, that the mother still had the superior claim to custody and the exercise of parental rights. In spite of this, in the Guyanese case of *Halls v. Mattal*[25] a decision was arrived at based on what was in the best interest of the child. In this case the mother of an illegitimate child died and her cousin took possession of the child. The father of the child applied for custody. His application was refused at first instance and he appealed to the Court of Appeal which dismissed his appeal but held that the welfare of an infant child, whether legitimate or illegitimate, was the first and paramount consideration, and the right to custody as between father and mother *was placed on an equal footing*. In this case, although the decision was forward-looking and therefore to be applauded, the court had obviously departed from precedent which at the time had always held that the custody of an illegitimate child vested *prima facie* in the mother.

Since the passing of *status of children* legislation in the region, in the territories which do have this legislation in force, the father of a child born out of wedlock, does have *locus standi* before the court to apply for custody or for orders in relation to the exercise of parental rights, providing that his paternity has been legally established. The Trinidad case of *Durity v. Benjamin*[26] illustrates this recent trend to recognize the equality of parental rights provided for by the legislation. In this case, the issue was whether the custody of a female child born out of wedlock should vest in the mother or father of the child. The child's father was resident in Canada and wanted to take the child out of Trinidad to live with him in Canada. There was evidence before the court that the paternal grandmother had been looking after the child for various periods, and that the child's father, throughout his residence abroad, had kept in regular contact with the child and had maintained her. Council for the mother argued

24. For other local decisions, see *Clarke v. Carey* (1971) 18 WIR 70, [1971] 12 JLR 637; *Finlayson v. Matthews* (1971) 12 JLR 401(Jamaica); *Watson-Morgan v. Grant* [1990–91] CILR 80 (Cayman Islands).

25. (1963) 6 WIR 481 (Guyana).

26. (Unreported) 30 July 1993, HC, T&T (No. 1596 of 1993).

that because the child was born out of wedlock, that the mother was in law entitled to custody as of right. Basdeo Persad-Maharaj J. reviewed the case law authorities as well as relevant legislation on the subject and stated:[27]

> it seems to me and I so hold that there is equality of parental rights as there are no illegitimate child[ren] once paternity is established.

Custody was therefore granted to the father, with reasonable access to the child's mother.

In several Australian cases, Australian states having similar *status of children* legislation to that adopted by the various territories of the Commonwealth Caribbean, the putative father has been held to possess specific rights which formerly only the mother possessed.

In *Gorey v. Griffin,*[28] for example, a child born out of wedlock was in the custody of the mother. The putative father applied for access under the Infants' Custody and Settlements Act. Formerly, this act was held by the courts to apply only to children born in wedlock, and the issue in this case was whether a putative father could apply under the act in view of the changes brought about by the Children (Equality of Status) Act 1977. The court held that insofar as the latter act made the out-of-wedlock child the legal child of its putative father, it also altered the legal status of the putative father so as to enable him to apply under the provisions of the Infants' Custody and Settlements Act.

In *Douglas v. Longano*[29] the father of an out-of-wedlock child was held to have standing to apply under the Marriage Act for access as the Status of Children Act empowered the court to make applications in respect of both classes of children.

In *Youngman v. Lawson*[30] it was held that *equality of status* legislation had made both parents of an out-of-wedlock child separate guardians as well as joint custodians of that child.[31]

In the case of *McM v. C (No. 1)*[32] the court held that a mother no longer had the unilateral right to change the residence of the child without the consent of the putative father.

G v. P[33] is another case which vindicates the right of the putative father to be involved in the decision-making matters relating to his

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27. Ibid, p. 24 of judgment.
28. [1978] 1 NSWLR 739 (Sup. Ct.); discussed *supra,* chapter 4.
29. [1981] FLC 91-024 p. 245 (Full Court, HC Australia), discussed *supra,* chapter 4.
30. [1981] 1 NSWLR 439.
31. For further details see A. Dickey, *Family Law,* 3d ed. (Sydney: LBC Information Services 1997), 278–79.
32. [1980] 1 NSWLR 1, discussed *supra,* chapter 4.
33. [1977] VR 44 (Sup. Ct.).

out-of-wedlock child. Here the court decided that the putative father of a child who bore his surname, had the right to insist that that name not be changed. On the facts X was the putative father of the child in question who had been registered at birth under X's name. The mother later married P and wished the child to adopt P's surname. On learning of her plans, X applied to the court for an order that the child should retain X's surname. In its deliberations the court considered the provisions of the *status of children* legislation and concluded that it was in the best interests of the child to retain X's surname.

The above decisions illustrate that the legal position of the putative father has indeed taken a turn for the better,[34] and as Georges J.A. stated in one local decision:[35]

> in the context of law policy does not require the recognition of the distinction between legitimate and illegitimate children. Once that distinction disappears there is no need to differentiate between parents of such children.

A JUDICIAL SETBACK TO THE RIGHTS OF THE PUTATIVE FATHER

The development of both statute and case law towards equating the rights of the putative father to those of the mother is constructive, in that it is an example, in recent times, of the law being sensitive to changed social values, a recognition of the fact that there are many out-of-wedlock children in our society, together with many putative fathers, who are no less children or fathers for not being born into or being parties to lawful marriage unions. Additionally, there are many such fathers who are willing to take responsibility for their children, to have constructive and meaningful relationships with them, and to play a central role in their lives.

Nevertheless, one recent Trinidadian decision appears to have turned the hands of time back insofar as the interest of the putative father is concerned. In this 1997 decision given in *The Application of Sharon Lee Garcia,*[36] X was the putative father of the child in question. The child had been carrying X's surname but the mother remarried, had a child by her husband, and wished both children to have the same surname. She therefore applied to the court to allow her to change the surname of the first child. X objected. In a very brief

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34. See too the Guyana Adoption of Children (Amendment) Act 1997 which defines "father" as including the father of an out-of-wedlock child in certain circumstances, thus giving him the right to consent or to refuse to consent to the adoption of his child. See chapter 11, *infra.*
35. *Watson-Morgan v. Grant* [1990–91] CILR 81, 103 (Cayman Islands), dissenting judgement.
36. (Unreported) 17 April 1997, HC, T&T (No. 2768 of 1994). See *Re T* [1963] Ch. 238 on the right of the father of a legitimate child not to have the mother, to whom custody was granted, change the child's surname without his consent.

judgment, consisting of but a few paragraphs, the court held that it was in the interest of the child, albeit, the family unit, that both children carry the same surname. *G v. P* was not cited to the court, nor did the court make any references to the changed position of the putative father having regard to the Status of Children Act.

The decision appears to be unsatisfactory, especially as no attempt was made to review the authorities, to assess the current position of the putative father in the light of recent legislation, or to even indicate why in the court's view, it was better for the child not to carry his father's name. The age of the child was not revealed, nor did the court address the possibility of asking the child himself how he felt about the matter.

In *G v. P* the court, while basing its decision on what was best for the child in allowing the child to continue to be known by the name of the putative father, at the same time stated that they were obliged to take into account the alterations in the law in recent times affecting the status and rights of the illegitimate child. The court held that while the name of the mother's husband, if ordered to be used by the court in relation to the child might be advantageous and convenient for the child, nevertheless, there would be disadvantages to the child, such as inconvenience, prejudice, and embarrassment so that her welfare would best be served if she were to retain the surname of her putative father. In this case, the child in question was eight years of age.

Apart from the above considerations, one other very strong reason as to why it may be just for a child to carry the name of the putative father is because once paternity is established, the putative father has liabilities in relation to the child. The mother may apply for an order that he pay maintenance to support the child, and on his death, the child can legally claim a share in his estate. If he dies intestate, is unmarried and has no other children, his out-of-wedlock child can now, in view of *status of children* legislation, claim entitlement to his entire estate. It may thus seem contrary to one's sense of justice that in these circumstances, the putative father is denied the right, to insist that his out-of-wedlock child bear his name.

The full and entire decision of the court in this matter, handed down by Blackman J., is repeated thus:

> This is an application for the change of a child's name. The parents of the child, who is a boy, were not married. The mother subsequently married and had a daughter as a result. The boy child has been bearing the name of his biological father; the mother wishes to have the name of the boy changed to the name of her husband so that the daughter and the boy child can have the same surname. The biological father of the boy objects. The mother's husband has no problem with the change of name.

> The boy child in question lives with the mother, her husband and his half sister in the same household.
>
> The overriding consideration in an application of this nature is what would be in the best interests of the child. I think that it is the best interests of the child that he should belong to a family unit and in that regard changing his name to that of the wife's husband's surname will assist in that regard. He and his sister can then bear the same surname. (See *D v. B* 1979 1 All ER 92 at p. 100). Therefore I would dispense with the consent of the biological father in this case and make an order in terms of the summons of 8th September, 1994.
>
> The husband should pursue his wish with regard to his having the order for access made in the Magistrate's Court varied by making a separate application in that regard when both parties can be heard on that matter.
>
> There will be no order as to costs.
>
> Dated this 17th day of April, 1997.

Surely, the important issues raised in this case necessitated a more extensive examination. It is regrettable that the learned judge made no reference to the Status of Children Act, and especially Section 3(1)(b)[37] which provides *inter alia* that the status, rights and obligations of the *parents* are the *same*.

Although the court held that the overriding consideration was the best interest of the child, the decision nevertheless remains unconvincing. The judge referred to *D v. B*[38] by citation only without going into the facts and decision of that judgment. This was a case in issue between a husband and a wife. The wife had formed a relationship with another man B, but accidentally became pregnant by her husband. The child when born was registered in the husband's name. The parties subsequently divorced and the wife continued her relationship with B. The wife thereafter changed the child's name to B's name by deed poll. It was held by the court that it was in the child's interest to be known by the surname of the family unit to which it belonged, therefore the mother's change of the child's name was approved of by the court. This case was decided in England in 1979. In 1981 Trinidad and Tobago passed the Status of Children Act. England does not have a similar act so that in relying on this English decision and in not noting the existence of the local legislation, Blackman J. may have erred in his judgment. On the other hand, the court in *G v. P*, in the face of identical issues, dealt more appropriately with the matter. Kaye J., in his judgment in *G v. P* gave sufficient and convincing reasons as to why it was in the child's best interest to keep

37. Op. cit.

38. Op. cit. For a more recent English decision on point see *Dawson v. Wearmouth* [1997] 2 FLR 629.

her "true surname"[39] being the name of her biological father. Before arriving at his decision, he outlined the history of the law relating to illegitimacy, and reviewed the effect of current legislation improving the child's status. He stated thus:[40]

> The cases to which I have referred concerned children of a marriage, and there does not appear to be any reported instance where similar powers have been exercised in relation to an illegitimate child.
>
> But notwithstanding the absence of reported authority, in my opinion, in an appropriate case, the Court might interfere by directing that the mother of an illegitimate child should cause her infant to be known by his putative father's surname . . . In former times an illegitimate child commenced his life subject to many and serious disabilities. He entered the world 'as a nameless piece of babyhood' without the right to the surname of either his father or his mother. He was regarded by the law as *filius nullius* [the child of no one]. It was only by accepted practice or custom that he was called by, and registered and baptized under, the name of his mother . . . But those considerations are no longer relevant in determining whether a child born out of wedlock should continue to be known by the surname of his putative father. In recent times legislative provisions have substantially altered the status of a child born out of wedlock . . . As a consequence of these provisions, an illegitimate child does not commence life as a nameless person, but by operation of law he bears either the surname of his father if the latter's name appears in the Register of Births as his father, or the surname of his mother if his father's name is not recorded . . .
>
> The law relating to illegitimate children has more recently undergone further and more fundamental changes. These were brought about by the Status of Children Act . . . the putative father occupies the same position in law in relation to his natural child as he does to his child born in wedlock. By parental right, a father of an infant is endowed with the guardianship of his infant child . . . It follows therefore that . . . the father of an illegitimate child is his guardian . . . by changing her surname without his consent the respondent infringed his right as the child's natural guardian.

The learned judge then went on to give reasons as to why it was important for the child to retain her father's surname. He explained:[41]

> it is important that the child should retain a warm and full relationship with her father . . . I conclude that she goes to him willingly and enjoys doing so. Nothing should be done which might undermine her willingness to do so. No doubt the strength of her relationship with the applicant will depend in part upon her continued recognition of him as her father. By retaining her surname, an important and meaningful bond between them will be maintained. The need for her to have a close and loving relationship with

39. Op. cit., p. 49 of report.
40. Ibid, pp. 45–48.
41. Ibid, p. 49.

> him might influence both the control and direction which he, as her father, could give her as well as her readiness to accept his parental guidance. Furthermore, the maintenance of a loving relationship between them might affect the strength of her claim upon her father's bounty.

Having stressed the need for the child to continue having a meaningful relationship with her father, the learned judge then went on to identify various inconveniences to the child which using the stepfather's surname might cause.[42] He in effect stated that for the purpose of school activities, examinations, the procuration of a passport, applications for certain types of employment, and upon marriage, she would be required to produce her birth certificate or an official extract of the entry of her birth. If she were to have her stepfather's surname, embarrassment and inconvenience would be caused on such occasions. Having said this, the court then proceeded to give its decision thus:[43]

> I have taken into account the advantages and conveniences which 'V' would enjoy . . . comparing those with the risks of prejudice, disadvantage, inconvenience and embarrassment . . . I have concluded that her welfare would be best served if she were to retain her father's surname.

The decision of Kaye J. is one that could easily be supported and accepted as representing a right which the putative father should be entitled to expect would be vindicated by the courts, in view of current legislation relating to illegitimacy. At the same time, the local decision of Blackman J. appears unsatisfactory, and has taken this area of the law relating to children and the law relating to the putative father, back to the days when such a father had no rights in relation to his child. By not even acknowledging the existence of current legislation on the subject, the court has not only insulted the person of the putative father, but also the child of such a man, whom the legislation was intended to protect. By holding that the child's name should be changed to that of his stepfather so that the child could "belong to a family unit", the court was consequently suggesting that a putative father and his out-of-wedlock child could belong to no family unit as separate and distinct from the family unit to which the child's mother or sister belonged; that an out-of-wedlock child could not belong to two family units at the same time; and that the only family unit the court was prepared to recognize was the family unit created by lawful marriage. Such a stand goes against recent trends in the law to recognize changed social values – a

42. Ibid, pp. 49–50.
43. Ibid, p. 50.

recognition which not only reflects social reality, but which also reflects parliament's changed approach to some issues of family law. It is hoped that Blackman J.'s judgment will consequently not be followed, or at least, that some attempt will be made to deal more extensively with the issues, before coming rapidly to an undesirable conclusion. In the end, serious judicial consideration ought to be given to the plight of the putative father and whether or not parental authority in any case is given to him, this must at all times be tested against the welfare principle.

One of the primary responsibilities of a parent is the continued support of children . . . and that may . . . mean making financial sacrifices or cutting one's cloth.
– Full Court (Asche A.C.J., Fogarty and Cook J.J.)[1]

Chapter 7

Maintenance: Children Born in Wedlock

Introduction

This chapter will consider statutory maintenance provisions for children as they obtain in the Magistrate's Court and in the High Court. The subject is very broad, and since the state of the law in the various jurisdictions is not uniform, this would necessitate an examination of several jurisdictions and different types of legislation representing different models upon which maintenance applications are based. The examination here will be limited to the rights of children born in wedlock, and to children to which legislation applies which enables certain out-of-wedlock children to claim on an equal footing as those born in wedlock, as for example, children born within unions other than marriage under the Barbados Family Law Act, or children who are born out of wedlock, but who are *treated* or *accepted* as one of the family under specific legislative provisions. The general position as it relates to children born outside of wedlock will be dealt with under the Affiliation Acts[2] or similar-type legislation, as for example, termed the Maintenance Act in Barbados, of the various territories possessing them.

1. *In the Marriage of J.F. Mee and P.J. Ferguson* (1986) 10 Fam LR 971 at 989.
2. See chapter 8, *infra*.

GENERAL PRINCIPLE

Children are legally entitled to financial support. In some territories, a strict duty to maintain children is laid down by parliament. In Jamaica, for example, legislation requires every man to maintain his own children. This is provided for by Section 2 of the Jamaica Maintenance Act which stipulates that "Every man is hereby required to maintain his own children". An equal obligation is also placed on every woman to maintain her children. The reason why the law places such an obligation upon the parent or guardian is obvious – the child is incapable or unable by reason of his infancy to maintain himself. Parents, whether married or unmarried, have duties and obligations in respect of the maintenance of their children. Consequently, the law offers protection to children where a parent might have neglected or refused to perform this basic duty. In particular circumstances, depending on the statutory provisions of the various jurisdictions, children (through an adult) can claim maintenance in the form of periodical or lump sum payments, or property orders. Access to financial provision by children is through a number of different pieces of legislation.[3]

DEFINITION

The provision of maintenance in this context logically implies that the child ought to have the benefit of monetary payments to be applied towards the child's upkeep. In some jurisdictions, statute defines the provision of maintenance as including the provision of education, as for example, relevant legislation of Barbados and Trinidad and Tobago.[4] In the Belize Families and Children Act 1998, parliament has given an extended meaning to the word *maintenance*. Section 5 of the act provides that:

> (1) It shall be the duty of a parent, guardian or any person with custody of a child to maintain that child, and in particular that duty gives a child the right to –
> (a) education and counselling;
> (b) immunization;
> (c) balanced diet;
> (d) clothing;
> (e) shelter; and
> (f) medical attention.

3. Unfortunately, in many instances the law is difficult or slow to be accessed since children must necessarily rely on adults to act for them.
4. See for example, the interpretation section of the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act, and the interpretation section of the Barbados Family Law Act.

SUMMARY MAINTENANCE PROCEEDINGS[5]

A child's right to maintenance from its parent(s) or guardian(s) may be enforced in the Magistrate's Court. It is contended by some that such a procedure is swift, less formal and less expensive than High Court maintenance procedure, although at the magistrate level applicants may tend to find themselves amidst numerous petty criminals and habitual drunkards.[6]

Generally, there must be some legal ground upon which the application is to be made. In one category of jurisdictions, which for convenience will be labelled as having "fault-based" statutes, the ground of wilful neglect to maintain is available. In the Bahamas, for example, Section 3(1)(h) and (i) of the Matrimonial Causes (Summary Jurisdiction) Act, provides *inter alia* that a married man or woman may apply for an order where the other party has wilfully neglected to provide reasonable maintenance for the applicant or for any child of the family who is a dependant. Other relevant provisions of the act include Section 7 which provides for interim maintenance, and Sections 8 and 9 which enable the court to make orders relating to the suspension, cessation, revocation, revival or variation of maintenance orders.

It is generally accepted that the ground of "wilful neglect" to maintain connotes fault, and that an applicant will only succeed if it can be shown that the respondent was guilty of some "fault", as developed by the common law, which includes specific bars to an application for maintenance.[7] As will be seen, in other jurisdictions where other grounds for the application exist, such as a "failure to provide reasonable maintenance", it is generally accepted that an applicant may more readily succeed on this latter ground because of the less stringent requirements of the legislation and the de-emphasis on "fault".

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5. Statutes relating to summary maintenance include the following: Antigua and Barbuda, Magistrate's Code of Procedure Act, Chap. 255, Part V; The Bahamas, Matrimonial Causes (Summary Jurisdiction) Act, Chap. 112; Barbados, Family Law Act, Cap. 214; Belize, Families and Children Act 1998 (No. 17); British Virgin Islands, Magistrate's Code of Procedure Act, Chap. 44; Cayman Islands, Maintenance Act, Chap. 89; Dominica, Maintenance Act, Chap. 35:61; Grenada, Maintenance Act, Chap. 180; Guyana, Maintenance Act, Cap. 45:03; Jamaica, Maintenance Act (Vol. xii); Montserrat, Magistrate's Code of Procedure Act, Chap. 46; St. Kitts & Nevis, Magistrate's Code of Procedure Act, Chap. 46; St. Lucia, Separation and Maintenance Act, Chap. 9; St. Vincent and the Grenadines, Maintenance Act, Chap. 171; Trinidad and Tobago, Family Law (Guardianship of Minors, Domicile and Maintenance) Act, Chap. 46:08.
6. See H.A. Finley and R.J. Bailey-Harris, *Family Law in Australia*, 4th ed. (Butterworths 1989), 278–79.
7. See Z. McDowell, "Anomalous Maintenance Legislation: A Folly Fixed in Fault", 2(1) *Caribbean Law Bulletin* (April 1997), 37.

In Trinidad and Tobago, for example, a different approach is taken towards summary maintenance in that the ground of the application differs from that which obtains in "fault-based" statutes. Section 24(b) of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act[8] provides that either party to a marriage may apply to the Magistrate's Court on the ground that the other party to the marriage "has failed to provide or to make a proper contribution towards reasonable maintenance for any minor child of the family." Section 25(9) provides that "minor" in this Section, in relation to one or both of the parties to a marriage, includes a minor child of that party born out of wedlock, or, as the case may be, of both parties.

Section 25(1)(c) provides *inter alia* that where an application for an order is made, the magistrate may order that the respondent make to the applicant for the benefit of the child such periodical payments and for such term as may be specified, and Section 25(1)(d) provides for the payment of such lump sum as may be specified.

Section 25 (6) lists the matters which the Magistrate's Court is to have regard to in making an award, including the financial needs of the minor; the income, earning capacity (if any), property and other financial resources of the minor; any physical or mental disability of the minor; the standard of living enjoyed by the family; the manner in which the minor was being educated or trained and the manner in which the parties to the marriage expected him to be so educated or trained; as well as the financial resources of the parties to the marriage, and their financial needs and obligations.

Section 17 provides for the duration of maintenance orders, and states *inter alia* that an order shall not be of any force or validity after the minor has attained the age of 18 years or has died. It further provides that payments under any order shall not be required to be made after the minor has attained the age of sixteen unless the order contains a direction that payments are to continue until the minor reaches the age of 18. Section 16 makes provision for an extension of the period up to the age of 21 years if the minor is, or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will be in gainful employment, or if there are special circumstances which justify the making of such an order.

On variation or cessation of maintenance orders, Section 25(9) provides *inter alia*, that a Magistrate's Court may on the application of either party and upon cause being shown upon fresh evidence, vary or discharge any order made under the Section and may upon

8. Laws of the Republic of Trinidad and Tobago, Chap. 46:08.

application from time to time increase or diminish the amount of any periodical payment ordered to be made.

The Barbados Family Law Act provides yet another approach to summary maintenance. Here the right to maintenance is based on the *need* of the child for maintenance and the *ability* of the parent to provide it. Out-of-wedlock children born to a union other than marriage are also covered by the legislation. The operative section is Section 51 which provides that:

> The parties to a marriage, or union other than marriage are liable, according to their respective financial resources, to maintain the children of the marriage or of the union who are unmarried and have not attained the age of 18 years.

Section 52 provides *inter alia* that in proceedings with respect to the maintenance of a child of a marriage, or of a union, the court may make such orders as it thinks fit. Section 53 lists a variety of matters which are to be considered in determining quantum, including whether either party has the care or control of a child of the marriage or union, who has not attained the age of 18 years. Section 54 then goes on to stipulate, *inter alia*, that in determining whether to make an order for the maintenance of a child of a marriage or of a union, or the period for which such an order should continue in force, or for the amount of the payment to be made, the court shall take into account the income, earning capacity, property and other financial resources of the child, the financial needs of the child, and the manner in which the child is being and in which the parties expect the child to be educated or trained. The period for which the order is to apply may extend until after the child reaches 18 years of age if the court is satisfied that the provision is necessary to enable the child to complete his education including vocational training or apprenticeship, or because he is mentally or physically handicapped.

Section 59 deals with the powers of the court. Orders may be for a lump sum payment, or for periodical payments, and wholly or partly secured.

Section 55 makes provision for an urgent maintenance award to be made in a situation where the child is in immediate need of financial assistance. Here an interim order will be made pending the disposal of the proceedings. Section 61 provides that a maintenance order ceases to have effect upon the death of a party to the marriage or union, or upon the death of the child.

Section 57(1)(b) enables the court, in proceedings in respect of the property of the parties to a marriage or union, to alter such interest in property for the benefit of a child.

Section 62 enables the court to modify the provisions of any maintenance order, either by increasing or decreasing the amount, or by discharging or suspending the order. As far as enforcement goes, Section 88 makes provision for maintenance awards to be deducted from salary or wages.

While an application for maintenance of a child is in practice usually made by the mother on behalf of the child, Section 44 of the act makes provision for the child to be separately represented, if this is desirable. The Section states that:

> Where in proceedings in respect of the custody, guardianship or maintenance of, or access to, a child of a marriage or of a union, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application of the child or of the Chief Welfare Officer or Chief Probation Officer, as the case may be, or of any other person, order that the child be separately represented; and the court may make such other orders as it thinks necessary for the purpose of securing separate representation.

HIGH COURT MAINTENANCE PROCEEDINGS[9]

As with summary maintenance, in the High Court, maintenance provisions relating to children in the respective jurisdictions are not uniform. Again there are different jurisdictional approaches to the subject. In territories having "old law",[10] an application for maintenance for a child may be made where there has been a petition for divorce, nullity, judicial separation or restitution of conjugal rights. Under "newer" statutes, the court will consider maintenance for a child where there is before the court a petition for divorce, nullity, or judicial separation. However, an application may also be made independently of these other applications for matrimonial relief, where there is a charge that one party to the marriage has wilfully neglected to maintain the other party to the

9. Statutes regulating High Court maintenance include the following: Antigua and Barbuda, Divorce Act, No. 10 of 1997; Bahamas, Matrimonial Causes Act, Chap. 111; Barbados, Family Law Act, 1981; Belize, Supreme Court of Judicature Act, Chap. 82; British Virgin Islands, Matrimonial Causes Act, Chap. 47; Cayman Islands, The Children Law, 1995; Dominica, Eastern Caribbean Supreme Court (Dominica) Act, Chap. 4:02, Section 11 provides for exercise of jurisdiction in matrimonial causes as nearly as may be in conformity with the law and practice administered on 1 June, 1984 in the High Court of Justice in England; Grenada, West Indies Associated States Supreme Court (Grenada) Act, Chap. 336, Section 11 provides for jurisdiction as nearly as may be in conformity with the law and practice for the time being in force in the High Court of Justice in England; Guyana, Matrimonial Causes Act, Cap. 45:02; Jamaica, Matrimonial Causes Act, 1989; Montserrat, Matrimonial Causes Act, Chap. 50; St. Kitts and Nevis, Matrimonial Causes Act, Chap. 50; St. Lucia, Divorce Act, 1973-2; St. Vincent and the Grenadines, Matrimonial Causes Act, Chap. 176; Trinidad and Tobago, Matrimonial Proceedings and Property Act, Chap. 45:51.

10. See chapter 1, *supra*.

marriage or a child, as the case may be. This type of legislation exists, for example, in Trinidad and Tobago. Here the Matrimonial Proceedings and Property Act provides in Section 25, *inter alia*, that in proceedings for divorce, nullity of marriage or judicial separation, the court may make an order that a party to a marriage shall make for the benefit of a child of the family, such periodical payments, secured or unsecured, or lump sum as may be specified.

Section 28 deals with wilful neglect proceedings and provides, *inter alia*, that either party to a marriage may apply to the court for an order on the ground that the other party to the marriage, being either the husband or the wife, has wilfully neglected to provide, or to make a proper contribution towards reasonable maintenance for any child of the family. Section 27(3) provides that in deciding to make to the liability of any an award against a party to a marriage in favour of a child of the family who is not the child of that party, the court is to have regard to whether that party had assumed any responsibility for the child's maintenance, and if so, to what extent, and the basis upon which that party assumed such responsibility and to the length of time for which that party discharged such responsibility; to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own; and to the liability of any other person to maintain the child.[11]

Section 26 of the act further provides that on granting a decree of divorce or nullity or judicial separation, the court may order a party to the marriage to transfer to any child of the family such property as may be specified by the court.

This power of the court to transfer property for the benefit of children has been exercised in a number of cases. In *Fisher v. Fisher*[12] a humble house was built by a church for the benefit of the Fisher family. On the breakdown of the marriage, the wife returned to live at her parents' house with their two children and the husband remained in the matrimonial home where he cohabited with a new companion and a child of that union. The court applied the provisions of the Matrimonial Proceedings and Property Act and ordered maintenance payments to be paid by the husband for the benefit of the children until each attained the age of 18, and also ordered the respondent to transfer his interest in the matrimonial home to the wife so that she and the two children could return to live there. The respondent was ordered to vacate the matrimonial home and find alternative accommodation for his new family.

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11. See *Roberts v. Roberts* [1962] P 213 and *Bowlas v. Bowlas* [1965] P 450 for interpretations of this provision.
12. (Unreported) 22 March 1991, HC, T&T (No. M-137 of 1989).

In *King v. King*[13] the parties were divorced and the court was called upon to determine the relevant issues of custody, maintenance and the division of matrimonial property. The court ordered the father to pay maintenance for the child of the marriage. The matrimonial home was divided in equal portions between the father and the mother, but the father was ordered by the court to transfer his interest in the house to the child of the marriage. Waterman J. stated:[14]

> The child of the marriage . . . now lives with her mother in the matrimonial home. The wife will have the responsibility for providing a home for the child if she is forced to leave the matrimonial home. The $60.00 per week the wife receives from the husband will help. The wife's financial resources are weak. I will refrain from making an order for the sale of the home in order to satisfy the husband's interest. Instead I order that the applicant/husband transfer his interest in the chattel dwelling-house to the child of the marriage.

In *Alleyne v. Lowe*[15] on the breakup of a union other than marriage, the court exercised its discretion under Section 57 of the Family Law Act by dividing the matrimonial home into one third for the father and two-thirds for the mother as according to the court, the latter share "would go some way towards the provision of a home for the children".[16] The court also ordered the father to pay maintenance for the children.

In making a maintenance order, or in varying or revoking such an order, the court must exercise caution in its attempt to do justice between the parties. In the Trinidadian case of *Ramsaroop v. Ramsaroop*[17] an ex-husband applied to have an order for the payment of money to his wife and two children of the family revoked. The applicant was ill and unemployed and claimed to be dependent on his new wife for financial support. The court varied the order by reducing the amount rather than revoking it. Best J. gave a good analysis as to how a reasonable decision may be arrived at. He stated:[18]

> In arriving at a decision herein, I considered the income earning capacity of both parties, and noted that they were almost equal, save that the applicant now has an employed spouse. I put in the balance, the fact that his new family now comprises two young children. Also, I kept in mind the principle that payment of maintenance should not put the respondent in a penurious

13. (Unreported) 15 October 1991, HC, B'dos (No. 248 of 1990).
14. Ibid, pp. 5–6 of judgment.
15. (Unreported) 9 April 1986, HC, B'dos (No. 193 of 1985).
16. Ibid, p. 5 of judgment, per Williams J.
17. (Unreported) 17 February 1997, HC, T&T (No. 4211 of 1995).
18. Ibid, p. 2 of judgment.

> position. I have factored in their ages and their physical disabilities. In the process, I have attempted to do broad justice between these parties, bearing all the relevant circumstances in mind. Looking at the respondent wife's declared income, his inability to work and their combined expenses, I concluded that it would have necessitated the use of creative accounting methods to make their ends meet. As a consequence, I did not accept their estimation of their living expenses. However, I balanced this with the thought that this Court should do nothing to wreck the financial stability of the respondent's new family. Looking at the whole issue in a detached manner and not making use of any arithmetical rule of thumb, I concluded that there was available to this Court sufficient new evidence to enable it to vary downward the respondent's obligation to his ex-wife from $60.00 per week to $20.00 per week, rather than revoke the order.

In Jamaica, the Matrimonial Causes Act 1989 governs High Court maintenance proceedings. The relevant provision is found in Section 25 which provides, *inter alia*, that where a husband has failed to provide reasonable maintenance for any child, the court may, on the application of the wife, order the husband to make such periodical payments as may be just. The section further provides that payments may continue after the child has attained the age of 18 years if the child is engaged in a course of education or training not extending beyond the child's twenty-first birthday, and they may extend to any period specified by the court where the child suffers from an illness or infirmity which is likely to be permanent. Section 23 provides for the maintenance of children in proceedings for dissolution or nullity of marriage. It states, *inter alia*, that the court may, on granting a decree of dissolution or nullity of marriage order the husband or the wife to secure for the benefit of the relevant children such gross sum of money or annual sum of money as the court deems reasonable, provided that the term for which any money is secured for the benefit of a child shall not extend beyond the date when the child attains the age of 21, but where the child is unable to maintain himself by reason of illness or infirmity, such sum of money shall be secured for such period as the court may direct. In considering whether such payments should be made for the benefit of a child who is not a child of the party against whom the order is to be made, the section provides that the court shall have regard to the extent to which that party had, on or after the acceptance of the child as one of the family, assumed responsibility for the child's maintenance, and the liability of any person other than a party to the marriage to maintain the child.

In Barbados an application for maintenance for children may be made where there is before the court a petition for divorce or nullity. In addition, there may also be an independent application under

Section 51 of the act if a child is in need of maintenance. Since the Family Law Act governs both summary and High Court maintenance, what was said of summary maintenance in Barbados is equally relevant for High Court maintenance.[19]

It is to be noted that the right of the child to maintenance expires when the child reaches the age of 18 years, or until 21 years in most jurisdictions, if the child is engaged in a course of education or training. In the Trinidadian case of *Busby v. Busby*[20] where a wife applied for an attachment order in respect of maintenance due from her husband to a child of the family, the court refused her application since the order had lapsed as the child had attained the age of 18 years. Blackman J. stated:[21]

> It seems to me that such an application cannot be sustained if only because there is no maintenance order in existence and therefore no maintenance to be attached since the relevant order for maintenance has ceased . . . In my view the application as constituted is misconceived and must therefore be dismissed . . . [22]

MAINTENANCE AVAILABLE IN CUSTODY PROCEEDINGS UNDER SPECIFIC ACTS

If a court makes an order granting custody of a child to one parent, it may further order that maintenance be paid for the child's benefit. In Barbados, for example, Section 10(2) of the Minors Act, provides, *inter alia*, that where the court makes an order giving custody of the minor to the mother, the court may further order that the father shall pay to the mother, towards the maintenance of the minor, such weekly or other periodical sum as the court may think reasonable.

The Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act contains a similar provision in Section 13(2) which provides that where the court makes an order under Subsection (1) giving the legal custody of the minor to any person (whether or not one of the parents), the court may make a further order requiring payment to that person by the parent or either of the parents excluded from having that custody of such periodical sum towards the maintenance of the minor.

In the Barbadian case of *Best v. Boyce*[23] the court had to determine

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19. See Section 20 of the Family Law Act.
20. (Unreported) 24 February 1997, HC, T&T (No. 6 of 1993).
21. Ibid, pp. 3–4 of judgment.
22. See too *Sugden v. Sugden* [1957] P 120 where it was held that an order for periodical payments could not be made to extend beyond the paying parent's death to bind the personal representatives.
23. (Unreported) 7 February 1991, HC, B'dos (No. 235 of 1990).

the issue of custody of a female child as between father and mother. The court awarded joint custody to both parties, with care and control to the mother and access to the father. Although a claim for maintenance for the child was not specifically applied for, the court nevertheless ordered the father to pay $150.00 a month for her maintenance.

WHO MAY BENEFIT FROM MAINTENANCE PROVISIONS

The various pieces of legislation referred to make reference to "children of the marriage" or "children of the family". "Children of the marriage" is the terminology used in the older statutes, such as obtains in Guyana, the British Virgin Islands, Montserrat, and St. Kitts and Nevis. Jamaica also uses it in Section 21 of the Matrimonial Causes Act 1989. "Children of the marriage" include a child born into marriage to the parties to the marriage, a child born before marriage but legitimated by the marriage of the parents under the Legitimacy or Legitimation Acts, or a child adopted by the parties to the marriage by virtue of the Adoption Acts.

In Jamaica, Section 21 of the Matrimonial Causes Act provides that:

> The court after a final decree of nullity of marriage or dissolution of marriage may . . . make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the *children of the marriage*[24] or of their respective parents, as the court thinks fit.

The legislation here refers to *children of the marriage,* but the legislation is not consistent in using this term, and the word *children* is given an extended meaning in Section 23 which makes provision for custody, maintenance and education of any *relevant child.* In the interpretation Section of the Act, *relevant child* means a child who is a child of both parties to the marriage, or a child of one party to the marriage who has been *accepted* as one of the family by the other party, and includes an adopted child or a child of a void marriage. As far as provision for maintenance or education is concerned in relation to the *relevant* child, Section 23(3) provides that the court is to have regard to the extent (if any) to which that party had, on or after the *acceptance* of the child as one of the family, assumed responsibility for the child's maintenance, and to the liability of any person other than a party to the marriage to maintain the child.

In Barbados, Section 3 of the Family Law Act defines *child of the marriage* in two different ways. In relation to a marriage generally, a

24. Emphasis supplied.

child of the marriage includes a child adopted since the marriage by the husband and the wife, or a child of the husband and the wife born before the marriage. A child of the husband and the wife who has been adopted by another person or other persons is not a child of the marriage.

In relation to Section 42 which deals with the court's power to make a *decree nisi* of divorce absolute providing that proper arrangements have been made for the welfare of children of the marriage, the term here means a child adopted since the marriage by the husband or wife with the consent of the other, or a child of either the husband or wife, *including an ex-nuptial child of either of them*, if, at the relevant time, the child was ordinarily a *member of the household* of the husband and wife.

The Antigua and Barbuda Divorce Act 1997[25] has also adopted the "child of the marriage" concept and its specific definition of the term is found in Section 2(1) of the act which provides that:

> 'child of the marriage' means a child of two spouses[26] or former spouses who, at the material time,
> (a) is under the age of sixteen years, or
> (b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

Section 2(2) further states that:

> For the purposes of the definition 'child of the marriage' in Subsection (1), a child of two spouses or former spouses includes
> (a) any child for whom they both stand in the place of parents; and
> (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

The "child of the marriage" concept under the latter act is differently worded from the concept under the former acts as the latter definition makes no mention of the child being accepted as one of the household. It may be argued, however, that in substance the implication is the same, since a spouse or spouses cannot stand in the place of parent or parents to a child if they do not accept such a child as one of the household.

Children of the family is the terminology used in Section 2 of the Trinidad and Tobago Matrimonial Proceedings and Property Act. It

25. No. 10 of 1997.
26. "Spouse" under the act "means either of a man or woman who are married to each other" (Section 2).

applies also in Grenada and Dominica following Section 25 of the UK Matrimonial Causes Act 1973. The term includes a child of the marriage, a child of one party *treated* as one of the family, and a child of neither party *treated* as one of the family.

Section 2 of the Trinidad and Tobago Matrimonial Proceedings and Property Act expressly provides that a child of the family in relation to the parties to a marriage means a child of both of those parties, and any other child who has been *treated* by both of those parties as a child of their family. In determining maintenance for the benefit of a child of the family who is not the child of the party against whom the order is to be made, Section 27(3) provides that the court is to have regard to whether that party had assumed any responsibility for the child's maintenance, and if so, to what extent, and the basis upon which that party assumed such responsibility and to the length of time for which that party discharged such responsibility; to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own; and to the liability of any other person to maintain the child.

In Trinidad and Tobago under the Family Law (Guardianship of Minors, Domicile and Maintenance) Act, Section 2(1) defines "minor child of the family" in relation to the parties to a marriage or to unmarried persons as a minor child of both of those parties, and any other minor child who has been *treated* by both of those parties as a minor child of their family. The same considerations highlighted by Section 27(3) of the Matrimonial Proceedings and Property Act are to be regarded by the court in making an award against the party who is not the biological parent of the child.

In the Bahamas, Section 27(8) of the Matrimonial Causes Act, defines "child" and "child of the family", in like fashion as the Trinidadian statute, and Section 29(3) lists the circumstances in which the court may order a party to a marriage to maintain a child of the family who is not the child of that party on the same basis as that laid down by the Trinidadian legislation.

In a number of English decisions, the word "treated" and the concept of "children of the family" were judicially considered by the courts, which may be instructive for the interpretation of these phrases in our regional jurisdictions.

In *Snow v. Snow*[27] at the time of her marriage to her husband, the wife had two out-of-wedlock children by someone else. At the time of the marriage and subsequent to it, the husband took parental control of the children, disciplined them, and maintained them. The

27. [1971] 3 All ER 833.

husband had made claims for allowances in regard to the children for tax purposes and referred to them as his stepchildren. The wife subsequently left the husband and applied to the court for maintenance on the ground that the husband had wilfully neglected to maintain her and the two children of the family. The husband argued that the children were not children of the family as the wife had taken them out of his control, therefore he should not be legally bound to maintain them. The court held that if a child was unconditionally accepted by both parties as a child of the family at the time of the marriage, it was irrelevant what occurred subsequently. The husband's appeal against an order being made against him for the benefit of the children was therefore dismissed by the English Court of Appeal.

In *W (R.J.) v. W (S.J.)*[28] H and W married and subsequently had two children. H fed and clothed the children, and behaved towards them as if they were his own. He had no reason to believe that they were not his, until he returned home one day to find W and a man, X, about to commit adultery. H later petitioned for divorce on the ground of adultery. Blood tests revealed that H was not the father of the children and indicated that X could be the father. The issue was whether or not the children were children of the family. H argued that they were not as the word "treated" should be interpreted to mean "treated with knowledge of the material facts". The court held that the children were treated by both H and W as children of the family, that the children were therefore children of the family for purposes of the legislation, and that the husband's lack of knowledge of the facts relating to their paternity was immaterial.

In *A v. A*[29] H and W married after W became pregnant and H believed that he was responsible for the pregnancy. In fact, W had also been intimate with another man, X. When the child was born, because of the difference in skin colour, it was clear that H was not the father. H neither maintained the child nor did he take any interest in her. He later petitioned for divorce and W claimed financial provision for the child on the basis that the child was a child of the family. She argued that by marrying her, H had "treated" the child as a child of the family. The court held that the child was not a child of the family and that H could not have "treated" an unborn child as a child of the family.

In *Day v. Day*[30] H and W had associated with each other for some four years before they finally married. W had had two children from

28. [1971] 3 All ER 303.
29. [1974] 1 All ER 755.
30. [1988] 1 FLR 278.

another relationship. During the four years of their courtship, H had given W a weekly sum to cover all outgoings. The relationship eventually turned sour, and after some six weeks of marriage, H left W. W applied for maintenance for herself and the children and an order was made in that regard. H appealed the order but was unsuccessful. The court held that having regard to the history of the parties, H had treated the children as children of the family and was therefore legally bound to contribute to their financial support.

ENFORCEMENT

The duty to maintain may be enforced in a variety of ways. In *Ramsaroop v. Ramsaroop,*[31] for example, an ex-husband had been incarcerated for a breach of his duty to maintain. Together with the penalty of imprisonment, various pieces of legislation provide for the attachment of earnings, as for example, the Trinidad and Tobago Attachment of Earnings Act 1988. This act was amended in 1995 by the Attachment of Earnings (Maintenance) (Amendment) Act[32] which provides in Section 3 that:

> Where a maintenance order has been made, whether before or after the commencement of the act, the Court making the maintenance order may upon an application made under this act, at the same time, or at any subsequent time as the case may be make an attachment of earnings order to secure the maintenance payments.

In *Busby v. Busby*[33] an attachment of earnings order had been made by Razack J. against a husband for the benefit of two children, and for other purposes, in the following terms:

> It is HEREBY ORDERED that the said Government of Trinidad and Tobago through the National Housing Authority do make payments out of those earnings in accordance with the Attachment of Earnings Act 1988 of the sum of Eight Hundred and Fifty Dollars ($850.00) to be paid to the said . . . BUSBY c/o Savings Account No . . . to the Bank of Nova Scotia of Trinidad and Tobago Limited, Independence Square, Port of Spain with effect from the 1st day of August, 1993 and continuing until further order.

RECENT LEGISLATION

Two acts passed in Trinidad and Tobago in 1998 have to some extent affected the law relating to maintenance as far as cohabitational relationships are concerned, and in relation to the procedure which

31. Op. cit., *supra.*
32. No. 28 of 1995.
33. (Unreported) 24 February 1997, HC, T&T (No. 6 of 1993).

may be invoked for the settlement of disputes relating to maintenance applications, among other things.

COHABITATIONAL RELATIONSHIPS

While the Barbados Family Law Act makes provision for the maintenance of parties to and children born to a union other than marriage, as defined by the act, the Trinidad and Tobago 1998 Cohabitational Relationships Act[34] extends the right to a cohabitant to apply for maintenance in certain circumstances. Under the act, no specific right is granted to a child of the cohabitational relationship, although the existence of a child born to the cohabitants is a factor which will determine whether or not the cohabitant's application will be entertained.

Section 6 of the act gives the right to a cohabitant to apply for a maintenance order in the High Court or in the Magistrate's Court where the applicant has, according to Section 7, lived in a cohabitational relationship with the respondent for a period of not less than five years; or the applicant has a child arising out of the cohabitational relationship. Under Section 15(1) (a) a court may make a maintenance order where it is satisfied that the applicant is unable to support himself or herself adequately by reason of having the care and control of a child of the cohabitational relationship, or a child of the respondent, being in either case, a child who is (i) under the age of 12 years, or (ii) in the case of a physically disabled or mentally ill child, under the age of 18 years.

Unlike the Barbados Family Law Act, the Trinidad and Tobago Act does not impose a duty upon the parties to maintain the child of the cohabitational relationship, but appears, rather, to link the right of the child to maintenance to the right of the applicant to bring an action for maintenance under the act. It would therefore appear that the basic right of children to maintenance continues to be governed by the Matrimonial Proceedings and Property Act and the Family Law (Guardianship of Minors, Domicile and Maintenance) Act, in spite of the recent 1998 legislation.

COMMUNITY MEDIATION

The 1998 Trinidad and Tobago Community Mediation Act[35] seeks to provide community mediation as an alternative to litigation for certain summary offences and civil matters. In relation to civil matters, for purposes of this chapter, a person may apply for

34. No. 30 of 1998.
35. No. 13 of 1998.

mediation in respect of applications for ancillary relief following the grant of a decree nisi of divorce or a decree of judicial separation, and in relation to applications, *inter alia*, for maintenance under the Matrimonial Proceedings and Property Act and the Family Law (Guardianship of Minors, Domicile and Maintenance) Act.[36]

According to the interpretation Section, a mediator is a "person having adequate knowledge of, and experience in mediation and approved by the Minister[37] to be a mediator by Notice published in the *Gazette*."[38]

Where a party elects to have the matter mediated, the powers of the court are listed in Section 14(2) and (3) which provides *inter alia* that:

> (a) either party may seek to have the matter mediated directly with a mediator agreed to by both parties; and
> (b) where the mediation process fails and proceedings are instituted in respect of those matters, the Court may make an Order in accordance with Subsection (4).
>
> (3) Where the parties opt for mediation under Subsection (2), the Court shall adjourn for the parties to agree on a mediator and on the adjourned date the Court shall make an Order –
> (a) appointing the mediator agreed to by both parties;
> (b) referring any matter to the mediator for mediation;
> (c) suspending its hearing of the matter.

It is no secret that upon the breakdown of family relationships, arrangements regarding the maintenance of children, among other things, are often causes for grave hostility and resentment amongst the parties involved. This piece of legislation will no doubt assist in the process of making the experience less hostile and less adversarial.

36. Section 14(1).
37. That is, the minister to whom responsibility for community mediation is assigned.
38. Section 2.

The object in instituting proceedings is to obtain support for the begotten child and not to punish immorality.
– Luckhoo, J.A.[1]

Chapter 8

Maintenance: Children Born out of Wedlock
(Affiliation Proceedings)

Introduction

This chapter examines the legislation of specific territories having affiliation acts or maintenance acts providing for out-of-wedlock children. The local law on the subject is derived principally from the UK Affiliation Proceedings Act 1957, as amended from time to time. The legislation was intended to ameliorate the harshness of the common law position that an out-of-wedlock child had no right to maintenance from its father. In European civil law systems, however, which St. Lucia inherited, the law did afford the out-of-wedlock child some degree of recognition. Section 208 of the St. Lucia Civil Code,[2] for example, provides that the forced or voluntary acknowledgment by the father or mother of their illegitimate child gives the latter the right to demand maintenance from each according to the particular circumstances. Section 209 is also important as it provides that an illegitimate child has a right to establish judicially his claim to paternity or maternity.

In England, by the intervention of parliament, the English common law was altered to allow the child born out of wedlock to

1. *Jagroop v. Singh* (1979) 28 WIR 158 at 161.
2. Laws of St. Lucia, Chap. 242.

obtain maintenance from its father, providing that the man alleged to be the father was adjudged by the court to be his father. This is known as *affiliation proceedings*, which are proceedings adjudicated in the Magistrate's Court, and considered by some to be a contemptible and unhealthy mode of securing maintenance for a child. According to Finlay and Bailey-Harris:[3]

> Persons resorting to the magistrates' courts for maintenance [find] themselves rubbing shoulders with drunks and petty criminals in the precincts of those courts. Regard for the human dignity of the applicant in the maintenance court [is] generally measured in very small quantities.

It has thus long been advocated that legislation be enacted to allow proceedings to be brought in the High Court, so that the applicant at least has the option of selecting the court she wishes to approach. Lazarus-Black, who conducted research into the workings of the Magistrate's Court in Antigua in relation to kinship cases, has highlighted a number of drawbacks and inconveniences to women and children in the employment of these courts. She writes:[4]

> . . . local law stipulates that disputes over child support between unmarried persons, a very high percentage of whom are lower class, must be resolved at the magistrate's court. 'Carrying a case' to one of these courts entails many inconveniences and a willingness to endure an invasion of family privacy and community gossip. The monetary costs of prosecuting a case are minimal, so that anyone can bring a suit, but the amount of support that is awarded is never enough to maintain a child . . . Indeed the amount of child support is so low that it can make a difference only to the most indigent of women, and that fact is well known in the community . . . after 1982, when the stipend was raised . . . the records reveal no radical changes in the number of new cases filed in any of the country courts. Apparently neither urban nor village women were motivated to go to court for purely financial reasons . . . women take men to court when those men violate local norms about respect, support, and appropriate relations between the sexes.

NATURE OF PROCEEDINGS

In the Bahamas, the relevant legislation is found in the Affiliation Proceedings Act.[5] The long title describes it as an act to consolidate the law relating to the maintenance of children born out of wedlock. Section 2(1) provides that "child" in the act means a child born out of

3. H.A. Finlay and R.J. Bailey-Harris, *Family Law in Australia*, 4th ed. (Butterworths 1989), 278–79.
4. Mindie Lazarus-Black, *Legitimate Acts and Illegal Encounters* (Washington, DC: Smithsonian Institution Press 1994), 195–97.
5. Statute Law of the Bahamas 1987, Chap. 119.

wedlock and court means Magistrate's Court. For affiliation proceedings to be instituted, Section 3 provides that a single woman with child, or who has been delivered of a child, may apply to the court for a summons to be served on the man alleged by her to be the father of the child.

The definition of "single woman" includes a married woman who is reduced to the condition of a single woman by widowhood or otherwise.

To succeed in these proceedings, the woman's application must be timely. Section 4, as amended by the Family Law Provisions (Miscellaneous Amendments) Act 1988,[6] provides that the application may be made at any time within three years[7] following the child's birth, or at any subsequent time, upon proof that the man alleged to be the father of the child has within the three years next after the birth, paid money or given money's worth for the maintenance of the child, or, at any time within three years after the return to the Bahamas of the man alleged to be the father of the child, upon proof that he ceased to reside in the Bahamas within three years next after the birth of the child.

Since this limitation period is strict, if the mother does not make a timely complaint, this would prejudice the right of the child to be maintained by the father. It would thus be reasonable to recommend that the provision be amended to provide that a complaint may be made at any time before the child's majority is attained, so as to equate the right of the child born out of wedlock to maintenance with the right of the child born in wedlock.

The powers of the court on hearing the application are dealt with under Section 7. Here the court may adjudge the man alleged to be the father of the child to be the putative father of the child. But in a case where evidence is given by the mother, the court shall not do so unless her evidence is corroborated in some material particular by other evidence to the court's satisfaction. Once the defendant is adjudged father the court may then proceed to make an affiliation order for the payment by him of:

(a) a weekly sum of money, and, if the court sees fit, in addition, a lump sum payable for the maintenance and education of the child[8]
(b) the expenses incidental to the birth of the child, or
(c) if the child died before the making of the order, the child's funeral expenses.

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6. No. 17 of 1988.
7. Before 1988, the time limit was 12 months.
8. See the *Family Law Provisions* (Miscellaneous Amendment) Act 1988 (No. 17).

It is to be noted therefore, that the right of a child born out of wedlock to maintenance is not automatic, but is dependent upon whether or not the man alleged to be the father is adjudged putative father of the child, and is also dependent upon whether the mother is able to bring a timely application. These hurdles do not apply to children born in wedlock who are able to secure maintenance awards under different legislation.[9]

Sections 9 and 10 provide for the duration of an order. Previously, an order could have been made up to the age of 16 years with provision for payments to continue to 21 years if the child was engaged in a course of education or training. However, the Family Law Provisions (Miscellaneous Amendments) Act 1988[10] amended this to make provision for children up to the age of 18 with an extension for four years up to the age of 22.

Section 11 provides for variation, revival or revocation of an order. It states that a person entitled to the payments or a person liable to make the payments may apply to the court to vary, revive or revoke the order. The legislation also provides for enforcement of the order and the court has power under Section 21 to make an attachment of earnings, or under Section 13 to impose imprisonment where the defendant's default is due to his wilful refusal or culpable neglect. Imprisonment or detention shall not operate to discharge the defendant from his liability to pay, although Section 14 provides for a prohibition of committal more than once in respect of the same arrears. Section 20 further provides that in a case where it appears that the putative father is about to leave the Bahamas, the court may order him not to leave if he has not made adequate provision for payments to be made during his absence.

Although the act imposes a responsibility on the putative father to maintain the child, the act also enables him to have access to the child. This is provided for in Section 16 which states that on the application of the person adjudged to be the putative father of the child, the court may make such order as it thinks fit regarding the right of access of the putative father to the child.

In Barbados, while the Family Law Act governs maintenance for some out-of-wedlock children, this is so only if such children fall within the description of a child of the marriage or union other than marriage under the act. For a union other than marriage to have legal efficacy, the parties must have cohabited continuously for a period of at least five years. Children not falling within this

9. See chapter 7, *supra.*
10. No. 17 of 1988.

description, if born out of wedlock, must seek to be awarded maintenance under the Maintenance Act.[11] Section 2 of the act provides that "child" does not include a child of a marriage or union other than marriage. "Court" means a Magistrate Court, and "maintenance" means the provision of money, property and services, and includes the provision of money for or towards:

- the child's education and training to the extent of the child's ability and talents,
- the reasonable expenses incidental to the birth of the child, or
- the child's reasonable funeral expenses, where the child has died before the making of the order or dies while the order is in force.

Section 4 affords each child the right to maintenance and provides that each parent is liable to maintain his or her child who is unmarried and has not attained the age of 18 years. Section 6 provides that a single woman who is with child, or who has been delivered of a child may apply for a summons to be served on the man alleged by her to be the father of the child. Such an application may be made before or after the birth of the child. This section does not stipulate a time limit within which the application is to be made, so that an application may be made at any time before the child reaches the age of majority.

Section 9 gives the magistrate power to adjudge the defendant father of the child on hearing the evidence of the applicant and such other evidence as may be adduced by her or on her behalf, as well as evidence tendered by the defendant. If satisfied on the evidence that the case has been proved, he shall adjudge the defendant father, but if unsatisfied, he shall dismiss the application. The burden of proof is the civil standard, and the section is silent as to whether corroboration or evidence amounting to corroboration is required.

Section 13 provides specifically for defences to an application. A defendant may thus defeat claims for maintenance under the act where he is able to establish:

- that in accordance with the Status of Children Reform Act, another person has filed with the Registrar a declaration that he is the father of the child; or
- that under the Vital Statistics Registration Act, another person has signed the register as father of the child.

Section 10 provides that where the magistrate adjudges the defendant to be the father, he may proceed to order that the

11. Laws of Barbados, Cap. 216.

defendant pay a sum of money towards the maintenance of the child, the reasonable expenses incidental to the birth of the child, and funeral expenses if the child is deceased. In making an order, the magistrate shall have regard to the matters listed in Section 14, that is, the income, earning capacity, property and financial resources of the child; the financial needs of the child; the manner in which the child is being or is expected to be educated or trained; the age and state of health of each of the parties; the income, property, financial resources of the parties as well as their physical and mental capacity; the financial needs and obligations of the parties; the responsibilities of either to support any other party; the eligibility of either party to a pension, allowance or benefit under any act, rule, or superannuation fund or scheme; and any fact or circumstance which, in the opinion of the magistrate, the justice of the case requires to be taken into account. Under Section 25, the court also has power to direct an investigation into the means of the father and the mother. The act imposes no monetary limit, and what is operative are the needs of the child and the means of the father and mother.

A maintenance order under the act shall not be made where the child has attained the age of 18 years, unless this is necessary to enable the child to complete his education including vocational training or apprenticeship, or because he is mentally or physically handicapped.

In making an order, Section 16 provides *inter alia*, that the magistrate may order payment of a lump sum, periodical sums, wholly or partly secured, or order the execution of a deed or instrument to provide security for the performance of the order. Section 17 provides that the order ceases to have effect on the death of the child, the death of the father, the adoption or marriage of the child, or where the child has attained the age of 18 years. Under Section 19, maintenance orders may be discharged, suspended, varied, or revived. There is also provision for increasing or decreasing the amounts awarded if there are changed circumstances, or if material facts were withheld from the court.

Under Section 23 where the father has defaulted in payments due to his wilful refusal or culpable neglect the magistrate may extend the time for payment, or, the relevant party may apply to recover payment under the terms of the Magistrates Jurisdiction and Procedure Act. Under Section 30, provision is made for payments to be deducted from wages.

Section 20 makes provision for the legal custody of the child. In cases where the child is not in the custody of the mother, the court may order the child to be delivered to the mother, or where the

mother is not a fit and proper person to have custody, or has died or is of unsound mind, the court may appoint the father or some other person to have the legal custody of the child.

In Trinidad and Tobago, the Family Law (Guardianship of Minors, Domicile and Maintenance) Act 1981 provides for both the child born in wedlock as well as the child born out of wedlock. For out-of-wedlock children, the relevant provisions are found in Section 13 onwards.

Section 13 of the act provides for maintenance applications to be made both to the High Court as well as to the Magistrate Court, although subsequent provisions relating to affiliation proceedings specifically makes reference to the complaint being heard by a magistrate so that in practice, these proceedings may only be brought in the Magistrate's Court.

Section 13(7) provides that an application for maintenance of a minor may be made by the mother of a minor though not a single woman at the date of the birth of the minor and whether or not she is a single woman at the time of the application. No limitation period is specified within which the application is to be made, so that it may be made at any time, until the child attains his majority.

Section 22 provides for the making of paternity orders by the court, and the section applies to the father of a minor in respect of whom paternity is not presumed under Section 2 of the act. Such an application for paternity may be made before or after the birth of the minor by way of complaint to the magistrate for a summons to be served on the man alleged to be the father. Upon the hearing of the summons, the magistrate may make a paternity order if satisfied that the defendant is the father. Where a paternity order is made, the court may then proceed to make an order for maintenance. Section 23 provides that the Magistrate's Court shall not make a finding of paternity based upon the evidence of one witness only unless that evidence is corroborated by some other material evidence.

Under Sections 16 and 17 of the act, maintenance orders may be ordered to be made until the child reaches 18 years, although this may be extended until the age of 21 years, if necessary for the education or vocational or professional training of the child, or if there are other special circumstances justifying such an order. In making an order, Section 19 provides that the court is to have regard to a number of factors, namely, the income, earning capacity, property and other financial resources of the parties; the financial needs, obligations and responsibilities of the parties; the financial needs of the minor; the income, earning capacity, property or other financial resources of the minor; and any physical or mental

disability of the minor. Payments ordered to be made by the father may be periodical or in lump sum form, and the court also has power to vary or discharge the order, or to suspend, or revive any provision or order, having regard to the circumstances of each case, including any changed circumstances. Section 26 provides for the enforcement of orders by fine or imprisonment, by distress and sale of goods and chattels belonging to the defendant, or by attachment of pension or income. Earnings may also be attached under the Attachment of Earnings (Maintenance) Act 1988, as amended in 1995.

Under the provisions of the act, complaints may also be made by, and payments made to another person or institution not being the mother of the child, where such a person or institution has custody of the child. Payments may also be made to an officer of the court with power to invoke criminal penalties for nonpayment.

In Jamaica, Section 3 of the Affiliation Act provides that a complaint may be made by a single woman, within the prescribed time limit and the conditions specified under the act are similar to those contained in the Bahamas Act, discussed above. It should be borne in mind, however that Section 12 (c) imposes a duty on the mother of a child to maintain the child and Section 14 imposes penalties upon a woman who neglects to maintain her child, or who deserts her child.

Section 13 limits the duration of an order to the time when the child reaches 16 years with extension to 18 years by special application. Where the child is or will be engaged in a course of education or training, the period may be extended to 21 years.

Under the act, where the person alleged to be the father is guilty of wilful refusal or culpable neglect to make payments, he may be committed to prison under Section 18. Sections 2 and 12 of the act make provision for a guardian of the child or the Inspector of Poor to make a complaint on behalf of the child against the man alleged to be the father.

JUDICIAL CONSIDERATION

In jurisdictions where there is *status of children* legislation, an order or declaration of paternity obtained under this legislation will be sufficient evidence of paternity for purposes of affiliation or maintenance acts and it will thus not be necessary for the mother or person making the complaint to adduce any additional evidence.

As for the construction of the term "single woman", *Gaines v. W*[12] is instructive. Here W was a married woman. At all material times

12. [1968] 1 All ER 189.

she and H occupied separate bedrooms of their home. She provided him with meals and ordinary services, but had otherwise ceased to treat him as a husband. She had a relationship with X and a child was subsequently born. A few days later, H moved out of the house. W applied to have X be adjudged putative father in affiliation proceedings. The issues were whether W was to be declared a "single woman" for the purposes of the legislation, and whether she was to be a single woman at the time of the birth of the child or at the time of the application. On the facts, at the time of the birth, H was living in the house with W so strictly speaking, she was not a single woman then. However, at the time of the application, X had moved out of the house, so at this stage she was single. The court held that the woman should be single at the time when the application was made. Widgery J. stated:

> the question whether the woman ought to receive money for the support of the child must surely depend on her circumstances at the time when she seeks the order.

In *Whitton v. Garner,*[13] H and W were living in the same house but for four years W had occupied a separate bedroom and lived separate and apart from H who had no access to her. W subsequently became pregnant and gave birth to a child. She applied under the UK Affiliation Proceedings Act alleging that one, X, was the father. Because W's evidence of nonaccess by H was unchallenged, it was held that W was a "single woman" for the purposes of the legislation and X was therefore ordered to pay maintenance for the benefit of the child.

In the Trinidadian case of *Thompson v. Goodridge*[14] the issue for the court was whether the woman in question was a "single woman" for the purposes of the then Affiliation Ordinance.[15] P had been adjudged putative father of two of W's children. W had subsequently married G, but they later separated. It was held that the term "single woman" included a married woman living apart from her husband so that W was able to obtain an affiliation order against P. Wooding C.J. stated:[16]

> The cases show that the relevant date for determining whether the mother of a bastard child is a 'single woman' is the date of her application for an affiliation order. The respondent at that time was in fact living apart from her husband and had lived apart from him for a considerable period, so much so

13. [1965] 1 All ER 70.
14. (1968) 12 WIR 103.
15. Now repealed.
16. Op. cit., p. 106.

> that she knew nothing of his whereabouts assuming he were yet alive and had apparently good reason to believe that he was dead. Accordingly, we hold that she was a 'single woman' and, as such, was entitled to maintain the applications against the appellant.[17]

As for the requirement of corroboration, the woman's evidence must be supported by independent testimony showing that it was probable and not merely possible, that the defendant had fathered the child. In the Jamaican case of *Allen v. Dwyer*[18] a woman sought to have X be adjudged putative father of her out-of-wedlock child. She succeeded at first instance, but X's appeal was allowed as the woman's evidence had not been corroborated in any material particular. In *Nurse v. Clarke*[19] a woman gave birth to a child in August 1971 and in November 1971 applied for X to be adjudged putative father. There was evidence that the parties had been intimate. The relevant issue was *when*. The man admitted to sexual intercourse prior to the date of conception. This was some nine or ten months before conception would have taken place. The court held that there was a great difference between an interval of a few weeks and a lapse of nine or ten months, therefore the admission of intercourse by itself could not amount to corroboration of the woman's story.

In *Watson v. Stephens*[20] an affiliation order was made against X adjudging him to be the putative father of a child. X appealed the decision. The issue was whether or not the complainant's evidence was corroborated. The woman gave evidence that the practice of X was to visit her after 9:00 o'clock at night and that they were intimate until the time when the child was born. The woman's mother also gave evidence that X used to visit her daughter and that during the time when he visited her, no other male person visited, and that when it became obvious that the daughter was pregnant, that X ceased his visits. The court held that there was strong evidence of corroboration, and the appeal was dismissed. Carey J.A. quoted the magistrate who said:

> If . . . a middle aged man turns up night after night at the doorsteps of a woman in her late teens or early 20s . . . [and] if following upon such visits and departures the woman's girth is seen to be engorged with pregnancy and

17. The requirement that the applicant be a single woman was removed in Trinidad and Tobago in the reformed affiliation provisions now contained in the Family Law (Guardianship of Minors, Domicile and Maintenance) Act, Chap. 46:08, section 13 *et seq.*
18. (1964) 6 WIR 261.
19. (1972) 19 WIR 17.
20. (Unreported) 11 April 1988, CA, Jamaica (No. 1 of 1988).

> she points her finger at the regular nightly visitor, it would demonstrate our total lack of understanding of the way of life and behaviour of some of our citizens . . . for anyone to ask where was the opportunity and the inclination.

In *Barclay v. McKenzie*[21] X had sold a sewing machine to the woman in question on an instalment plan and visited her home each month to collect the instalment due. The woman subsequently gave birth to a child and instituted affiliation proceedings against X. The issue was whether the woman's story had been corroborated in any material particular. At the time, the woman had a six-year-old son, who gave evidence at the trial at the age of thirteen, that X visited at night and that sometimes he would stay in the mother's room until 12:00 midnight. It was held that this evidence not only showed opportunity, but that it was open to the magistrate to accept it as amounting to corroboration.

As for the standard of proof, the Guyanese case of *Jagroop v. Singh*[22] is instructive. In this case J, a single woman, instituted proceedings to have X be adjudged putative father of her child, and gave evidence of sexual intercourse having taken place between them. Both the Magistrate and the Full Court dismissed her complaint as it was held that the standard of proof was proof beyond a reasonable doubt. On appeal, the Court of Appeal held that affiliation proceedings were civil proceedings and therefore, the standard of proof was on a balance of probability. Luckhoo J.A. stated:[23]

> It seems clear to us, also, that affiliation proceedings here in Guyana, despite the outward trappings of criminal proceedings by way of procedural forms, have all the attributes of civil proceedings, and are by their nature civil proceedings. The object in instituting proceedings is to obtain support for the begotten child and not to punish immorality. A defendant is not merely a competent witness, but also a compellable one, at the instance of the complainant . . . The learned magistrate, we think with respect, fell into error, because of the outward trappings of criminal proceedings, in treating the proceedings before him as a criminal matter requiring the higher standard of proof beyond reasonable doubt.

In the Barbadian decision of *H v. B*[24] X was adjudged putative father by a magistrate on a balance of probabilities, and ordered to pay a weekly sum of maintenance for the child in question, until the child reached the age of 16. X appealed on the ground that as

21. (1978) 27 WIR 207.
22. (1979) 28 WIR 158.
23. Ibid, pp. 161–62.
24. (1977) 30 WIR 25.

affiliation proceedings were quasi-criminal proceedings, the standard was higher than a balance of probabilities and on that basis, the magistrate's decision ought to be reversed. It was held that the magistrate had applied the correct standard of proof.

Another case of interest on the subject of affiliation proceedings is the Guyanese case of *Williams v. Persaud*[25] where it was held that a woman's promise not to proceed with an affiliation action against the alleged father of her child was sufficient consideration for the execution of an agreement between them whereby the man would pay a fixed sum to her for the maintenance of the child. The man had promised to pay her $10.00 per month for the child and she agreed to discontinue affiliation proceedings, the matter being later struck out by the magistrate. The man, however, paid no money under the agreement whereupon the woman sued him for $110.00 being a sum due for 11 months. The man claimed that the agreement was illegal, void and unenforceable. The Court of Appeal of Guyana held that the agreement was enforceable and gave judgment for the woman for the sums due to her under the agreement.

25. (1968) 12 WIR 261.

Chapter 9

Rights to Family Provision and Succession to Property on the Death of a Parent

The law of succession is one that touches and concerns us all, irrespective of our socioeconomic background . . . [Q]ualifying members of a deceased's family (whether the deceased has died testate or intestate), are entitled to apply to the court for reasonable provision out of the deceased's estate. This in effect gives the court the power in the case of intestacy to vary the statutory rules of distribution and in the case of testacy, to virtually rewrite the testator's will and thus redistribute the deceased's estate in a manner which in its opinion is more in accord with equity and good conscience.
– Karen Nunez-Tesheira[1]

Introduction

The law relating to inheritance and succession to family property on the death of family members in the Commonwealth Caribbean appears to be in an unsatisfactory state in many countries.[2] In some territories like the Bahamas, the law's recourse is still to be had from old-model statutes as for example, the Dower Act,[3] and in this country property still passes "primogeniture". In some countries, recourse is still had to the UK Statute of Distribution, and even in a country such as Trinidad and Tobago which has acknowledged the need to update its legislation by enacting a new Succession Act in 1981, more than 19 years later, the act is still not in force. Countries like Barbados and Guyana have attempted to improve their laws by the enactment of fairly recent legislation, and Jamaica has also made some attempt to achieve the same.

Where a parent dies, the rights of children in this context may be determined from one of two angles, or both. Legislation in some

1. "A Case for Reform in the Law of Succession", *The Lawyer* (Trinidad and Tobago), (April 1995), 17; 45 ICLQ (July 1996), 675–84.
2. For a detailed study of this area of law, see K. Nunez-Tesheira, *Non-Contentious Probate Practice in the English Speaking Caribbean* (Kingston: Caribbean Law Publishing 1998).
3. Statute Law of the Bahamas 1987, Chap. 135.

territories has made allowances for *family provision* to be made out of the estate for qualifying children, and additionally, in relation to intestate succession, the law makes specific provision for the portion of the estate to which children are entitled. In relation to the child's right to the former, that is, *family provision*, and unless the specific legislation restricts the child's right to apply if the child is beyond the age of majority, it is generally proposed by case law that, for the purposes of family provision, *child* need not be limited to a minor child.[4] The child must, however, fall within the definition of *child* under the respective acts, usually under the age of 18 or older if pursuing an education, or if mentally or physically handicapped. In Jamaica, for example, the Inheritance (Provision for Family and Dependants) Act 1993 specifically provides in Section 2 that "child" means "a child under the age of 18 years", but a child of or over the age of 18 years may be regarded as a child for the purposes of the act if (i) such child is under the age of 23 years and pursuing academic studies or receiving trade or professional instructions; or (ii) if there are special circumstances (including physical or mental disability) which justify the disregard of the age limit. In relation to the latter, that is, intestate succession, *child* is to be interpreted broadly and means any child of the deceased, however old.

As for the definition of *family provision*, case law demonstrates that this means reasonable financial provision which, in *Re Dennis*,[5] was held to refer to the maintenance standard needed to discharge the daily living expenses of the applicant. Browne-Wilkinson J. in this case stated that:[6]

> in my judgment the word 'maintenance' connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him.[7]

An applicant's right to family provision will be further discussed under the subsequent headings and in relation to the law of the specific countries under examination.

4. *Re Callahan* [1984] 3 All ER 790.
5. [1981] 2 All ER 140.
6. Ibid, p. 145.
7. See too *Re Jennings* [1994] 1 FLR 536, where a deceased father died leaving an estate of some £300,000 and after bequeathing various legacies, left the residual estate to three charities. His son, whom he had not financially supported since the son had turned two, applied for reasonable provision, but failed, as the son was a successful businessman and financially well off.

TESTATE SUCCESSION: RIGHTS OF CHILDREN TO FAMILY PROVISION

Testate succession becomes relevant in a situation where a testator by will[8] or codicil, leaves either real or personal property to a beneficiary. There is freedom to make dispositions in favour of anyone, whether blood relative, friend or other non-blood connection. However, this freedom is subject to family inheritance provisions contained in relevant legislation of countries possessing it, which imposes certain restrictions on the right to testamentary freedom. Among other things, these restrictions are designed to protect the rights of children and especially their right to maintenance.

In Barbados, the Succession Act of 1975 seeks to ensure that children are protected and will be provided for in cases where a testator might have made little or no adequate provision for his child, although Norma Forde in her article on the act,[9] is of the view that the act seeks to protect a spouse more than it protects a child. Nevertheless, at least the child can challenge the testator's actions by applying to the court for family provision.

In the interpretation section of the Barbados Act, "child" or "issue" is defined as including an illegitimate child in respect of whom the deceased has been adjudged by a court to be the father or putative father, or that person has acknowledged himself to be the father under the Registration Act, or that person has by registered affidavit together with a declaration by the mother, admitted paternity. The act therefore applies to both the child born in-wedlock as well as the child born out-of-wedlock.

If a testator makes a will therefore, and no adequate provision is made for his child, an application may be brought on behalf of the child under Section 100 of the act. Section 100 provides *inter alia* that where a testator dies leaving a child who is a minor or a child who is, because of some mental or physical disability, incapable of maintaining himself or herself, if the court is of the opinion that the testator has failed to make proper provision for the child in accordance with his means, whether by will or otherwise, the court may order that such provision be made out of the estate as it thinks fit.

Under this section the court may order maintenance for the child by way of lump sum, or periodical payments to be terminated when

8. For the requirements as to the making of a valid will see *West v. McCarthy* (unreported) 14 May 1979 HC, T&T (No. 801 of 1977); *Moonan v. Moonan* (1963) 7 WIR 420; Alvarez v. Chandler (1962) 5 WIR 228; *Cooper v. Nurse* (unreported) 10 April 1978 HC, T&T (No. 1067 of 1972); see too K. Nunez-Tesheira, *Non-Contentious Probate Practice in the English-Speaking Caribbean.*

9. N. Forde, "Family Inheritance Provisions in the Barbados Succession Act – Redefining 'the family'", *9 Lawyer of the Americas* (1977), 115–25.

the child attains 18 years, and in the case of a child under disability, when the disability ceases, or when the child dies.

There is a time-limit specified by the section, and any application under it must be made within 12 months from the first taking out of representation of the deceased's estate.

For a child who does not fall within the definition of *child* under the act, such a child may apply for provision as a dependent if he satisfies Section 57. This section provides *inter alia* that:

> For purposes of this Part [Part VII] 'dependent' in relation to a person who dies intestate means . . . (c) an illegitimate child [other than an illegitimate child referred to in Section 2(2)(c)] who claims to be the illegitimate child of the deceased person and is (i) under the age of 18 years; or (ii) because of some mental or physical disability, incapable of maintaining himself or herself, and was wholly or mainly maintained by or was living with the deceased person at the date of his death.

It would appear therefore that such a dependent child refers to a child claiming to be an out-of-wedlock child of the testator in relation to whom paternity has not been established. Since the Section 57 definition of "dependent" does not include a reference to any other child, as for example, a child of a widowed spouse, or a child of neither of the spouses who had been treated or accepted as a member of the household by the deceased, it would seem on a strict interpretation of the legislation, that such a child would not be able to satisfy the description of "dependent" under the act, even though he might have been wholly or mainly maintained by or was living with the deceased at the date of the deceased's death. There seems to be some anomaly in the law here for while a child of either spouse is able, by virtue of Section 42[10] of the Family Law Act, to secure his right to maintenance where the parties decide to obtain a divorce, if the breadwinner suddenly dies, the same child has no right to maintenance from his estate even though the child might be a very small child and unable to rely on any other means of support.

Other relevant provisions of the act take into account the moral right of the applicant to share in the deceased's estate. If, for example, a person has been found guilty of an offence against the deceased, or the deceased's spouse, or a child of the deceased punishable by at least two years imprisonment, that person will be precluded from taking part in the deceased's estate or from making an application under Section 100. Section 102(3) refers to a "person"

10. This section deals with the court's power to make a decree *nisi* of divorce absolute providing that proper financial arrangements have been made for the children of the marriage.

being found guilty, but there is no reason to exclude a deceased's own child from falling within the definition of "person".

Section 45 makes provision for advancements to children to be taken into account. The section states that any advancement made to a child of a deceased during the deceased's lifetime shall be taken into account, unless a contrary intention is expressed by the deceased, as being made in or towards satisfaction of the share of such a child in the estate of the deceased. Advancement is defined as a gift intended to make permanent provision for a child and includes a portion or settlement of a life or lesser interest, or an advancement for the purpose of advancing a child in a profession, vocation, trade or business, a marriage portion, and payments made for the education of a child to a higher standard than that provided by the deceased for any of his other children.

Section 103 deals with the situation where a testator might have made dispositions in favour of others so as to avoid benefitting his own children, and thereby disinheriting them. In such a situation, whether the deceased dies testate or intestate, the court may order that the disposition or bequest, in whole or in part, be deemed to have no effect and the donee of such a gift shall be regarded as a debtor of the estate for such amount, and an order may be made in the interest of a child.

In Jamaica, the applicable law is found in the Inheritance (Provision for Family and Dependants) Act 1993. For the purposes of the act, child includes, under Section 2, an adopted child, a child *en ventre sa mere* at the death of the deceased, a child of the deceased's husband or wife who had been accepted as one of the family by the deceased, or a child over 18 years but under 23 years who is pursuing academic studies or receiving trade or professional instructions, or a child suffering from physical or mental disability.

Section 4 allows a child of the deceased to apply for an order on the ground that the disposition of the deceased's estate effected by his will is not such as to make reasonable financial provision for the child. Under Section 5, there is a six-month period from the date on which representation of the estate is taken out, within which to make the application. Section 6 provides for the types of orders which may be made, including orders for periodical payments, lump sum payment, acquisition, transfer or settlement of property, or an order setting up a trust fund.

In exercising its powers under Section 6, Section 7 lists various items which the court is to have regard to, including the size and nature of the net estate of the deceased; the financial resources and financial needs of the applicant whether present or future; financial resources and needs of any other applicant or any beneficiary under

the will; any obligations and responsibilities which the deceased had towards the applicant; any physical or mental disability of the applicant; the conduct of the applicant towards the deceased;[11] the relationship of the applicant to the deceased and the nature of any provision for the applicant made by the deceased during his lifetime; the manner in which the child was or is expected to be educated or trained; and where the child is not the child of the deceased, the extent to which the deceased had assumed responsibility for the child's maintenance, and the liability of any other person to maintain the child. The court may also consider any other matter which is relevant in the circumstances.

Under Section 8, where a child is in immediate need of financial assistance, the court is empowered to make an interim order. Sections 10 and 11 provide for the variation of orders, and Section 13 gives the court various powers in relation to transactions made by the deceased prior to his death which were intended to defeat applications for financial provision. The test to be applied is on a balance of probabilities, in accordance with Section 15.

In Trinidad and Tobago, testate succession is governed by the family provisions contained in the Wills and Probate Ordinance [Ch. 8 No. 2], repealed and replaced by the Matrimonial Proceedings and Property Act.[12] Under these provisions, a child is entitled to apply to the court for reasonable provision out of the deceased's estate. Under Section 89, the class of statutory dependants includes an unmarried daughter, a son or daughter under the age of 21,[13] or a disabled child who by reason of some physical or mental disability is incapable of maintaining himself or herself. Under the unproclaimed Trinidad and Tobago Succession Act 1981, others who would be allowed to apply would include a *child of the family*[14] and any person who was being maintained either wholly or partly by the deceased immediately before his death.

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11. See *Williams v. Johns* [1988] 2 FLR 475 where the child's conduct had caused much distress to the deceased so that the application proved unsuccessful. Here the deceased and her husband had adopted the applicant who was then six weeks old. The applicant had become a juvenile delinquent and was also delinquent as an adult, which caused the deceased severe emotional distress and suffering. The deceased had therefore made no provision for the applicant in her will and stated that she had received no affection from the applicant and felt that she had no moral duty towards her. The applicant's claim for financial provision was therefore dismissed. Micklem J. gave the reasons for so doing thus: "She has quite clearly, in the past, caused shame and distress to her mother, and this is a matter which the court is entitled to take into account . . . it seems to me that it was not unreasonable for Mrs Johns to make the will which she did, and it was not unreasonable that the provision made by her disposition left nothing to the applicant."
12. No. 2 of 1972, Second Schedule.
13. See Section 4 of the Age of Majority Act, Chap. 46:06.
14. Who need not be a child of the deceased. See chapter 7, *supra*, for a definition of this concept.

Under Section 90, the court may make a periodical payments order or a lump sum order. In making an order, the court is to have regard to the nature of the property representing the deceased's estate; the interests of the deceased's dependants and other persons entitled to the deceased's property; any past, present or future capital or income of the dependant; the conduct of the dependant in relation to the deceased; the deceased's reason for making the disposition made in his will, or his reasons for refraining or not making any provision for the dependant; and to any other relevant matter, including any statement in writing made by the deceased.

Section 91 provides for a time limit of six months within which the application is to be made, being six months from the date on which representation of the estate is taken out. Section 93 provides for variation of orders and for the making of interim orders.

There is anti-avoidance legislation in Trinidad and Tobago, but this applies only to a former spouse who has not remarried.[15] The 1981 Succession Act, when proclaimed, will give effect to provisions therein which expand the present anti-avoidance law.

Section 94 onwards of the unproclaimed Succession Act 1981 expands the description of child dependents so that in the future, if and when the act is proclaimed, a wider group of children will be allowed to benefit.[16]

In Guyana, the Family and Dependent Provisions Act 1990 allows a child to apply to the court for reasonable provision out of the estate of the deceased. The class of statutory dependents includes a child of the deceased whether born in or out of wedlock, an adopted child, a child of the family being a child who was not a child of the deceased but who was treated[17] by the deceased as a child of the family in relation to any marriage to which the deceased was a party, or any person who immediately before[18] the death of the deceased was maintained either wholly or partly by the deceased. According to the act, a person is to be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.[19]

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15. See Section 44 of the Matrimonial Proceedings and Property Act.
16. See K. Nunez-Tesheira, "A Case for Reform in the Law of Succession", 675–84, for inadequacies in the current law.
17. See *Re Leach* [1985] 2 All ER 754 and *Re Callaghan* [1984] 3 All ER 790.
18. In *Jelley v. Illiffe* [1981] 2 All ER 29 it was held that "immediately before the death of the deceased" did not refer to the de facto situation at death but to the general arrangements for maintenance which had existed during the deceased's lifetime.
19. For a dependent to qualify for financial provision, there must have been an assumption of responsibility for the dependent on the part of the deceased. In *Jelley v. Illiffe* where the deceased had cooked and washed for the applicant as well as provided rent-free

Under Section 3 of the act, a child may apply to the court for an order under Section 4 on the ground that:

> the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.[20]

Financial provision under the section means "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance". Section 4 empowers the court to make any of a number of orders, namely, periodical payments, lump sum payment, transfer of property and settlement or variation of ante-nuptial or post-nuptial settlements. Section 7 provides for the making of interim orders where an applicant is in immediate need of financial assistance and Section 8 enables the court to vary or discharge any orders made under Section 4.

In determining whether or not to exercise its powers under the act, Section 5 lists a number of factors which the court is to have regard to, being:

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
(b) the financial resources and financial needs which any other applicant for an order under Section 4 has or is likely to have in the foreseeable future;
(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
(d) any obligations and responsibilities which the deceased had towards any applicant for an order under Section 4 or towards any beneficiary of the estate of the deceased;
(e) the size and nature of the net estate of the deceased;
(f) any physical or mental disability of any applicant for an order under Section 4 or any beneficiary of the estate of the deceased;
(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

It is further provided in Section 5(3) that the court is to have regard to the manner in which the applicant was being or in which he might expect to be educated or trained and where the child is not a child of the deceased but was treated by the deceased as a child of the family, the court is to have regard to:

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accommodation, this was held to be enough. In *Re Beaumont* [1980] 1 All ER 266 it was held that the deceased must not have received consideration as this would have been a contractual arrangement and would not amount to an assumption of responsibility.

20. Section 3(2).

(a) whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;
(b) whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;
(c) the liability of any other party to maintain the applicant.

Applications under Section 4 are to be made within the period of one year from the date on which representation with respect to the estate of the deceased is first taken out. Applications after this period can only be made with the permission of the court.[21]

The legislation includes anti-avoidance provision which allows the court to review the deceased's *inter vivos* dealings with his property which were intended to defeat applications for reasonable provision. The court has various powers, including the power to order a donee of property disposed, to transfer that property to the applicant or to provide such sums in lieu thereof. The property subject to such an order includes property held on a joint tenancy or joint account, as well as credit union shares. The anti-avoidance provision is found in Section 12 of the act and provides *inter alia* that where the court is satisfied:

(a) that, less than five years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this act made a disposition; and
(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as the 'donee') or by any other person; and
(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this act . . . then . . . the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.

OUT-OF-WEDLOCK AND ADOPTED CHILDREN

The law on family provision on the death of a parent has in recent times been expanded in many Commonwealth Caribbean countries. Previously, family provision excluded out-of-wedlock children unless specifically provided for. According to the common law rule of construction, "child", "issue" or "dependent" meant legitimate children and out-of-wedlock children were excluded from participating.[22]

21. See Section 6.
22. See for example, *Re Makein* [1955] 1 All ER 57; see too chapters 1 and 4, *supra*.

A classic example is found in the facts of *Re McConney,*[23] a Barbadian decision. In this case the testator by will left certain property to be divided between all of his grandchildren. One of his daughters had seven out-of-wedlock children. It was held that these children could not take under the will and only legitimate grandchildren were allowed to share.[24]

However, since the abolition of the legal discrimination between legitimate and illegitimate children as well as express abolition of this old rule of construction by *status of children* legislation, all children whether born in or out of wedlock are included in the definition of "child", "issue" or "dependent", providing of course that paternity has been established. Thus in cases like *Re Quashie*[25] and *Johnson v. Salim,*[26] children born out of wedlock were able to share in the estates in question. In the 1998 Trinidadian decision of *King and King v. Lezama*[27] the court also looked at the position of an out-of-wedlock daughter who brought an action against the husband of her deceased mother and ruled that she was entitled to share in her deceased mother's estate.[28]

As far as adopted children are concerned, various pieces of legislation in the region provide that the effect of adoption is to make the adopted child, in law, the child of the adopted parents, therefore adopted children have an equal right to apply for financial provision in the same vein as biological children and will be dependents for purposes of succession.[29] In Trinidad and Tobago, for example, Section 15 of the Adoption of Children Act provides that the adopted child becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted child. Conversely, the section also provides that the adopted child ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child.

The Barbados Succession Act 1975 in its interpretation section defines "child" or "issue" as including a child in respect of whom an adoption order has been made.

Section 2 of the Jamaica Inheritance (Provision for Family and Dependants) Act 1993 defines child as including a child adopted in

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23. (1976) 27 WIR 52.
24. See too *Rosaline v. Singh* (1974) 22 WIR 104.
25. (Unreported) 31 July 1991, HC, T&T (No. 2237 of 1990), discussed *infra.*
26. (Unreported) 11 June 1993, SC, Grenada (No. 118 of 1992), discussed *infra.*
27. Discussed in chapter 3, *supra.*
28. See too *Ranghell & Ors. v. McIntosh* (unreported) HC, T&T (No. 224 of 1977); *Re Boland* (unreported) HC, T&T (No. 1331 of 1977).
29. See chapter 3, *supra.*

pursuance of an adoption order, whether in Jamaica or in a country other than Jamaica.

INTESTATE SUCCESSION

This becomes relevant when a testator has not made a will, or where he has made a will disposing of some of his property but not the whole of it so that part of it still remains to be administered, or where he has made a will which is declared to be invalid. The view has been expressed that the application of rules of intestacy by the court in effect amounts to either a writing of a will for the deceased by the court, or a re-writing of such. In the old case of *Cooper v. Cooper,*[30] Lord Cairns observed that the provisions of intestate succession ought to be viewed "as in substance no more than a will made by the legislature for the intestate".

The old approach of the law was that with respect to freehold estates, the person who fitted the description of the *heir at law* inherited the freehold.[31]

With respect to *personality* or the personal estate of the deceased, this was distributed according to the provisions of the UK Statute of Distribution which most of the Commonwealth Caribbean inherited.[32]

In Trinidad and Tobago the UK Statute of Distribution 1670 which governs the rules of distribution of the personal estate of an intestate is still partly applicable to Trinidad and Tobago and governs both the distribution of real and personal estates of the intestate.[33] This is provided for in Section 23 of the Administration of Estate Ordinance,[34] which provides that:

> Subject to the provisions of this ordinance where any person shall die intestate or partially intestate domiciled in Trinidad and Tobago or entitled to real estate in Trinidad and Tobago where ever domiciled, the undisposed of residuary estate of such person whether real or personal in its nature, shall be distributed among the same persons being next of kin within the meaning of section 3 in the same manner and in the proportions as the personal estate of such person dying domiciled in England and intestate would be distributed by the law of England.

30. [1874] LR 7 HL, 53 at 66.
31. See, for example, the Bahamas Inheritance Act, Statute Law of the Bahamas 1987, Chap. 99.
32. See, for example, the Bahamas Statute of Distribution Act, Statute Law of the Bahamas 1987, Chap. 97.
33. See K. Nunez-Tesheira, "The Case for Reform in the Law of Succession". This article is especially good on the issue of the right of parents to participate in the property of a deceased child.
34. Chap. 8, No. 1.

Section 24 of the ordinance then goes on to provide that the widow or surviving husband of an intestate shall be beneficially entitled as follows: if there is no lawful issue of the deceased, the whole estate, and, if there is lawful issue, to one third. Children therefore would be entitled to two thirds of the estate to be divided between them, and if there is only one child, that child would be entitled to the full two third portion. This in effect, is the provision of section 3 of the Statute of Distribution. In the recent decision of *King and King v. Lezama*[35] Bharath J. confirmed this as currently representing the law in Trinidad and Tobago.

The Second Schedule of the Matrimonial Proceedings and Property Act 1972 is also relevant in a situation where the deceased dies intestate, and the court has power to vary the statutory rules of distribution where a dependent applies for reasonable provision out of the estate. The unproclaimed Succession Act would alter the present rules of distribution to make a surviving spouse entitled to one-half of the estate and the other half to the child, if there is only one child. If there is more than one child, the spouse would be entitled to one-third and the children two-thirds in equal shares.

In Barbados, the Succession Act contains provisions relating to intestate succession. Of significance is section 49 which provides for the distribution of shares in the estate. These shares are as follows:-

- If there is a surviving spouse and no issue or next of kin, the spouse takes the whole estate.
- If there is a spouse and next of kin but no issue, the spouse is to take two-thirds and one-third is to be divided between the next of kin in equal shares.
- If there is a spouse and one child, the spouse takes two thirds and the child one-third. If there is a spouse and children, the spouse takes one-third and the children take two-thirds, in equal shares.
- If an intestate had a child who predeceased him but that child had issue, the child's issue will take in place of the child.
- If an intestate dies leaving no spouse and no issue, then the intestate's mother and father will take, or the survivor of them will take the whole estate.

It should be remembered that the Barbados Status of Children Reform Act 1979 has abolished the old rule of construction so that the child born out of wedlock is entitled to share equally with the child born in wedlock.

35. (Unreported) 16 June 1998, HC, T&T (No. CV998 of 1997).

In Guyana the rules for intestate succession are found in the Civil Law of Guyana Act.[36] Section 5 sets out the relevant rules thus:

> (1) There shall be for the whole of Guyana only one law of succession to the estate of every person, male or female, married or single, dying intestate after the date of this Act, that is to say, after all debts, funeral expenses, and just expenses of every sort have been first allowed and deducted, namely –
>
> (a) if there are descendents, one-third part of the surplusage shall be allotted to the widow or widower and all the residue by equal portions to the children of the intestate, their descendants taking *per stirpes*, in case any or all of those children are then dead:
>
> Provided that if any child shall have any estate by a settlement of the intestate, or shall be advanced by the intestate in his life-time, that child shall bring the estate or amount advanced into hotchpot or so much of it as shall make the estate of all the children to be equal or so near as can be estimated; . . .
>
> (c) if there is no widow or widower, the whole estate shall be divided equally among the children, the grandchildren of any deceased child or children taking *per stirpes*.

Subsection (2) further provides that the rules of succession to both immovable and movable property shall be the same and that no distinction is to be made between movable and immovable property for the purposes of distribution.

It should be noted that the Civil Law Act of Guyana was amended in 1983 by the Children Born Out of Wedlock (Removal of Discrimination) Act[37] to create Subsection (7) of Section 5 which has made the legal position of children born out of wedlock equal to that of children born in wedlock for purposes of succession. The new Subsection (7) thus provides that in determining relationships for the purposes of Section 5, no regard is to be had to whether a person is born in or out of wedlock and a person born out of wedlock is entitled to the same rights under the section as a person born in wedlock.

In Jamaica where a parent dies intestate Section 4 of the Inheritance (Provision for Family and Dependents) Act 1993 allows a child to apply to the court on the ground that the law relating to intestacy is not such as to make reasonable financial provision for him. The greater part of the law on intestacy however is to be found in the provisions of the Intestates' Estates and Property Charges (Amendment) Act 1988.[38] The relevant section which affects the

36. Laws of Guyana, Cap. 6:01.
37. No. 12 of 1983.
38. No. 3 of 1988.

rights of children on the intestacy of a parent is the same section which affects the rights of the spouse, namely, Section 3 of the Act which sets out the "table of Distribution". It is thus provided:

> The surviving spouse of the intestate shall take –
> (a) The personal chattels absolutely;
> (b) ten thousand dollars or a sum equal to ten percent of the net value of the estate (excluding personal chattels), whichever is greater, free of death duties and costs;
> (c) interest at the rate of ten percent per annum . . . until the sum is paid or appropriated; and
> (d) the whole or a proportion of the residue of the residuary . . . apportioned on the following principles –
> (i) if there is no child or other issue and no parent surviving the intestate the whole of the residue aforesaid, absolutely;
> (ii) subject to subsection (5) –
> (A) if there is only one child of the intestate, two-thirds of such residue, absolutely;
> (B) if there is more than one child of the intestate, one half of such residue, absolutely;
> (iii) if there is no child or other issue surviving the intestate but a surviving parent or parents, as the case may be, two-thirds of such residue, absolutely.

Subsection 5 further provides that:

> Where a child of an intestate predeceases the intestate and is survived by issue who survives the intestate the issue shall take the share to which that child would have been entitled, so, however, that the apportionment of the estate between the spouse and issue shall be on such basis as would apply if the child of the intestate had survived the intestate.

It is to be noted that the Jamaica Status of Children Act enables the child born out of wedlock to share equally with the child born in wedlock except in relation to entailed interests in respect of which the old rule of construction continues to apply.[39]

Some significant decisions affecting the rights of the child born out wedlock have been given in cases like *Re Quashie*[40] and *Johnson v. Salim.*[41]

In the former case E, born in St. Vincent, died intestate in Trinidad and two children who had been born to him and a woman he had been living with in a common law union in Trinidad, applied for and had been granted letters of administration for his estate. Q

39. See Section 3(4) of the Jamaica Status of Children Act.
40. (Unreported) 31 July 1991, HC, T&T (No. 2237 of 1990).
41. (Unreported) 11 June 1993, SC, Grenada (No. 118 of 1992).

subsequently applied to the court for a declaration under the Status of Children Act that the relationship of father and child existed between the deceased and himself. The point of applying for this declaration was that if it was granted, then Q would be entitled to share in the deceased's estate. The court looked at the evidence in the form of affidavits from Q, from Q's mother, and from a number of other persons, to the effect that the deceased had represented Q to everyone as his son, that he had sent money for Q's maintenance when Q lived in St. Vincent with his mother, and that on coming to Trinidad, Q had lived for some time with the deceased and his common law wife. There was also evidence that Q had often assisted the deceased in his business of rearing pigs. The court, based on this evidence, made the declaration in favour of Q.

In *Johnson v. Salim* the deceased had died intestate and the plaintiff applied for a declaration that she was the daughter of the deceased, and that by virtue of the Status of Children Act 1991 and the Intestates Estates Ordinance, she was entitled to the entire un-administered estate of the deceased. In alleging that she was the daughter of the deceased, various items of evidence were led to support her claim. Her mother lived in Grenada and her deceased father had lived in Trinidad. There was evidence that as a child, the deceased had always visited Grenada and brought her presents whenever he did. Witnesses gave affidavit evidence that the deceased and the plaintiff visited each other often and that the deceased referred to the plaintiff as his daughter. The deceased had also executed an affidavit declaring himself to be her father, but that affidavit had not been registered and was therefore of no effect. Nevertheless the court held that the deceased had by his conduct "implicitly and consistently acknowledged" that he was the plaintiff's father and the court therefore declared her his daughter. The court thus held that she was entitled to his estate on intestacy.

SUBJECTIVE OR OBJECTIVE TEST

There are two conflicting approaches in the determination of what is in fact reasonable provision. Is the test a subjective or objective one, or a combination of both? While case law may be said to have created some degree of confusion in this regard, provision found in fairly recent statutes adopts the objective approach. On the subjective test, reasonableness is viewed from the testator's point of view.[42] In *Chamroo v. Rookmin and Satnarine*[43] the testator by will left his property

42. See *Re Howell* [1953] 1 All ER 604; *Radaram v. Seusahai* [1967] XIX (2) *Trinidad Law Reports* 285.
43. (Unreported), October 1968, CA, T&T (Civil Appeal No. 790 of 1967).

to his out-of-wedlock children thereby excluding his wife. The wife applied to the court for provision from the estate. The court had to determine whether the testator acted reasonably in making the disposition which he did. The court found that he had a moral obligation to provide for his wife as well as for his children. However, on the facts of the case, the court held that it would not interfere with the disposition. On the facts, the testator and his wife had separated, and in a deed of separation it was agreed that the wife would maintain and support herself at her own cost and that the husband, being the testator, would not be obligated to maintain her. The court therefore held that the testator's exclusion of the wife in the will was reasonable and that the children should be entitled to the disposition in question.

The testator's reasons for making or not making adequate provision for an applicant were considered in one case in relation to whether or not the validity of one of two wills alleged to have been made by the testator should be upheld. In *Manwarren v. Thomas*[44] the court had to determine the issue of which of two competing wills should be admitted to probate. The first will favoured the testator's mistress and their children, who had cared for the testator until the time of his illness when he was admitted to hospital, and in which will he made the following provision for his widow:

> To . . . my lawful wife I hereby give devise and bequeath the sum of TEN DOLLARS only for her sole use and benefit absolutely because she has been estranged from me for the past nineteen years and has lived and still lives separate and apart from me.[45]

The second will was more beneficial to his widow and favoured the defendant with whom he was not particularly close. The court rejected the second will and admitted the first to probate. McMillan J. stated:[46]

> I have come to the conclusion that the testator was taken to Cedros by the defendant to remove him from the companionship of his children and the woman with whom he had lived on good terms for a number of years and for the purpose of influencing him into making a will; that while at his mother's home he was physically in poor state of health and completely dependent on the defendant and other members of his family including his mother; that having kept the plaintiff and her children away from him, the testator then was likely to have the feeling that he was abandoned by them; and that he was, while in the physical condition he was in, easily but unduly influenced by the defendant, his mother and brother into making the second will in the

44. (Unreported) 23 January 1978, HC, T&T (No. 490 of 1971).
45. Ibid, p. 2 of judgment.
46. Ibid, pp. 15–16 of judgment.

> terms in which it is couched thus completely cutting off his son Peter, and almost completely cutting off the plaintiff and her two daughters by him. I find, too, that he was physically carried to Samuel's home by the defendant and his brother Norbert for the purpose and that he would not, of his own free will, either have been as generous to his widow whom he had literally disinherited by the first will because of their estrangement, or given anything to the defendant merely because of their relationship.
>
> In the circumstances, I reject the second will on the ground that it was obtained as a result of the undue influence of the defendant, find for the plaintiff in respect of the first will . . . and decree it to be admitted to probate.

On the objective test, the court looks at the reasonableness of the actual disposition and takes into account facts and circumstances known to the court at the date of hearing. In *Re Goodwin*[47] the testator left various lands and buildings to his children from a previous marriage, and left his residuary estate to his wife. The residuary estate, after the payment of estate duty, was much less than anticipated by the testator, and the wife applied for reasonable provision to be made for her by the court. The court held that the test of reasonableness was an objective one having regard to the situation at the time of the testator's death as well as to subsequent events. The court ordered periodical payments to be made to the wife out of the net estate, which would have meant a reduced share for the children. Megarry J. in this case stated that:[48]

> The question is simply whether the will or disposition has made reasonable provision, and not whether it was unreasonable on the part of the deceased to have made no provision or no larger provision for the dependent. A testator may have acted entirely reasonably . . . yet through . . . some change of circumstances, unknown to the testator in his lifetime, the provision in fact made may prove to be wholly unreasonable.

In *Millward v. Shenton*[49] the testatrix made a will in which she left all her property to charity, her reason being that her children were self-supporting. She was survived by six children, and one of them, X, was an invalid who was incapable of maintaining himself and was living entirely on state assistance. X applied to the court for reasonable provision out of the estate. The court at first instance ruled against him and held that it was reasonable for the testatrix not to make any financial provision for the applicant. The Court of Appeal allowed his appeal and held that the true test was whether the will or disposition had made reasonable provision for the

47. [1969] 1 Ch. 283.
48. Ibid, p. 287.
49. [1972] 2 All ER 1025.

maintenance of the applicant and not whether the testatrix was acting reasonably.

The 1965 Trinidadian decision of *Lewis v. Baker*[50] may be said to have adopted the objective approach. Here the deceased died testate in 1961 and left a net estate of some $14,114.00. In his will the testator bequeathed $25.00 to his wife and stated that she had caused him much unhappiness during the 15 years of their marriage and that she had deserted him in 1955. He devised leasehold property to an aunt, and bequeathed the remainder of his property in equal shares to his mother, the aunt, his three children of the marriage and a woman friend. His widow applied for an order that reasonable provision be made for her maintenance out of the testator's estate. The court dismissed her application, finding that the testator was under no moral duty to provide for the widow, and that before making an order, the court should take all relevant factors into account and must be satisfied that it was unreasonable for the testator to make no real provision for his wife. According to Wooding C.J., while the court had the power to interfere with the testator's dispositions, it could only do so if it found his dispositions unwarranted. He cited *Re Styler*[51] in which Morton J. stated that before the court could intervene, "the court has to find that it was unreasonable on the part of the testator to make no provision for the person in question or that it was unreasonable not to make a larger provision."

Wooding C.J. then seems to have imposed an objective test of reasonableness by insisting that the court look at all the facts and circumstances of the case. He stated:[52]

> What is reasonable is of course relative and must depend on the circumstances. Accordingly, before I can find for the wife, I must be satisfied that, taking all relevant factors into account, the testator acted unreasonably in not making larger provision for her than he did. Perhaps, I ought more properly to say that what it is necessary for me to find is that it was unreasonable for him to make no real provision for her . . . In considering whether the testator was unreasonable in making no provision for the wife, I am enjoined . . . to have regard to the reasons so far as they are ascertainable, which caused him to act as he did. He stated them himself in the will. In it he declared that she had caused him much unhappiness during the 15 years of their marriage and that she had deserted him in the year 1955. I must ascertain whether or to what extent this is true. Only then can I determine what weight I should attach to the reasons he gave.

50. (1966) 10 WIR 122; see too *Piggott v. Royal Bank Trust Co.* (unreported) 25 March 1985, HC, T&T (No. 1375 of 1983).
51. [1942] Ch. 387 at 389; see too *Thompson v. Roach & Anor* (1968) 13 WIR 297.
52. Op. cit., p. 124.

The Guyana Act has adopted the objective approach as it provides in Section 5(5) that the court is to take into account the relevant facts as are known to the court at the date of the hearing. The unproclaimed Trinidad and Tobago Succession Act 1981 also adopts the objective test in Section 97(5) which provides that:

> In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.

BONA VACANTIA

Where the deceased leaves behind no relatives, his property goes to the State as *bona vacantia*. However, the State may distribute his property to persons having a "moral" claim to it. A person may have a "moral" claim, for example, where he or she looked after the deceased prior to his death, or might have assisted or cared for the deceased in a variety of ways.

In Barbados, the Succession Act provides in Section 55 that in default of any person taking the estate of an intestate, the residuary estate of the intestate shall vest in the Crown as *bona vacantia*. The minister responsible for legal affairs may, if he thinks fit, waive in whole or in part and in favour of such person such terms as he thinks proper having regard to the circumstances of the case.

In Jamaica, Item 5 of Section 3 of the Intestates' Estates and Property Charges (Amendment) Act 1988[53] provides that if the intestate leaves no surviving spouse, issue, parents or other eligible relatives; or if for any reason there is a default of any person taking an absolute interest under the distribution table, then the residuary estate of the intestate will devolve on the State as *bona vacantia*. The State is then enabled by the legislation to provide for dependants of the intestate, whether kindred or not, and/or to provide for other persons for whom the intestate might reasonably have been expected to make provision out of the whole or part of the property devolving on the State.

The Guyanese provisions relating to *bona vacantia* are expansive and are to be found in Section 5(6) of the Civil Law of Guyana Act. The details are as follows:

> (a) In the absence of all blood relations . . . and in the absence of a surviving wife or husband of a deceased person, his residuary estate shall belong to the State as *bona vacantia* . . .

53. No. 3 of 1988.

(b) the President may, at any time, out of the whole or any part of the property devolving on the State as aforesaid, provide for –
  (i) dependants, whether kindred or not, of the intestate;
  (ii) persons other than dependants for whom the intestate might reasonably have been expected to make provision; and
  (iii) other persons who would have succeeded to the estate of the deceased but for their own, or their ancestors', or the deceased's illegitimacy.

(c) The personal representative of a deceased person may, before transferring any property to the state as *bona vacantia*, publish a notice in the *Gazette* and in a daily newspaper circulating in the district or county in which the deceased ordinarily resided, calling on all persons desiring to claim any of the property to lodge their claim with the personal representative within three months from the date of the publication of the notice in the *Gazette*.

(d) The personal representative of a deceased may, before transferring any property to the State as *bona vacantia*, apply to the court for the opinion, advice or direction of the court on any question respecting the ascertainment of any claim to any property of the deceased or the transfer of such property to the state.

Chapter 10

Custody of Children

Courts do not operate on any rights of either parents to custody, but on the right of the child or children to be placed in an environment most conducive to their welfare. The court ought to make an order in the best interest of the children involved. In other words, this court must consider what is best for the benefit of the child and not the benefit of the parents. I intend to bear this in mind as a golden thread which runs through the case.
– Basdeo Persad-Maharaj[1]

Introduction

In the Commonwealth Caribbean, the issue of custody has been extensively dealt with by the courts, and local case law on the subject abounds. However, before describing how custody disputes are settled by the courts, for a full appreciation of the subject it is worthwhile to commence with the historical setting in which the issue emerged.

At common law, the father was in law superior to the mother and was therefore entitled to the legal custody of his legitimate children.[2] His rights were protected by the courts as against the mother, but in the normal course of events, the mother became entitled to custody if the father predeceased her. To add some measure of balance to this rule, equity took a qualified approach and sought to ameliorate the position of the mother in a limited way so that by the end of the nineteenth century, equity gave effect to the father's right to custody on the proviso that the welfare of the child required this to be so. If for example, the father's right to custody involved some threat of

1. *Gopee v. Gopee* (unreported) 2 March 1993, HC, T&T (No. 19 of 1991).
2. This right to custody included, among other things, the right of the father to decide the religion in which his child was to be brought up, which interestingly enough, was held in *Hawksworth v. Hawksworth* (1871) LR 6 Ch. 539 to continue even after the death of the father. See, however, *Re Collins* [1950] Ch. 498.

moral or physical damage and injury to the child, or if the father had abandoned the child or had by his actions abdicated or given up his right to legal custody, then equity deprived him of this right and allowed the mother to have custody.

Lystra Kodilinye writes thus:

> At common law, the father of a child born in wedlock was absolutely entitled to its custody, as well against its mother as against a foster-parent or a stranger. The contest was one of legal right; accordingly, the proper procedure was by way of writ of *habeas corpus*. Equity, however, took a fundamentally different and essentially humane view. Equity was not so much concerned with the rights of the parties seeking to obtain or retain custody as with the welfare of the child itself. Its jurisdiction was a paternal one; a judicially administrative jurisdiction by which the Court of Chancery acted as *parens patriae* of an infant and thus superseded the natural guardianship of the parent. In most West Indian jurisdictions the common law position has been abrogated.[3]

Much of the background to the subject is of historical interest only, in light of parliament's intervention over the years, to accord the mother positive rights to custody. Nevertheless, its history is useful in terms of showing up the gender-biased approach towards disputes between the parties involved.

The Infants' Acts which had been enacted in the Commonwealth Caribbean are based on the UK Guardianship of Infants Acts 1886 and 1925 as amended, and later consolidated in the UK Guardianship of Minors Act 1971. The UK Guardianship Act 1973 had the effect of providing equality of custodial rights to both mother and father of a legitimate child and provided that in relation to the custody of a child, the mother should have the same rights and authority as the father. Then came the 1975 UK Children Act, and in 1989, another UK Children Act was passed with the aim of promoting and safeguarding the welfare of the child. Much of the legislation in the Commonwealth Caribbean region is based on the older English models.

As for the child born out of wedlock, the original common law position was that neither the mother nor the father had a claim to custody. Then following the decision of *Barnardo v. McHugh*[4] the principle emerged that the mother *prima facie* had the exclusive claim to custody of an out-of-wedlock child. The father, however, could obtain custody if the mother was found to be unfit. As will be seen

3. Lystra Kodilinye, "The Judicial Approach to Child Custody Issues in the Commonwealth Caribbean", *Commonwealth Caribbean Legal Studies* (Butterworths 1992), 219 at 220.
4. [1891] AC 388.

later on in the chapter, the old approach of the common law has to a large extent been altered by legislation.

MEANING OF CUSTODY

The word may be used and understood in two different senses. The broader sense refers to the rights and duties of the parent or guardian in relation to the child, or the whole bundle of rights and powers over children vested in these persons and terminating at the age of majority; the narrower sense refers to the actual possession of the child's person or the power of the parent or guardian to exercise physical care and control of the child which terminates at an earlier age, being the age of discretion, and is sometimes referred to by the courts as "care and control" or "possession". This narrower sense is merely one of the powers derived from custody in the broader sense.

Kodilinye explains the meaning of custody thus:

> Having the right to look after a child involves more than providing a home. It involves the rights and duties associated with bringing up the child at the present and in the future. These rights are collectively known as the rights of custody. The term 'custody', however, is an ambiguous one. It may mean that a child is under the physical control of an adult, or it may have a wider meaning in law. In *Hewer v. Bryant*[5] Sachs L.J. explained that in its wide meaning custody was almost the equivalent of 'guardianship', which embraced a 'bundle of powers', such as the power to control the child's education, his religious upbringing and the management of his property, until the child attained his majority or, in the case of a female child, until marriage. Further powers included the right to veto the issue of a passport to the child and the right to withhold consent to marriage. 'Custody' in this wide sense embraced both the power of physical control over the child and the right to apply to the courts to exercise the powers of the Crown as *parens patriae*. Sachs L.J. concluded by observing that, 'somewhat confusingly, one of the powers conferred by custody in its wide meaning is custody in its limited meaning, namely such personal power of physical control as a parent or guardian may have'.[6]

The UK Children Act 1975 sought to clarify the use of the word custody and distinguished between legal custody and actual custody. The Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act also adopts this clarification and distinction. Section 2 of the Trinidad and Tobago Act provides, *inter alia*, that:

> 'actual custody' in relation to a minor, means the actual possession of his person, whether or not that possession is shared with one or more persons;

5. [1970] 1 QB 357, 373.
6. L. Kodilinye, op. cit., 223.

> 'custody' means the right to possession and care of a minor;
> 'legal custody' means, as respects a minor, so much of the parental rights and duties as relate to the person of the minor (including the place and manner in which his time is spent).

The 1997 Divorce Act of Antigua and Barbuda defines custody in Section 2 of the act, but again, Parliament has not provided an expansive definition of the term. Section 2 merely provides that: "'custody' includes care, upbringing and any other incident of custody."

ENTITLEMENT TO CUSTODY

For children born in wedlock, the parents, or guardian formally appointed are/is legally entitled to custody, unless there is a court order depriving a party of this right. In Barbados, both parents are entitled in respect of children of a marriage or union other than marriage. For other out-of-wedlock children, the mother or a guardian formally appointed is entitled to custody. It must also be remembered that case law has established that in territories which have abolished the distinction between legitimate and illegitimate children through the implementation of *status of children* legislation, once paternity is proved under the provisions of the respective legislation, both parents have an equal right to custody. In some countries, legislation has also given effect to this right. Section 6(2) of the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act for example, provides *inter alia*, that the mother of a minor born out of wedlock shall be the sole guardian of the minor unless and until the paternity of the minor has been registered pursuant to the Births and Deaths Registration Act or established by any of the modes specified in Section 8 or 10 of the Status of Children Act.

In Guyana, the Children Born out of Wedlock (Removal of Discrimination) Act 1983 has amended the Infancy Act[7] to include a new Section 1A which redefines "infant" as "any person who is a minor, whether born in wedlock or out of wedlock". A new Section 10A was also enacted to provide that, "Both the father and the mother of an infant shall be the guardians, and shall be entitled to the custody, of the infant."

Further, Section 15 of the Guyana Infancy Act had been substituted with reformed provisions enabling the court to deal with custody issues in cases where the parents were living apart. This is a

7. Laws of Guyana, Cap. 46:01.

particularly useful provision which might easily come into play in relation to out-of-wedlock children who in most cases live with the mother and not the father. The section provides that:

> Where the parents are living apart the court may, upon the application of a parent with whom the infant is not residing, make any order it thinks fit regarding the custody of the infant and the right of access to the infant of either parent, having regard to the welfare of the infant and the conduct of the parents, and to the wishes as well of the father as of the mother, and may alter, vary or discharge the order on the application of either parent or, after the death of either parent, any guardian under this act.

RIGHTS FLOWING FROM CUSTODY

(a) The person in whose favour an order for custody is made has the right of physical control over the child. This ends at the age of discretion. It is worth noting however that control may be separated from general custody and delegated to others, as for example, in cases where a child is sent to boarding school, or where a child is allowed to spend a night at his friend's house under the supervision of that friend's parents.

(b) The person having custody has the right to discipline the child, including the administration of reasonable corporal punishment.

(c) The person who has custody of the child has the right to control the education of the child[8] including the religious education of the child. While the welfare principle remains dominant, the wishes of the parent and the existing pattern of education usually have a strong influence. In *May v. May,*[9] H and W had two infant sons. W went to live with Mr X, and a judge granted joint custody to H and W with care and control to H. W appealed. Her appeal was dismissed. The court held that it was in the children's best interests to be in the care and control of their father. The court looked at the fact that from an educational point of view, the father was able to stimulate the children, and also in the area of discipline, the father was more suitable than the mother.

(d) The person having custody also has the right to protect the child, and may thus legally defend the child against attacks directed at the child by others. The person having legal custody may additionally invoke the civil law to institute proceedings against any one injuring the child, whether through negligence or otherwise.

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8. See *Hall v. Hall* 26 ER 1213.
9. [1986] 1 FLR 325.

(e) The person having custody also has the right to make medical decisions affecting the child, subject to veto by the courts in appropriate cases, and subject also to the right of the *Gillick competent*[10] child to make decisions for himself.

REMEDIES FOR ENFORCING OR CLAIMING CUSTODY

(a) *Habeas corpus* is available and employed generally against third parties for the restoration of the child's person.[11] It appears however that this remedy is not available where the child has reached the age of discretion and consents to his absence or voluntary removal from the parent's control.[12] For out-of-wedlock children, the remedy is available only to those who have custody of them or an immediate right to custody. In *Re Husbands*[13] *habeas corpus* was granted on the application of the mother of an out-of-wedlock child for the child to be released from the care of the paternal grandmother and to be delivered to its mother. In *White v. Springle*[14] where a boy went to live with his putative father of his own volition, it was held that this amounted to taking him out of his mother's custody as it represented a receiving and harbouring of the child. In such a case, *habeas corpus* could be had against the putative father of the child. In these circumstances, and at a time before the enactment of *status of children* legislation in Trinidad and Tobago, the putative father had no right to custody. But on similar facts presented today, once paternity is established, the court will not automatically remove the boy from his father's care.[15]

(b) Wardship proceedings may also be brought. This is not usually used for inter-parental disputes but is a good remedy for "kidnapping" cases.[16] In these proceedings parental powers are vested in the court up to the age of majority and no important step in the child's life can be taken without the court's consent. Such proceedings may be brought in respect of children born in wedlock, as well as those born out of wedlock under the inherent jurisdiction of the High Court based on the Crown's interest in protecting all children, or under statutory provisions providing for it.[17]

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10. See chapter 5, *supra*.
11. See *Ex Parte B (an infant)* (1985) 36 WIR 198.
12. See *The Queen v. Howes* (1860) 3 El. & El. 355; 121 ER 467 and contrast *Thomasset v. Thomasset* [1894] P 295; see too *Stark v. Stark & Hitchins* [1910] P 190.
13. [1968] *Law Reports of Guyana*, 224.
14. (1966) 10 WIR 152 at 159 (Trinidad and Tobago).
15. See *Haloute v. Adamira* (unreported) 17 March 1992, HC, B'dos (No. 233 of 1989); on *habeas corpus* proceedings see too *Cosdialchan v. Lena Savitri* [1964] LRBG 322 (Guyana).
16. See *P v. P* (1977) 30 WIR 8.
17. See *Re E.C. (an infant)* [1963] 3 All ER 874.

(c) Proceedings may be brought under the Infants Acts[18] for the settlement of any disputes relating to children. This is used mostly but not exclusively for parental disputes over the custody of the child. Under these Acts where custody is awarded to a party, this party can obtain maintenance in the same proceedings for the child as the court sees fit.

(d) Injunctive relief is also available to an applicant seeking such relief in relation to disputes affecting children.

(e) For children born out of wedlock the issue of custody may be determined under affiliation proceedings[19] at the time of applying for an affiliation order for the maintenance of the child or, where there is an existing order, the court can require the child to be delivered to the person from whose custody the child was wrongly removed.[20] In Trinidad and Tobago for example, the Family Law (Guardianship of Minors, Domicile and Maintenance) Act provides in Section 13 (13) and (14) that:

> (13) A Magistrate's Court may also on the application of the father of a minor born out of wedlock make an order that the custody of such minor be committed to the father.
>
> (14) If a minor in respect of whose maintenance an order subsists or is sought, is wrongfully taken out of the custody of the mother, father or custodian of the minor, a Magistrate may on the application of the mother, father or custodian make an order that the custody of the minor be committed to the mother, father or custodian.

It seems however that the putative father has a right to challenge the mother for custody only at the time the mother applies for an affiliation order or where there is an existing affiliation order against him. However, in territories with *status of children* legislation, once paternity is established, the father should have standing under the relevant acts relating to custody, to apply for same.

CUSTODY AGREEMENTS

At common law, an agreement by a father to give custody to the mother was void.[21] Under the more modern infants statutes, however, custody agreements between parents are valid so long as they are for the benefit of the minor. Agreements to hand custody to third parties are void. Section 12 of the Barbados Minors Act provides that no agreement contained in a separation deed made between the father

18. Also called Minor's Acts or Guardianship Acts in some countries.
19. See chapter 8, *supra*.
20. See *Phillips v. Alkins* (1967) 13 WIR 486 (Trinidad and Tobago).
21. See J.C. Hall, *Sources of Family Law* (Cambridge: Cambridge University Press 1966), 245.

and the mother of a minor shall be held to be invalid by reason only of its providing that the father of the minor shall give up the custody or control thereof to the mother, provided always that no court shall enforce any such agreement if the court is of the opinion that it will not be for the benefit of the minor.

Re Besant[22] illustrates the point that while custody agreements between parents are potentially valid, they will be upheld only if they are in the child's best interest. Here the mother and the father of a child had separated and they executed a separation deed in which the father agreed that their infant daughter was to remain in the mother's custody for 11 months per year. It was subsequently discovered that the mother had refused to give the child any religious education and she had also published an obscene book. On these grounds the court refused to enforce the covenant made by the husband, and the child was made a ward of the court and was removed from the mother's custody.

TYPES OF ORDERS

The determination by the court of a custody issue is not necessarily a mandate to the court to choose between one of two or even three parties. While the court has a broad discretion to make any such order as it thinks fit, it will at the same time make such order as is in the best interest of the child. It may thus grant custody not only to a parent or parents of the child, but it may also make an order in favour of a relative such as a grandparent or uncle or aunt, or even to someone unrelated by blood or marriage.[23]

Of the various types of orders possible, the usual order is in favour of custody being granted to one parent, with access to the other.[24] Here the parent who is granted custody has custody in the broader sense and is able to make all important decisions affecting the child's life. If, however, there is disagreement by the other parent, this parent has the right to have the dispute determined judicially.[25]

The court may also make a split order, granting custody to one person, and care and control to the other. The party having custody has the right to make the major decisions affecting the child, while

22. [1879] 11 Ch. D 508.
23. See *Morgan v. Morgan et al.* (1974) 4 *Fam Law* 189; *Cahill v. Cahill et al.* (1975) 5 *Fam Law* 16.
24. See *S v. S* [1962] 1 WLR 445, where it was held that the parent who was deprived of custody should normally be granted access to the child unless that parent was not a fit and proper person to be put into contact with the child. Willmer L.J. stated that "such a situation might arise, for instance, if she were a person with a criminal record, or one disposed to act with cruelty against children or something of that sort."
25. *Dipper v. Dipper* [1980] 2 All ER 722.

the party having care and control has the responsibility for making the day to day decisions relating to the child. In *Jane v. Jane*[26] for example, where the mother of the child was a Jehovah's Witness and did not believe in blood transfusions, custody was granted to the father with care and control to the mother, so that in an emergency situation the father could authorize a blood transfusion for the child.

In appropriate cases, the court may grant joint custody to both parents with care and control to one, as was done in *Jussa v. Jussa.*[27] In this case, while the parent with care and control has the right to make the everyday decisions affecting the child, all major decisions are to be made by both parents together.[28]

Where a custody order is made by the court, it should be remembered that the court always retains the power to vary, suspend, revive or revoke the order or any part of it at a subsequent time if appropriate to do so.[29]

DURATION OF ORDERS

The right to custody lasts until the child attains the age of majority or on his or her marriage whichever is earlier but as the child gets closer to becoming an adult, the exercise of parental rights and powers over the child is modified. While the order is enforceable against the parent or other party against whom it is made, it is, however, not enforceable against the child if he or she has reached the age of discretion and objects to it. Section 43(1)(b) of the Barbados Family Law Act for example provides that the court shall not make an order contrary to the wishes of a child who has attained the age of 16 years unless the court is satisfied that it is necessary to do so. In *Stark v. Stark and Hitchins*[30] where a 16-year-old girl was unhappy with custody being granted to her father, the Court of Appeal held that it could not make an order against a child of 16 years contrary to the wishes of the child, unless the child was a ward of the court. Cozens-Hardy M.R. stated:

> Having seen the girl, we are satisfied that she strongly desires to live with her mother and not with her father. She has attained sixteen. She is fond of her mother's present husband, and he is willing and able to provide for her maintenance and education.
>
> In these circumstances we think the proper course for us to adopt is to discharge the order for custody and to leave the parties to their common law

26. (1983) 4 FLR 712.
27. [1972] 2 All ER 600.
28. See too *Applewhite v. Apping* (unreported) 3 June 1994, HC, T&T (No. 908 of 1993), discussed *infra*.
29. See, for example, Section 43(7) of the Barbados Family Law Act.
30. [1910] P 190, 193.

> rights. If the girl is minded to leave her father's house, it is plain that the father cannot reclaim her by *habeas corpus* or otherwise . . .

WELFARE OF CHILD FIRST AND PARAMOUNT CONSIDERATION

Crucial to an understanding of the subject matter, is the principle first enunciated by equity, and later in the UK Infants Acts, adopted by West Indian jurisdictions, that in any dispute relating to a child the court must regard the child's welfare as the first and paramount consideration. This principle applies whether the dispute arises under the infants acts, matrimonial causes acts, summary maintenance acts, affiliation acts, wardship proceedings, or other proceedings affecting the child.

The statutes under which custody may be applied for in the various territories of the region vary and statutory provisions are not uniform. Nevertheless, the central principle applicable in all cases, is the same, that is, the welfare of the child is the first and paramount consideration. This principle has been elucidated by Lord Mac-Dermott in *J v. C*[31] thus:

> . . . it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare . . . That is of first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

STATUTORY PROVISIONS RELATING TO CUSTODY APPLICATIONS

The issue of custody may arise in a number of situations and may fall to be determined at different levels. It may, for example, be an issue regarding a child born within or out of wedlock; it may be an issue to be determined in the Magistrate's Court, or in the High Court. It may be the main or only content of an application before the court, or it may be an issue ancillary to another matter, as for example, in the High Court it may be related to proceedings for divorce, or nullity of marriage, or in Trinidad and Tobago, the additional relief of judicial separation may also require the court to rule on the issue of custody. In territories with affiliation acts, it may be an issue related to proceedings under those acts.

In Trinidad and Tobago, for example, Section 48 of the Matrimonial Proceedings and Property Act provides *inter alia* that the court, being the

31. [1969] 1 All ER 778.

High Court, may make such order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen, in proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree. Section 13 of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act also empowers the court to make orders relating to custody and provides, *inter alia*, that the High Court or a Magistrate's Court may make such order regarding the legal custody of the minor, and the right of access to the minor of his mother or father as the court thinks fit having regard to the welfare of the minor.

In the Bahamas, Section 16 of the Affiliation Proceedings Act[32] provides *inter alia* that on the application of the putative father, the court may make such order as it thinks fit regarding the right of access of the putative father to the child and in making such an order the court shall have regard to the welfare of the child. Section 7 of the Guardianship and Custody of Infants Act[33] provides that the court may upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of the child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parties. Section 4(1)(a) of the Matrimonial Causes (Summary Jurisdiction) Act provides that the court may make an order containing a provision for the legal custody of any child who is under the age of 16 years.

In Guyana alone, the issue of custody may arise under at least four different jurisdictions. Firstly, it may arise under Sections 19 and 30 of the Matrimonial Causes Act.[34] Section 19 provides that:

> In any suit or other proceeding for a decree of judicial separation, or nullity of marriage, or dissolution of marriage, the Court may from time to time, before making the final decree, make any interim orders and provisions in the final decree it deems just and proper, with respect to the custody, maintenance and education of the children of the marriage of whose parents is the subject of the suit or other proceeding, and may give any further or other directions it deems advisable as guardian paramount of all infants.

Section 30 further provides that:

> The court, at any time before final decree on any petition for restitution of conjugal rights, or after final decree if the respondent fails to comply therewith, upon application for that purpose, may make from time to time all the orders and provisions with respect to the custody, maintenance, and education of the children of the petitioner and respondent which might have

32. See chapter 8, *supra*.
33. Statute Laws of the Bahamas 1987, Chap. 118.
34. Laws of Guyana, Cap. 45:02.

> been made by interim orders during the pendency of a trial for judicial separation between the same parties.

Secondly, the issue of custody may fall to be determined in the Magistrate's Court under the Summary Jurisdiction (Magistrates) Act,[35] which provides in Section 36 that:

> The magistrate to whom the application under Section 34 is made may make an order or orders containing all or any of the provisions following . . . (b) that the legal custody of any children of the marriage between the applicant and her husband while they are under the age of sixteen years be committed to the applicant . . .

Thirdly, the issue of custody may be determined in accordance with the provisions of the Infancy Act[36] which provides in Section 15[37] that:

> Where the parents are living apart the court may, upon the application of a parent with whom the infant is not residing, make any order it thinks fit regarding the custody of the infant and the right of access to the infant of either parent, having regard to the welfare of the infant and the conduct of the parents, and to the wishes of the mother as well as of the father, and may alter, vary, or discharge the order on the application of either parent or, after the death of either parent, any guardian under this act.

Since the section makes no reference to children of the marriage, the issue of custody in respect of children born out of wedlock may be determined under this act.

Fourthly, the issue of custody in Guyana, as in other territories of the region, may be determined in wardship proceedings where the child may be made a ward of the court, the court retaining custody in the wider sense, but granting custody in the narrow sense to any party showing a genuine interest in the child.[38]

General Content of Legislation

An examination of the various acts reveals common threads in the provisions. Some of the relevant provisions of the various Acts, whether called Infants Acts, Minors Acts or Guardianship Acts, are the following:

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35. Laws of Guyana, Cap. 3:05.
36. Laws of Guyana, Cap. 46:01.
37. This is the substituted Section 15, as authorized by the Children Born out of Wedlock (Removal of Discrimination) Act 1983.
38. See *Re W* [1964] Ch. 202. See too P.M. Bromley and N.V. Lowe, *Bromley's Family Law*, 8th ed. (Butterworths 1992), 458, *et seq.* for a discussion of the wardship jurisdiction.

(a) The welfare of the child principle is expressly stated as being of paramount importance. Section 43(1) of the Barbados Family Law Act provides that in proceedings in respect of the guardianship or custody of, or access to, children of a marriage or union, the court shall regard the welfare of the children as the first and paramount consideration. This principle is also highlighted in the Barbados Minors Act.[39]

Section 3 of the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act provides that:

> Where in any proceedings before any court the custody or upbringing of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . .

(b) Neither the mother nor the father has a superior claim to custody. Section 4 of the Trinidad and Tobago Family law (Guardianship of Minors, Domicile and Maintenance) Act provides *inter alia* that in relation to the custody or upbringing of a minor, the rights and authority of mother and father shall be equal and exercisable by either without the other. This position is also reflected in Section 40 of the Barbados Family Law Act which provides, *inter alia*, that each of the parties to a marriage or union other than marriage is a guardian of every child of the marriage or union who has not attained the age of 18 years, and the parties to the marriage or union have the joint custody of each child. In the Bahamas Section 6 of the Guardianship and Custody of Infants Act provides that the mother of a child shall have like powers to apply to the court in respect of any matter affecting the child as are possessed by the father.

(c) Due to legislative intervention, both mother and father now have the right to appoint a testamentary guardian of the child. Section 4 of the Bahamas Guardianship and Custody of Infants Act for example, provides that the father or mother of a child may by deed or will appoint a person to be guardian of the child after his or her death.

(d) Other provisions in the legislation relating to custody are in many respects practical, as for example the provision that when a court awards custody to one party, the court may also order the other party to pay maintenance for the child. However, the order is not enforceable if the parents continue to reside with each other.[40]

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39. Laws of Barbados, Cap. 215.
40. See for example Trinidad and Tobago, Section 13(2) and (3) of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act.

CUSTODY DISPUTES: GENERAL PRINCIPLES

In any dispute affecting a child, the first and paramount consideration is the welfare of the child, a principle rigidly upheld by the court in its role on behalf of the state as *parens patriae*.

In *Re O'Hara*[41] Holmes L.J. described the jurisdiction of the court thus:

> The Court of Chancery, from time immemorial, has exercised another and distinguishable jurisdiction - a jurisdiction resting on the paternal authority of the Crown by virtue of which it can supersede the natural guardianship of a parent, and can place a child in such custody as seems most calculated to promote its welfare.

In determining what is for the welfare of the child, the court pays attention to the physical, mental, material and religious well being of the child. While the welfare of the child is paramount, it is not exclusive, as other considerations may be relevant in assisting in the determination of what is actually for the welfare of the child.

Other considerations include, the wishes of the child old enough to be considered;[42] the wishes of the parent; conduct of the parents towards each other and towards the child; maintenance of the family unit; material standards and advantages which the child reasonably expects; or preserving the status quo in the child's life.

In *Durity v. Benjamin*[43] Basdeo Persad-Maharaj J. set out his "formula of the principles" applied in custody cases, which include the following:

- behaviour and characteristics of the parties
- child's education
- whether the child is suffering from any serious illness
- accommodation and material advantages
- satisfaction of the child's basic needs
- whether the custody application is bona fide or not
- wishes of the parent and if possible, wishes of the child
- sex and age of the child and ages of the parents
- religion of the child
- happiness of the child
- future prospects of the child if granted to one parent
- question of access to the unsuccessful party

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41. [1900] IR 232 at 235.
42. See for example, *Haloute v. Adamira* (unreported) 17 March 1992, HC, B'dos (No. 233 of 1989).
43. (Unreported) 30 July 1993, HC, T&T (No. 1596 of 1993).

- whether the new partners of the parents will be amenable to looking after the child.[44]

In the Guyanese case of *Re Husbands*[45] Crane J. stated:

> In considering the child's welfare, I must do so on the widest possible basis. I must take into account a wide range of subjects, viz., its moral, spiritual, social, educational, material and medical welfare; but it will be useful to consider some of these together, and my approach to the matter will be to consider the respective merits of each party with regard to each of them and decide the contest on what I think is the best thing to do in the interests and in the welfare of the child.

Wishes of the child

In *Haloute v Adamira*[46] the court had to decide the issue of custody of a 14-year-old boy. The child was a child of a non-marriage union, and the parents were no longer living together. The boy had left the home of his mother after the mother formed a relationship with another gentleman who moved into the house. The boy had difficulty in dealing with this arrangement and as a result, he went to live with his father. The father applied for custody. The court was of the view that the boy was old enough to be heard on the issue and took his wishes into account. Custody was therefore granted to the father with access to the mother.[47]

Religion

Although the religious education of the child is to be given weight to, the court will overlook this factor if in the interest of the child. In *Re McGrath,*[48] the mother of five children died. The father was also deceased. The mother had appointed a testamentary guardian under the Guardianship of Infants Act 1886 in favour of a woman who had assisted the children financially. The guardian was a Protestant and later, the father's aunt who was a Roman Catholic, applied to have the guardian removed and for herself to be appointed guardian. It was held that it was not for the welfare of the children that they should be removed and the court made no direction as to the religious education of the children.

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44. Ibid, p. 36 of judgment.
45. [1968] *Law Reports of Guyana*, 227.
46. (Unreported) 17 March 1992, HC, B'dos (No. 233 of 1989).
47. See too *Applewhite v. Apping* (unreported) 3 June 1994, HC, T&T (No. 908 of 1993), discussed *infra*; and *Montano v. Montano* (unreported) HC, T&T (No. M-723 of 1986), where a boy of ten and a half years was interviewed by the court about his wishes in regard to living with his mother or father.
48. [1893] 1 Ch. 143.

Lindley L.J. in this case stated:

> The duty of the court is, in our judgment, to leave the child alone, unless it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.[49]

On the question of religious affinities between the parent and the child, Section 34 of the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act makes statutory provision for this. The section provides that upon the application by a parent for the production or custody of a minor, if the High Court is of the opinion that the parent ought not to have the custody of the minor, and that the minor is being brought up in a different religion to that in which the parent has a legal right to require that the minor should be brought up, the court shall have powers to make such order as it may think fit to secure that the minor is brought up in the religion in which the parent has a legal right to require that the minor should be brought up; but nothing contained in the act is to interfere with or affect the power of the High Court to consult the wishes of the minor in considering what order ought to be made, or diminish the right which any minor possesses to the exercise of his own free choice.

In *A v. A*[50] the mother and father of the child in question were divorced. The mother remarried and her new husband was an American citizen. She applied for leave to take the child out of the jurisdiction. The father opposed the application. The father belonged to a religious order called the *Closed Brethren* and believed in the doctrine of separation. The court held that the child should be allowed to develop normally until the age of 16, and that it was not in the interest of the child to be exposed to the doctrine of separation. Custody, care and control were given to the mother with leave to remove the child out of the jurisdiction, while provision was made for the child to visit the father every year.

Financial considerations

There is an abundance of judicial dicta to the effect that a court will not grant custody of a child to one parent solely on the basis of that

49. Ibid, at p. 148.
50. (1964) 8 WIR 247 (Barbados).

parent's affluent financial circumstances[51]. In *Ramkissoon v. Ramkissoon*[52] Permanand J stated:

> The fact that one party is in a position to give the children a better start in life does not give the party a superior claim. It is the happiness of the children and not the material prospects with which I am concerned as any other rule would put a poor parent at a disadvantage, although a party's financial position cannot be ignored so that when one party cannot provide a home for the children this in itself might be sufficient to refuse custody . . . although the quality of home life is not to be measured in purely material terms, the court has also to consider the time one parent can spend with the children.

The Trinidadian case of *Balram v. Balram*[53] however illustrates the point that the better a party is in a position to care for and maintain the child, the better that person's position is in the eyes of the court to have custody providing that the other party is incompetently performing his duties towards the child. In this case the parents of two young children separated when the mother left for the United States in search of work. She left her two children with her niece. The father removed the children. The mother subsequently obtained a divorce in the United States and remarried. Her financial position had greatly improved. The father formed a relationship with another woman with whom he had two other children. It was accepted in evidence that this woman ill-treated the children and physically abused them. The children were often absent from school. It was found that one child sometimes wore slippers to school and sometimes went barefooted. The father was a habitual drinker, and in the circumstances, the court found that he paid little attention to their mental and physical health, and little attention to their schoolwork. On the other hand, the mother had continued to maintain constant contact with the children and often sent them presents and money. The court ordered custody to the mother with access to the father. Ramlogan J. applied the law to the facts thus:[54]

> It is well established that what is of paramount importance in cases like these is the welfare of the children. All the circumstances must, however, be taken into account. Each case has different circumstances. In this case the relevant factors are: the education and intelligence of the parties, their ages, their character, their earnings and employment, their attitude to the children, the prospects of the parties, the prospects of the children in Trinidad or in the United States, the environment here as against the United States and the children's happiness.

51. See *Clarke v. Carey* (1971) 18 WIR 70.
52. (Unreported) 24 February 1989, HC, T&T (No. 1012 of 1988).
53. (Unreported) 12 April 1995, High Court Action (No. S-360 of 1995).
54. Ibid, pp. 8–9 of judgment.

> There must be a balancing process. At the end of the day how will the children's interest best be served?
>
> I am of the view that the children would be better off with the mother, particularly because of my findings on the questions of their absences from school, their abuse and neglect, the punishment meted out to them and the father's drinking habits. *But I am also more impressed with the mother as a person determined to improve her life and that of her children.*[55] The scales tilt heavily in favour of the children being with their mother.
>
> I would therefore grant custody of the children to the applicant/mother and grant leave to take the children out of the country.

Moral welfare

The moral welfare of the child is also of importance to the court in its determination of a custody case. In *Batson v. Batson*[56] for example where the father indulged in the smoking of marijuana in the presence of his young daughter and his influence was such that he even taught her to "roll" one, the court awarded custody to the mother. In *Forsythe v. Jones*[57] where a father, who applied for custody of a four-year-old boy admitted to smoking ganja for "health and spiritual" purposes[58] the court found the habit immoral, stating, "What moral authority would he have to tell [the child] . . . it is wrong to use ganja when he himself is a constant user of it? It is very likely that if the child should live with him, he too might succumb to its use which would not be in his best interest of welfare." His application therefore failed.

In *Quesnel v. Quesnel*[59] where a mother took her young son to Tobago on holiday during which time he was exposed to "suspect" moral attitudes of her companions, the court regarded this as "an element of irresponsibility and instability in her personality"[60] and granted custody to the child's grandmother.

The unimpeachable parent

It now appears, having regard to the welfare principle, that there is no presumption of law in favour of a child's parents or even an unimpeachable parent.

This, in effect, was the decision in the English case of *J. v. C.*[61] In this case a Spanish couple had gone to the UK in search of work. The

55. Emphasis supplied.
56. (Unreported) 25 March 1987, HC, T&T (No. 710 of 1981).
57. (Unreported) 6 April 1999, SC, J'ca (No. E230 of 1997).
58. Ibid, pp. 7 and 10 of judgment.
59. (Unreported) 26 July 1979, HC, T&T (No. M-179 of 1977).
60. Ibid, p. 11 of judgement.
61. [1970] AC 668.

wife discovered that she was pregnant and subsequently gave birth to a baby boy while in the UK. However, because the wife was unwell, the couple allowed the baby boy to be put into foster care. The couple later returned to Spain but while there, the boy became ill and was returned to the care of the foster parents. The couple then went to Germany in search of work and later returned to Spain after successfully improving their economic condition. They then wished to have their son returned to them. Legal proceedings took several years, by which time the boy was 10 years old and had spent only 18 months with his biological parents. The House of Lords held that even if the parents were unimpeachable, the child's welfare required that he stay with the foster parents.

Clarke v. Bushell[62] also demonstrates that an unimpeachable parent does not have an automatic right to custody. Here the mother of a child died in childbirth and the baby boy, X, was left at the maternity hospital for six weeks until B, a woman who had a seven-month-old baby boy, took X into her home and raised him as her own along with her natural son. X's father was physically incapable of looking after X and allowed X to be raised in B's household, although he contributed towards X's maintenance and visited him from time to time. When X was about to sit the 11-Plus examinations, X's father applied for custody. X declared that he would run away if he was taken from B's household. The court held that while X's father was not guilty of neglect or abandoning X, it was nevertheless in the best interest of X that he remain in B's household, where he was thriving.

In a more recent Barbadian decision, however, it was held that although there was no presumption in favour of an unimpeachable parent, nevertheless, on the facts, the mother who was not at fault, should be given custody of the child in question. In *Nicholls v. Golding et al.*,[63] D had come to Barbados from Guyana and entered into a cohabiting relationship with a man. She later gave birth to a baby girl. The man gave her no support and assumed no responsibility for the child. D had made the acquaintance of a woman N and N's husband. At the time of the birth D lived in squalid conditions with no water or electricity and slept on a mattress on the floor. She had no money to purchase necessaries for the child. N offered to assist and D allowed the child to be nurtured by N and N's husband. D's position later improved and she married S. When the child was about three years old, D retrieved the child and N subsequently applied under the

62. (1981) 16 Barb. LR 126.

63. (Unreported) 1 September 1994, HC, B'dos (No. 352 of 1993).

Minors Act to have the issue of custody determined. The court held that it was in the best interest of the child to remain with her natural mother. Chase J. in this case stated:[64]

> On my analysis and evaluation of the evidence . . . I find that the conduct of the first defendant, as a parent, during the period when R was in the care and control of the plaintiffs does not evince a disregard for R's welfare or any unmindfulness on the part of the first defendant as to her parental obligations to R. Indeed, I find that the first defendant's failure to provide financial support for the child during this period was due to the adverse economic circumstances that she was then undergoing. In my view, she remained prepared always to provide the natural love and affection to which R was entitled.

In the Guyanese case of *Re Husbands*[65] in which the court had to decide a custody issue between the mother of the child and the child's paternal grandmother, the court ruled in favour of the mother. Crane J., citing dicta of Fitz Gibbon L.J. in *Re O'Hara*[66] stated:[67]

> Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities . . . the court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord Esher in *R. v. Gyngall* (1893) 2 QB 232 at p. 243) that 'the best place for a child is with its parent'.[68]

Young children

Sometimes when all factors are evenly balanced between parents, the fact that the child is a very young child, might tip the balance in favour of the mother. In *Re K*,[69] H was a parish priest. He and W had two young children. In the course of her parish duties, W met a young man X and commenced an adulterous relationship with him.[70] She wished to live with X and wanted to take the children with her, and thus applied for custody. The children were made wards of the court and care and control were given to W on the grounds that a mother was the natural guardian and protector of very small children and that W was an excellent mother. H's appeal was dismissed by the Court of Appeal.

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64. Ibid, p. 7 of judgment.
65. [1968] *Law Reports of Guyana*, 224.
66. (1900) 2 IR 232.
67. [1968] *Law Reports of Guyana*, 224 at pp. 230–31.
68. See too *Re Thain, Thain v. Taylor* [1926] Ch. 676.
69. [1977] 1 All ER 647.
70. See *Willoughby v. Willoughby* [1951] P 184 where it was held that there was no rule of law that adultery by a mother precluded the mother from being granted custody, although matrimonial misconduct was a relevant factor. See *Re L* [1962] 1 WLR 886.

In *Thornhill v. Thornhill*[71] H and W had two young children and on the collapse of their marriage, W had been hospitalized because of the mental and emotional stress arising out of her marital problems. While she was in hospital, the children were cared for by H's mother. When W came out of hospital, she became employed and applied for the custody of the children. The court held that having regard to the tender ages of the children and the quality of the care she gave them prior to her hospitalization, that it was in their best interest to be in her custody.

In *Stephenson v. Stephenson and Johnson*[72] a female child of three years was given to the mother as the court held that the special relationship and bond between a very young child and his or her mother could rarely be duplicated by the father. In this case H and W's marriage had become strained after W took up employment to augment the family's income. H was consequently compelled to look after their daughter on a regular basis. Due to the stress in the parents' relationship, W committed adultery upon which H obtained a decree of divorce. W then went to live with her mother taking their daughter with her. H forcibly removed the girl and an interim order was made placing the child in his care. On the hearing of the custody issue, it was held that although H had demonstrated that he was a good and devoted father and able to take care of the child's needs, nevertheless, custody was awarded to W based on the fact that the child was a female of tender years who needed the continued nurturing of that special relationship and bond with her mother. Summerfield C.J. stated:[73]

> There is no doubt that, throughout, the father has shown himself to be a good and devoted father. On many occasions he bathed the child at night, washed her clothes and diapers, fed her at night and put her to bed . . . The mother's insistence on improving her qualifications and taking employment to augment the family's income obviously caused some friction between the parties. However, her explanation for doing so is reasonable . . . This is a common pattern of living today where a wife understandably asserts her independence and wishes to improve the quality of life for the family in material things . . . In all cases the paramount consideration is the welfare of the child and the court must look at the whole background of the child's life and on all the circumstances of the case . . . More important, however, is the fact that the child is a female of tender years. There can be no doubt that, other things being equal, the interests of such a child are better served by placing her in the care and custody of her mother. The special relationship and bond between a very young child and his or her mother can rarely be

71. (1977) 12 Barb. LR 81.
72. [1980–83] CILR 93 (Cayman Islands).
73. Ibid, pp. 95–97.

> duplicated by the father. And, as a girl is growing up, the example and home training of the mother is obviously better suited to her needs while maturing into a young woman.

However, in the Jamaican case of *Simpson v. Condappa*[74] custody of a young girl was awarded to the father.[75] In this case the father applied for custody of an out-of-wedlock female child who was living with her mother. Investigations were carried out by the probation officer who reported that the father was in a better position to look after the child. Custody was therefore granted to the father and the mother appealed. It was argued on behalf of the mother that since the child was very young, that more consideration should be given to the mother than the father. The Court of Appeal held that the fact that the child was very young was a factor to be considered, but that the paramount consideration was the welfare of the child. Campbell J.A. stated:[76]

> Before us Miss Haughton submitted that the decision of the learned Resident Magistrate is unreasonable and such decision cannot be supported having regard to the evidence. She strenuously urged that, particularly in the case of a young girl, more consideration should be given to the mother having custody than the father. We appreciate that the child being a young girl is a fact that should be considered but having regard to the evidence which was led, and the findings of the learned Resident Magistrate which was well supported on the evidence, we cannot say that he did not apply the correct principle namely the welfare of the child and that in granting custody to the father he erred in any way. For these reasons we do not consider that his findings ought to be disturbed, the appeal is accordingly dismissed.

Existence of brothers and sisters

The existence of brothers and/or sisters of the child in question who is the subject of the dispute between the parties is a factor which the court will give due weight to. In *Leong Quen v. Bramble*[77] for example, Wooding C.J. stated:

> I am at one with Jessel M.R. in saying as he did in *Re Besant* that 'As a man of the world, and speaking as a father, I am satisfied that solitary children are not so happy and not so likely to make good men and good women, as children brought up in the society of brothers and sisters in early life.'

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74. (1988) 25 JLR 444.
75. See too *Re B* [1962] 1 WLR 550 where it was held that a child of tender years need not as a rule be given to the mother. On the facts of this case a four-year-old boy was given to the father on appeal.
76. (1988) 25 JLR 444 at 444.
77. (1965) 8 WIR 149, 157.

In *Applewhite v. Apping*[78] the court had to determine the issue of custody of a 14-year-old girl and a 7-year-old boy. The parents were not married to each other, and the father had recently married another woman. The children's mother had two other children from different unions. The court took into account the wishes of the girl to stay with her mother, and also the need not to separate the children. Therefore, a joint custody order was made in favour of both parents with care and control to the mother and access to the father every other weekend.

PARENT AND THIRD PARTY DISPUTES

The determination of a custody issue by the court is a very difficult and taxing experience for judges. The judicial function was encapsulated by Deyalsingh J. in *Kendall v. Kendall* thus:[79]

> The first and paramount consideration in all custody matters is the welfare of the child; and welfare here means 'welfare in the widest sense'. This is re-emphasized in the case of *J and Ors. v. C and Ors.* [1969] 1 All ER 788 (HL) where foster parents were preferred to the child's own parents even though the parents were deemed unimpeachable. The court looks at all the circumstances, for example, the age and sex of the child, the character of the parents and their fitness as parents, the prospective home, the character and fitness of any person(s) who would have the care of the child for any length of time during the day, etc. It is a balancing process so to speak, always remembering that it is the welfare of the child which matters. It is not always an easy job which judges wish would not arise; but when it does they do the best they could bringing all their experience into play.

The general principle is that parents have no overriding right but are generally favoured.[80] In *Leong Quen v. Bramble*[81] H and W had a two-year-old son. W then gave birth to another boy E, but died in childbirth. H committed the care and custody of E to his sister. H later remarried and H's new wife had an altercation with H's sister whereupon H requested the return of E. His sister refused to give up the child. It was held that it was for the welfare of the child to be returned to his father and to enjoy the society and companionship of his brother.

The case of *Balraj v. Dewar*[82] is also instructive. H and W had taken up residence in Canada and left an infant daughter, who was a few

78. (Unreported) 3 June 1994, HC, T&T (No. 908 of 1993).
79. (Unreported) 30 July 1988, HC, T&T (No. 5762 of 1984) at p. 7 of judgement.
80. See *J v. C* [1970] AC 668; [1969] 1 All ER 788.
81. (1965) 8 WIR 149 (Trinidad and Tobago).
82. (Unreported) 30 June 1994, HC, T&T (No. S878 of 1993).

months old at the time, with the maternal grandmother. The grandmother looked after the child for a while and then allowed a couple, Mr. and Mrs. H, to raise the child. The child was brought up by this couple for five and three-quarter years. The child's mother died in a vehicular accident in Canada and the father subsequently returned to Trinidad. The father wished the child to be returned to him. The grandmother applied for custody and Mr. and Mrs. H applied to be joined in the action as they too wished to have custody of the child. The child was unaware of her biological family ties and was ignorant of the existence of a brother and a sister. In the circumstances the court held that it was in the best interest of the child to live with her father and brother and sister so custody was granted to the father. The court allowed Mr. and Mrs. H to have access for a year to help in the transition, and also ordered the father to repay to the grandmother and to Mr. and Mrs. H sums spent by them in raising the child. The court's humane and paternalistic attitude in dealing with children was clearly reflected in the judgment of Shah J. who stated thus:

> Despite the emotional stress which my order will cause both . . . [the child] and the . . . [H's], I order that the applicants produce [the child] . . . and return her to her father. But this is not the end of the matter. The question is how should this be done with the least hurt. I have pondered over this and must here state my utter regret that the supportive services for a family court or family matters in our nation are woefully inadequate. Once more I will have to ask the over burdened Probation Services to help.
>
> I request Mr. Poliah to spend time with [the child] and explain to her that she has a father, a sister and brother, with whom she must now go to live. If necessary, he must make more than one visit. I trust that the . . . [H's] will cooperate and help to ease the pain which will be caused to [the child]. Thereafter, as soon as school goes on vacation, Mr. Poliah shall accompany [the child] . . . to her father's house.
>
> It is ordered that the . . . [H's] shall have staying access to [the child] on the second weekend of each month for a period of one year with liberty to apply for an extension of this period, from Saturday 9.30 a.m. to Sunday 5.00 p.m., the respondent to take the child to the [H's] . . . house and the [H's] . . . to return the child.[83]

In the Jamaican case of *Smith v. Orrigio*[84] the Court of Appeal had to decide a custody contest between the father of an out-of-wedlock child and the child's maternal aunt, the mother being deceased. The child was six years old and had not lived with its father except for a period of two weeks. There was evidence of a strong bond between the

83. Ibid, p. 19 of judgment.
84. (1989) 26 JLR 561.

child and the aunt. The father had a common-law wife and three other children and the common-law wife was willing and ready to accommodate and care for the child. The court held that the welfare of the child, morally, emotionally, spiritually, and materially, would be best served by awarding custody to the father being the only surviving parent. Morgan J.A. stated:[85]

> the welfare of the child is tipped heavily in favour of the father and that it is unjust to grant custody to the aunt. A child will love her aunt with whom she has had some years of association but will always want to love her father. This child will more proudly say "This is my father" rather than "This is my aunt." She is just six years old and will in time grow to love her father maybe as much or more than her aunt.

CHILDREN BORN OUT OF WEDLOCK

Before the passing of *status of children* legislation, and in territories not having *status of children* legislation or other legislation abolishing common law doctrines in relation to the illegitimate child, the right of the putative father to custody was and is not equal to the right of the mother.[86] Where the father had no standing to proceed under the Infants Acts, he could get custody of an illegitimate child only if the mother was unfit, or where he already had care and control *and* the welfare of the child required that he be given custody, or where the mother did not wish to exercise her rights personally and the welfare of the child permitted, the putative father could obtain custody. This approach is illustrated in the case of *White v. Springle*.[87] Here S was adjudged putative father of a child in affiliation proceedings. The child was a boy of 11 who went to live with his father and his father's wife. The father applied for custody and was granted the application. The mother, however, appealed. It was held, allowing the appeal, that the mother had the *prima facie* right to custody of an illegitimate child and for the father to have custody, it must be shown clearly that it would be detrimental to the welfare of the child for it to remain in the custody of its mother.

In *Re Husbands*[88] the custody of an illegitimate child born in England to Guyanese parents was in issue. The parents were at the time pursuing a course of study in England and allowed the child to be sent to Guyana to be raised by the paternal grandmother, as it was hoped that after the end of their studies, the parents would marry

85. Ibid, p. 564.
86. *Bernardo v. McHugh* (1891) AC 388, HL.
87. (1966) 10 WIR 152 (Trinidad and Tobago).
88. [1968] *Law Reports of Guyana*, 224.

and then assume responsibility for the child. The parents however did not marry as planned, and the mother obtained a job in England and returned to Guyana with the intention of taking the child back to England with her. The Guyanese High Court held that the child's mother, who had a *prima facie* right to custody, was entitled to custody and thus granted her application.

In *Phillips v. Alkins*[89] X was adjudged putative father of a child in affiliation proceedings. Custody was given to the father's sister as the mother was held to be unfit due to having had three different unions with men for whom she had various children. The mother appealed. It was held, allowing the appeal, that it was not shown that it was detrimental to the welfare of the child to remain in the custody of the mother, who had the *prima facie* right to custody.

However, in the Guyanese case of *Halls v. Mattal*[90] the custody of an out-of-wedlock child was placed on an equal footing as between mother and putative father. In this case the mother of an illegitimate child died and her cousin took possession of the child. The father of the child applied for custody. His application was refused and he appealed to the Court of Appeal which dismissed the appeal, but held that the welfare of an infant child, whether legitimate or illegitimate, was the first and paramount consideration, and the right to custody as between father and mother was to be placed on an equal footing.[91]

In territories with *status of children* legislation, custody of an out-of-wedlock child is vested in the mother until paternity is established. Once paternity is established, the father has an equal right to custody, as provided for example, by Section 6(2) of the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile and Maintenance) Act which provides that "the mother of a minor born out of wedlock shall be the sole guardian of the minor until the paternity of the minor has been registered . . . or established."

Clement v. Graham[92] illustrates the altered position of the putative father in view of the changed law. Here P was the putative father of a boy of tender years. The mother had left for the USA to further her studies and left the child with his father. The father subsequently married another woman. The mother of the child returned to Trinidad

89. (1967) 13 WIR 486 (Trinidad and Tobago).

90. (1963) 6 WIR 481.

91. In Guyana parliament has decreed by virtue of s. 10A of the Infancy Act (Cap. 46:01) as amended by the Children Born out of Wedlock (Removal of Discrimination) Act (12/83) that a father of an out-of-wedlock child now has equal rights to the custody of the child where it is established that he satisfies the definition of father under section 1(A) of the Infancy Act, being that he must have been adjudged father by a court of competent jurisdiction; he must have acknowledged the child to be his own and must have contributed towards the maintenance of the child.

92. (Unreported) 2 April 1993, HC, T&T (No. 2441 of 1991).

and sought the return of the child. The father applied for a declaration of paternity which was granted, and subsequently applied for custody. On the facts the father was gainfully employed; the mother was unmarried and unemployed, had another child, and shared accommodation with a friend who also had a child. In these circumstances, the court held that it was in the best interest of the child for the father to have custody with access to the mother.

RECENT LEGISLATION

While most of the existing legislation relating to custody in the region appears to be somewhat general, the 1997 Antigua and Barbuda Divorce Act contains some detailed provisions relating to the considerations which a court should have regard to in making a custody order. The Act makes provisions for the custody of and access to *children of the marriage*[93] in relation to divorce proceedings or *corollary relief* proceedings. It recognizes the "best interest" of the child principle in these matters, rules on issues such as conduct of the parties, and the interest of the child in having contact with its parents. The relevant sections are as follows:

> 14(1) A court may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage . . .
>
> (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.
>
> (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.
>
> (7) . . . the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.
>
> (8) In making an order under this section, the court shall take into consideration only *the best interests of the child*[94] of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> (9) In making an order under this section, the court shall not take into *consideration the past conduct*[95] of any person unless the conduct is

93. See chapter 7, *supra*, for definition of this concept.

94. Emphasis supplied.

95. Emphasis supplied.

relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that *a child of the marriage should have as much contact with each spouse*[96] as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact . . .

15(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

96. Emphasis supplied.

Chapter 11

Adoption

[Adoption] basically enables a parent-child relationship to be created between a child and one or two adults, with whom there may be no blood relationship. Not surprisingly, although parenthood may be achieved naturally quite carelessly and casually, once the relationship was being deliberately created by man, controls and limitations were introduced, some of which have proved less than desirable.
– Stephanie Daly[1]

Introduction

The subject of adoption may arise in a variety of situations. It may relate to children who are orphaned, or children whose parents are not able to or who might be unwilling to raise them; it may arise in situations where parties are childless; it may also arise in cases where an applicant wishes to adopt his own child born out of wedlock.[2] It involves the termination of legal ties with natural parents and in most respects the acquisition of full parental rights by the adoptive parents. In many of the countries of the Commonwealth Caribbean, for all legal purposes, the adoptive parents step into the shoes of the natural parents and the child becomes the legitimate child of its adoptive parents.[3]

Section 15(1) of the Trinidad and Tobago Adoption of Children Act, provides that:

> For all purposes, as from the date of the making of an adoption order:
> (a) the adopted child becomes the child of the adopting parent and the

1. *Child and Family Law: Trinidad and Tobago* (Port of Spain: Government Printery 1992), 97.
2. See for instance *Re B* [1964] Ch. 1.
3. This rule is qualified to the extent that in some countries, for succession purposes, the adopted child remains the child of the natural parents, discussed *infra*.

> adopting parent becomes the parent of the adopted child; and
> (b) the adopted child ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child, as if the adopted child had been born in lawful wedlock to the adopting parent.

The main consequence of adoption therefore, is that a complete substitution is made of the adoptive parents in place of the natural parents. The previous family relationship is legally and socially extinguished to all intents and purposes, as if it was never in existence. Cretney states that adoption is:

> the process whereby a court extinguishes the parental links between a child and his natural parents and creates analogous links between him and the adopters.[4]

The law on adoption in the Commonwealth Caribbean is to be found in the content of statutory provisions as well as case law authority. However, while the reported and unreported judgments reveal a high number of custody cases adjudicated upon by the courts, the adoption cases in comparison, appear to be fewer in numbers. The reasons for this fact are numerous and varied. Firstly, adoption applications before the courts are generally heard *in camera*.[5] Secondly, in the Caribbean region, while the adoption of children is quite common, a large number of incidences of "adoption" are in fact *de facto* adoptions whereby children are left indefinitely and often permanently with grandparents and other relatives in circumstances in which the child's parents may be deceased, physically or financially unable to look after the children, or where the parents might have emigrated abroad in search of a "better life." Many of these *de facto* adoptions are never formalized so that while statistics gathered may reveal a low number of adoption cases, this may not be a true reflection of what transpires in reality.[6]

Further, since adoption applications are less contentious than custody applications, this may be good ground for saying that there is much less of a need for written decisions.

Yet, it may very well be that there is a decline in the number of adoptions taking place, or at least, there is support for the view that

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4. S.M. Cretney, *Principles of Family Law*, 4th ed. (London: Sweet and Maxwell 1984), 417.
5. See for instance Section 6 of the Adoption of Children Rules, Laws of the Republic of Trinidad and Tobago Chap. 46:03 (subsidiary legislation).
6. See for example, the Barbados Adoption Act, Section 36 and the Guyana Adoption of Children Act, Section 22, for relevant provisions relating to the formalization of *de facto* adoptions.

the need for adoption in some cases has been eradicated. In relation to children born out of wedlock for example, since the passing of *status of children* legislation, the advantage of legitimating children through adoption is now academic. Additionally, legislation recognizing children born to unions other than marriage, such as obtains in Barbados, has also decreased the need for such children to be legitimated through adoption, as these children are now entitled to the same rights under the Family Law Act as equally as children born within lawful wedlock.

Bromley and Lowe have comprehensively defined the effect and consequences of an adoption order in the following terms:[7]

> . . . an adoption order completely severs the relationship between the child and his natural parents and vests parental rights and duties in the adopters. The result in brief is that for all legal purposes the adopters step into the shoes of the child's natural parents; by 'parents' in other words is now meant not the child's natural parents but his adoptive parents. Such a relationship is thus distinguishable from that of a married parent and child, unmarried father and child, and guardian and ward. It resembles most closely the first, for, although there need be no blood relationship between the parties, the legal consequences are almost the same. It differs most markedly from the second for the law does not automatically recognize any natural rights and duties flowing from the blood relationship: adoption in fact creates virtually the converse situation. It resembles the third in that the adoptive parents, like guardians, stand in loco parentis to the child to whom they are not necessarily related in blood, but differs from it in that the relationship of guardian and ward does not make the child a member of the guardian's family, for example, for the purposes of the devolution and acquisition of property.
>
> An adoption order is distinguishable from both a custody and custodianship order principally because it severs the legal ties between the child and the natural parent whereas the latter do not. Furthermore, whereas the former order is permanent[8] (*ie* the child remains a member of the adoptive family even after he attains his majority), the latter orders can subsequently be varied and, in any event, cease to have effect once the child reaches 18.

Apart from the fact that adoption legitimates the child, the adopted child also acquires rights to maintenance and property on a parent's intestacy. Section 24(1) of the Barbados Adoption Act, for example, provides that where at any time after the making of an adoption order, the adopter or the adopted person or any other person

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7. P.M. Bromley and N.V. Lowe, *Family Law*, 7th ed. (Butterworths 1987), 381.
8. See *Re B* [1995] 2 FLR 1 where it was held that the court had no power to set aside an adoption order; and *Re K*[1997] 2 FLR 221 for a rare decision in which an adoption order was set aside by the court.

dies intestate in respect of any real or personal property (other than property subject to an entailed interest under a disposition made before the date of the adoption order), that property shall devolve in all respects as if the adopted person was the natural child of the adopter and was not the child of any other person.

While in many jurisdictions the child is deemed to be the child of the adoptive parents only[9] nevertheless, there are jurisdictions in which the child, for certain purposes, remains the child of the natural parents and not the adoptive parents. This obtains for example, in Belize. Section 140(4) of the Families and Children Act 1998[10] provides that:

> An adoption order shall not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under any intestacy or disposition, whether occurring or made before or after the making of the adoption order, or confer on the adopted child any right to or interest in property as a child of the adopter and the expression 'child', 'children' and 'issue' where used in any disposition, whether made before or after the making of an adoption order, shall not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child.

In the Commonwealth Caribbean, adoption legislation is based on English legislation which has been amended from time to time in significant ways, and is now contained in the UK Adoption Act 1976. The process of adoption in the region is governed almost entirely by the provisions of the respective adoption legislation together with subsidiary legislation where applicable,[11] which give various powers to adoption or childcare boards to deal with preliminary issues, with the proviso that the court, exercising its judicial function, is the final arbiter and must make an order only where such will be for the child's welfare. The legislation of the various territories of the region is not uniform, but there is much similarity in the provisions, although one might be tempted to say that the majority do not reflect the injection of "new" approaches utilized in some non-Commonwealth Caribbean jurisdictions.

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9. See for example, the Adoption of Children Act, Bahamas, Chap. 117, Section 12; the Adoption Act, Barbados, Cap. 212, Section 25; the Adoption of Children Act, Guyana, Cap. 46:04, Section 20; and the Adoption of Children Act, Trinidad and Tobago, Chap. 46:03, Section 15.
10. No. 17 of 1998.
11. Termed "adoption rules" in some jurisdictions.

TEST TO BE APPLIED IN ADOPTION CASES

The policy behind adoption had traditionally been to find children for families rather than families for children.[12] In recent times there has been a shift from the old approach and adoption law now more or less favours a child-oriented approach. It is now, theoretically, a procedure whereby children are to be provided with the warmth, love and security which are associated with being part of a family, so that in placing a child with a family, extreme care and caution should necessarily be exercised by those involved in the decision-making process. To achieve this, a potential decision must be tested against the welfare of the child principle.

It is generally considered that the test to be applied in adoption cases is that found in Section 6 of the 1976 UK Adoption Act which reads:

> In reaching any decision relating to adoption of a child, a court or adoption agency shall have regard to all the circumstances, *first consideration* being given to the need to safeguard and promote the *welfare of the child* throughout his childhood.

This "welfare of the child" principle is reflected in Section 12(b) of the Trinidad and Tobago Adoption of Children Act which provides *inter alia* that "the order if made will be for the *welfare of the infant*". Section 7 makes reference to the "best interests of the child". There is no mention of these being the "first and paramount consideration" as it is in custody cases. Thus the test, unlike in custody cases, is not "the first and paramount consideration" but the "first consideration."

In *Re W*[13] Cumming-Bruce L.J. attempted to distinguish between the two. He said:

> What precisely the distinction is I find unnecessary, fortunately, to define. It is manifestly an extremely fine distinction. But the difference in language does have this effect, that in custody . . . welfare becomes paramount in the weighing exercise over all other considerations, including the interests of all the grown-ups. Parliament evidently decided . . . that though the welfare of the child should be the first consideration, it is the first among a number of considerations which will themselves depend upon the particular circumstances of the individual case, both as to the number of those considerations and, of course, their weight.[14]

12. In England, for example, the policy behind the first piece of adoption legislation, the Adoption of Children Act 1926, appears to have been drafted to ameliorate the condition of unmarried mothers as well as to meet the desires of couples without children. For more, see A. Bainham, *Children: The Modern Law*, 2d ed. (Bristol: Family Law, Jordan Publishing 1998), 206–207 on "Policy and Purposes".
13. [1984] FLR 402.
14. See *Re B (adoption: child's welfare)* [1995] 1 FLR 895 on application of the test in adoption cases.

The Guyana Adoption of Children Act[15] creates a test which appears to be a combination of the "best interests of the child" and the "welfare of the infant." Section 7 of the Act provides that:

> Where any person has made representations to the Board with a view to the adoption of a child, and the board is of the opinion that the adoption of the child by such person would not be in the *best interests*[16] of the child, the Board shall notify such person accordingly . . .

Section 13(1)(b) further provides that: "the order if made will be for the *welfare*[17] of the infant.[18]

It is clear then, that the test applied in custody cases, and the test applied in adoption cases, is not one and the same, although the difference may be merely one of semantics. It seems illogical that in custody cases, where an order can be revoked or varied, the child's welfare should be paramount while in adoption cases, where an order is final, the test is less stringent. When a court makes an order for a child to be adopted, isn't the court, in substance, concurrently making an order for the adoptive parents to have the legal right to custody of the child in question?

If a party wished to adopt a child, from a practical viewpoint, he must be advised that there are two stages involved in the process, being the pre-judicial stage and the judicial stage.

PRE-JUDICIAL STAGE

The purpose of the pre-judicial stage, is to ensure that the potential parents of the child in question will be suitable parents so that the welfare of the child will not be compromised. Subject to relevant legislation, placement for adoption may be done by a public agency, which is usually an adoption board; by the parents or guardian of the child; and in some countries by third parties, providing it is not done for gain or reward.[19] However, legislation in some countries specifically provide that only an *adoption* or *childcare* board set up for that purpose, shall make arrangements for the adoption of children.

In Trinidad and Tobago, the Adoption of Children Act establishes in Section 3 an Adoption Board. Section 4 provides that no other

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15. Laws of Guyana, Cap. 46:04.
16. Emphasis supplied.
17. Emphasis supplied.
18. See *Re D.X.* [1949] Ch. 320 which emphasizes the requirement that the order be for the child's welfare.
19. See for example, Section 19 of the Trinidad and Tobago Adoption of Children Act; and Section 13(1)(c) of the Guyana Adoption of Children Act; see too K. O'Donnell, "Illegal Placements in Adoption", 6 JCL 17 (1994).

person than the board shall make arrangements for the adoption of a child. Section 5 gives power to the board to receive applications for adoptions, to carry out investigations connected thereto, and to act as *guardian ad litem* of any child in respect of whom an adoption order is sought. The Trinidad and Tobago Adoption of Children Regulations[20] provides in Section 3 that:

> Every person desirous of adopting a child shall first make application to the Board . . . and submit with such application the certificate of a member of the Medical Board of Trinidad . . . as to the physical and mental health of such person.

Section 4 then goes on to provide that the board is to furnish the parent or guardian of the child with a memorandum and is not to proceed with any negotiations or arrangements for the adoption unless the parent or guardian has signed and delivered to the board a certificate to the effect that he or she has read and understood the memorandum and agrees to its terms. Section 5 empowers the board to make enquiries and obtain reports on all matters appertaining to the welfare of the child as well as a report on the health of the child. The case is then considered by a "case committee" appointed by the board for the purpose. Under the terms of Section 6, no child is to be delivered by the board into the care and possession of an adopter until the adopter has been interviewed, and his or her premises inspected, and the case committee has considered the relevant reports. During the six-month placement period, Section 7 of the regulations provides that at least once during the first month and thereafter at least once every two months, a representative of the board is to visit the child and make contact with the parents or guardian of the child and report upon the case and result of such visits and contacts to the case committee.

In Barbados, the Adoption Act was amended in 1981 to give power and responsibility for adoptions to the Child Care Board, although the court, of course, is empowered to make the final adoption order.

Prospective adopters are required by the board to undergo an assessment by a social worker. The intended adopters must also undergo a medical examination and submit medical reports along with their application. The role of the social worker is to consider whether the needs of the intended adoptive parents will meet the needs of the child in question and in this context the welfare of the

20. Laws of the Republic of Trinidad and Tobago, Chap. 46:03 (subsidiary legislation).

child is given due consideration. When the assessment is completed, the social worker submits the report to the Foster Care and Adoption Committee of the Child Care Board which makes a recommendation on the matter, which recommendation is then submitted to the board for approval. A supervisory placement for a period of six months is required, during which time the proposed adoptive parents may change their minds and give notice of an intention not to continue with the adoption, or, the board may revoke the placement if it thinks fit. If the placement goes well, an application is subsequently made to the court for an adoption order.[21]

In Guyana, the Adoption of Children Act establishes in Section 3 an Adoption Board. According to Section 4(1), "It shall not be lawful for any person other than the Board to make arrangements for the adoption of a child."

Section 4(2) imposes a penalty for non-compliance with the provisions of the act. It provides that:

> If any person takes part in arranging an adoption or in the management or control of a body of persons other than the Board which exists wholly or in part for the purpose of making arrangements for the adoption of children he shall be liable on summary conviction to a fine . . . and to imprisonment.

The duties of the board are laid out in Section 5 which provides that:

> It shall be the duty of the board –
> (a) to receive applications from parents, guardians and adopters in respect of the adoption of children;
> (b) to make such investigations concerning the adoption of children for the consideration of the court as may be prescribed;
> (c) to act as *guardian ad litem*, of any child in respect of whom an adoption order is sought.

Once arrangements are made by the board for the adoption of a child, an application must then be made to the court for an adoption order. There is, however, a required placement period of six months before the application can be made. This is set down in Section 6 thus:

> (1) Where arrangements are made by the board for the adoption of a child, an application to the court for an adoption order in respect of the child shall not be made by the adopter until the expiration of a period of six months from the date upon which the child is delivered into the care and

21. Extracted in a general way from the Initial Report on the Implementation of the Convention on the Rights of the Child (Barbados Child Care Board), 62–64 (copy lodged at the Faculty of Law Library, UWI Cave Hill).

possession of the adopter pursuant to the arrangements and at any time during that period -

(a) the adopter may give notice in writing to the Board of his intention not to adopt the child, or

(b) the Board may cause notice in writing to be given to the adopter of its intention not to allow the child to remain in the care and possession of the adopter, and where a notice is so given, the adopter shall, within seven days of the date on which notice was given, cause the child to be returned to the Board, and the Board shall receive the child accordingly.

JUDICIAL STAGE

The judicial stage simply means that a court of law now has the power and exercises this power to either grant or refuse the application for adoption. In Trinidad and Tobago, Section 6 of the Adoption of Children Rules[22] provides that applications are to be heard and determined *in camera*. As a result the public is excluded from having access to the proceedings because of the sensitive nature of the issues involved, together with the need for confidentiality.

Before granting an order, however, certain legal requirements must be satisfied and even if these are satisfied, the court must still ensure that the order will be for the welfare of the child.

The legal requirements relate to the applicant(s) as well as to the child to be adopted, and include the following:

(a) Description of the child: the child must fall within a statutory description as prescribed by the specific legislation in question. In some countries of the region, for example, the child must be below the age of majority;[23] unmarried; a citizen of the particular state and resident in the state. Section 11(5) of the Trinidad and Tobago Adoption of Children Act provides that:

> An adoption order shall not be made in favour of any applicant who is not resident and domiciled in Trinidad and Tobago nor in respect of any child who is not a Commonwealth citizen and so resident.

(b) Persons applying for an adoption order under the relevant acts must be domiciled in the particular state or country and resident, although there are some variations to this rule depending on the legislation of the country in question. In Barbados for example, the Adoption Act provides in Section 14(5) that, "An adoption order shall not be made unless the applicant and the minor reside in Barbados."

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22. Laws of the Republic of Trinidad and Tobago, Chap. 46:03 (subsidiary legislation).

23. See *Re D (a minor) (adoption order: validity)* [1991] 2 FLR 66, where an adoption order made six days before the attainment of the child's majority was upheld by the Court of Appeal.

In Guyana, the Adoption of Children (Amendment) Act 1997 provides in Section 4, which amends Section 9 of the Adoption of Children Act,[24] by allowing an application to be made by "a person domiciled in Guyana, a Guyanese national resident outside Guyana or a former Guyanese national who has acquired by registration or other voluntary and formal act (including marriage) the citizenship of any country other than Guyana." Further, where the applicant is not domiciled in Guyana, Section 4(b) of the amendment provides that the applicant shall "furnish the court with a certificate from the Guyanese diplomatic mission or consulate in the country in which he is resident, or such other office or person as may be prescribed, stating that the applicant is a suitable person to be entrusted with the child concerned."

(c) If a joint application is made, in most jurisdictions the parties must be married.[25] A single application may be made, but the consent of the spouse is usually required. In Guyana, Section 9(2) of the Adoption of Children Act has been amended by Section 4(b) of the 1997 Adoption of Children (Amendment) Act by allowing persons in common law unions to adopt. The amended legislation defines "spouse" as including "a single man and a single woman living together in a common law union for at least seven consecutive years immediately preceding an application for adoption."

(d) A male alone may be allowed to adopt a female child only in special circumstances. In Trinidad and Tobago for example, Section 11(2) of the Adoption of Children Act, provides that:

> An adoption order shall not be made in any case where the sole applicant is a male unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.

A similar provision obtains in Section 14(2) of the Barbados Adoption Act and Section 10(2) of the Guyana Adoption of Children Act.

The effect of this legislative provision was determined in the case of *R v. City of Liverpool Justices, Ex parte W.*[26] In this case the mother of an out-of-wedlock female child lived with the child in the grandmother's house. The mother subsequently formed a relationship with a man X and took the child to live with her and X. The

24. Laws of Guyana, Cap. 46:04.
25. An order may be granted in favour of married spouses who separate after the adoption application was made, see *Re W.M. (adoption: non-patrial)* [1997] 1 FLR 132.
26. [1959] 1 All ER 337.

mother later married X but died some months after. X applied to adopt the child and was successful in his application. The child's grandmother applied for an order of *certiorari* to quash the adoption order as there had been no evidence that any special circumstances prevailed which would have justified the court in making a decision in X's favour. The court granted the application for *certiorari*. Donovan J. stated:[27]

> It may be, as my Lord has indicated, that there may be special circumstances which would justify an adoption order in this case . . . But, under the express provisions of Section 2(2) of the Adoption Act, 1950, such an order clearly cannot be made unless the court is satisfied that such special circumstances do exist, justifying such an order as an exceptional measure, and I think that the inference here is overwhelming that this provision was overlooked.

(e) Persons wishing to adopt must satisfy the age requirement laid down by the particular legislation. Section 14(1) of the Barbados Adoption Act provides that:

> An adoption order shall not be made in respect of a minor unless the applicant or, in the case of a joint application, one of the applicants
> (a) has attained the age of 25 years and is at least 18 years older than the minor; or
> (b) has attained the age of 18 years and is a relative of the minor; or
> (c) is the mother or father of the minor.

In Trinidad and Tobago, Section 11(1) of the Adoption of Children Act provides that:

> An adoption order shall not be made in any case where – (a) the applicant is under the age of twenty-five years, or (b) the applicant is less than twenty-one years older than the child in respect of whom the application is made; but the court may, if it thinks fit, make an order - (i) notwithstanding that the applicant is less than twenty-five years of age, if the applicant is the mother of the child; or (ii) notwithstanding that the applicant is less than twenty-one years older than the child, if the applicant and the child are within the prohibited degrees of consanguinity, or if the application by or on behalf of two spouses jointly and the wife is the mother of the child or the husband is the putative father of the child.[28]

The Guyanese provision is found in Section 10(1) of the Adoption of Children Act which provides that:

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27. Ibid, p. 340.
28. See too Section 6(1) of the Adoption of Children Act, Bahamas, Chap. 117.

> An adoption order shall not be made in respect of a child unless the applicant or, in the case of a joint application, one of the applicants -
> (a) has attained the age of twenty-five years and is at least twenty-one years older than the child; or
> (b) has attained the age of eighteen and is a relative of the child; or
> (c) is the mother or father of the child.

(f) A parent may adopt an illegitimate child, as was allowed in the Bahamian decision of *Re Hall et al.*[29] Or, a blood relative may adopt the child, as was allowed in *Saunders v. Saunders*[30] where the natural grandmother of the child in question was able to obtain an adoption order as she had cared for the child after its abandonment by the natural mother. In *Re D.X.*[31] grandparents were allowed to adopt their illegitimate granddaughter born to their sixteen-year-old daughter, although, according to Vaisey J., it was

> impossible to exclude the risk of grave psychological strain and emotional disturbance arising there from in the future . . . The ostensible relationship of sisters between those who are in fact mother and child is unnatural and its creation might sow the seeds of grievous unhappiness for them both, and, indeed, for the adopters themselves. Every case must, however, be judged on its own facts, dealt with on its own merits, and decided upon a balance of considerations.

(g) Consent to the adoption is required in accordance with particular legislative provisions. Section 11 (3) and (4) of the Trinidad and Tobago Adoption of Children Act makes provision for consent to the adoption order by persons whose consents are required, as for example, the parents or surviving parent or the guardian or guardians of the child, or, the adopting parents or spouse of the surviving adopting parent.

The Guyana Adoption of Children Act provides in Section 10(4) that:

> the adoption order shall not be made
> (a) in any case, except with the consent of every person or body who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child;
> (b) on the application of one of two spouses, except with the consent of the other spouse.

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29. (Unreported) 28 July 1993, SC (Equity Side), Bahamas (No. 384 of 1990), discussed *infra*; see too Re D [1958] 3 All ER 716.
30. (Unreported) 6 February 1993, SC, Bahamas (No. 307 of 1990).
31. [1949] Ch. 320.

Consents of these persons are required to be filed in the court, but the court may dispense with the requirement for consent in certain situations. Under the Trinidad and Tobago Adoption of Children Act, for example, if an application is made by one spouse without the consent of the other, if the court is satisfied that the person whose consent is to be dispensed with cannot be found or is incapable of giving such consent or that the spouses have separated or are living apart and the separation is likely to be permanent, the court may dispense with consent. The court may also dispense with consent in the case of a parent or guardian of a child who has abandoned, neglected or persistently ill-treated the child; where a person who is liable to maintain the child by order or agreement has consistently neglected or refused to so contribute; in any case where the person whose consent is required cannot be found or is incapable of giving consent, or is unreasonably withholding consent; or in any other case where the court sees fit.

Under the Guyana Adoption of Children Act, Section 11 provides that:

> (1) The Court may dispense with any consent required . . . if it is satisfied -
> (a) in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child;
> (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the child, that he has persistently neglected or refused so to contribute;
> (c) in any case, that the person whose consent is required, cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld.[32]
> (2) The court may dispense with the consent of the spouse of an applicant for an adoption order if satisfied that the person whose consent is to be dispensed with cannot be found or is incapable of giving the consent or that the spouses have separated and are living apart and that the separation is likely to be permanent.

In Barbados, there is an additional ground on which consent may be dispensed with, namely, that the parent or guardian has persistently failed to discharge his or her parental duties in relation to the minor. The Barbadian provision on dispensing with consent is found in Section 15 of the Adoption Act as amended by Section 7 of the Adoption (Amendment) Act 1981, which provides that:

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32. See *Re K* [1953] 1 QB 117 where it was held that withholding consent unreasonably was to be narrowly constructed. But see *Re C(L)* [1965] 2 QB 449 where it was held that a parent's disregard of medical evidence relating to the consequences and effect of removing the child could make the withholding of consent unreasonable.

(1) The court may dispense with any consent required . . . if it is satisfied
  (a) in the case of a parent, guardian or a person granted custody by an order of the court
    (i) that he has abandoned, neglected or persistently ill-treated the minor,
    (ii) that he has persistently failed to discharge his parental duties in relation to the minor,[33] or
    (iii) that he has seriously ill-treated the minor;
  (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the minor, that he has persistently neglected or refused so to contribute;
  (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld.
(2) The court may dispense with the consent of the spouse of an applicant for an adoption order if satisfied that the person whose consent is to be dispensed with cannot be found or is incapable of giving the consent or that the spouses have separated and are living apart and that the separation is likely to be permanent.

Even in a case where consent has been given, the court will not make an order unless the person giving the consent understands the nature and effect of giving such consent. In Guyana, for example, Section 13(1)(a) of the Adoption of Children Act provides that:

> The court before making an adoption order shall be satisfied . . . that every person whose consent is necessary under this act and whose consent is not dispensed with has consented to and understands the nature and effect of the adoption order for which application is made, in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights.[34]

(h) Some pieces of legislation make provision for the withdrawal of consent. The 1981 Barbados Adoption (Amendment) Act creates, in Section 8, a new Section 15A to the principal act which provides that:

(1) Any person whose consent is necessary under the act may, at any time before an adoption order is made, withdraw his consent.
(2) In considering whether to accept the withdrawal of the consent of the person referred to in Subsection (1) the court must have regard to the welfare of the minor.

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33. In *Re P* [1962] 3 All ER 789 consent was dispensed with where a mother had put two of her children in foster care soon after their respective births, had neglected to visit them, had neglected to enquire about them, and drew family allowance from the state on the children's behalf but did not apply any funds towards their upkeep.
34. See *A.B. v. The Social Welfare Officer* (1960–61) 3 WIR 420, discussed *infra*.

There is ample case law to be found interpreting the various conditions under which consent or agreement to the adoption may be dispensed with. In *Re F (R) (an infant)*[35] the English Court of Appeal held that before a court could dispense with consent on the ground that the parent could not be found, it had to be shown that all reasonable and proper steps had been taken to locate the parent. On the facts, it was held that all such steps had not been taken since the adopters in searching for the child's natural mother had failed to make enquiries from the mother's father with whom the mother was still in contact. In citing submissions by counsel for the mother, Edmund Davies L.J. stated:[36]

> The mother of this child could have been found had proper steps been taken. Had the county court judge been told that there was a lacuna in the efforts made by the respondents to trace the mother, he would in all probability not have made the order.

The adoption order was therefore set aside and the matter remitted to the county court judge for his reconsideration.

The phrase "incapable of giving consent" generally refers to mental incompetence or some impairment of the mind. This concept was given as extended meaning in *Re R (adoption)*[37] where the child's parents lived in a totalitarian country and due to the difficulty in communicating with them, the court held that their consent to the adoption could be dispensed with.

The ground of "unreasonably withholding consent" is the more usual ground upon which application is made to dispense with consent. In *Re W (an infant)*[38] the House of Lords held that the test was an objective one, that unreasonableness and culpability did not mean one and the same thing, and that the issue depended upon whether a reasonable parent, placed in the position of the *particular* parent in question, would withhold agreement to the adoption. Lord Hailsham referred to it as "reasonableness in the context of the totality of the circumstances" including:

> anything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include, where carried to excess, sentimentality, romanticism, bigotry, wild prejudice, caprice, fatuousness, or excessive lack of common sense . . . Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is

35. [1969] 3 All ER 1101.
36. Ibid, p. 1104.
37. [1966] 3 All ER 613.
38. [1971] 2 All ER 49.

> unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgment with his own.[39]

In this case the child in question had been placed with foster parents, who were the applicants in the proceedings, when he was merely one week old. He had remained with them for some 18 months, and had settled down well. The mother, who was 23 years of age and who lived solely on public assistance, had put him up for adoption within days of his birth and had not seen him again until the hearing of the proceedings. She was unmarried and had two other out-of-wedlock children, aged three and four, with two different men. She later withdrew her consent to the adoption of the child and the issue was whether she was unreasonably withholding consent. Evidence was led that her prospects of marriage were reduced and that there was a serious risk that there would be no man in the household to provide male influence, although the mother suggested that an uncle who visited her could provide that influence. An objection was also taken to her on the ground that she lacked the capacity to raise three children herself. In these circumstances the House of Lords held that she was unreasonably withholding her agreement to the adoption. Lord MacDermott stated:

> I think that the judge plainly found that the child would have a much more stable home life and upbringing with the appellants than with his mother, the respondent.[40]

In the Cayman Islands decision of *Re Murphy*[41] the Grand Court had to determine whether a father's consent to the adoption should be dispensed with. In this case the mother and father of two children had been divorced. The mother remarried, had a third child, and she and her new husband applied to adopt the two children of her previous marriage. They submitted that it was in the interest of the whole family that the two children should bear the same surname as the rest of the family. The children's father refused to consent to the adoption. On the facts, the father had failed to contribute to the children's upkeep and had shown very little interest in them. The mother, however, was fully capable of providing for them from her

39. Ibid, p. 56.

40. This case seems to have provided precedent for the courts to dispense with consent quite readily, and it also seems to have equated the test in adoption cases with that applicable in custody cases by effectively utilizing the welfare principle. For further developments by the English courts see *Re H; Re W (adoption: parental agreement)* (1983) FLR 614; *Re C (a minor) (adoption: parental agreement)* [1993] 2 FLR 260, and *Re M (adoption or residence order)* [1998] 1 FLR 570.

41. [1985] CILR 342.

own resources. The father argued that the reason for his absence and neglect was because he was rebuilding his career in Florida, but was presently in a position to see his children regularly and wished to maintain the natural ties of father and children with them. In the circumstances, the court held that it was not proper to make the adoption order. Summerfield C.J. stated:

> There is no reason to doubt the natural father's claim to love his two children, to be interested in their welfare and his wish to enforce his rights of access. He stated that a major impediment to enforcing those rights over the great distance they live apart and, if necessary, taking legal steps to enforce them has been his straitened financial circumstances. It would have been preferable had he given a detailed account of his assets and income in support of this contention but there is no reason to doubt his assertion in this regard. It was not challenged. He claims that in the foreseeable future he will be in a financial position to make more and more visits to the children and, within two years, to see them as much as once a month. He was certainly sufficiently concerned about opposing the making of the adoption orders to visit these Islands and brief counsel for that purpose[42] . . . And it is as well to begin with the principles that apply in access cases, because the overall effect of the adoption orders would be frustration of the access rights . . . no court should deprive a child of access to either parent unless it was wholly satisfied that it was in the interest of that child that access should cease, and that was a conclusion at which the court should be extremely slow to arrive. Access was to be regarded as a basic right of the child rather than a basic right of the parent. Save in exceptional circumstances to deprive a parent of access was to deprive a child of an important contribution to his emotional and material growing up in the long term.[43]

In explaining the alleged neglect of the father, the learned Chief Justice continued:

> While the natural father has not been particularly zealous in making the contribution he could or should have done . . . he has given an explanation for his shortcomings. One cannot really blame him in the circumstances. It is not a case of having abandoned the children or neglected them through wilful default. He certainly wishes to preserve the natural tie with his children and I do not doubt his wish to make the contribution he should be given the ability and cooperation necessary to do so . . . One cannot say of a man who loves his children and who wishes to retain his tie with them (although defeated in furthering that objective by misfortune and the absence of cooperation) that he is unreasonably withholding his consent to their adoption by a stepfather. As the biological father his relationship with them is permanent and unassailable unless his behaviour or circumstances make it appear that that natural bond should, in the interests of the children themselves, be severed in favour of another.

42. Ibid, pp. 344–45.
43. Ibid, p. 346.

> I can well understand why the mother would want her present husband to supplant the natural father and take on the role of legal father in addition to his role of *de facto* father. It would be a nice tidying-up operation which would have much to commend it from her point of view. I can understand, too, why, from the history of this case, she would bear some resentment towards the natural father. But the interests of the children remain paramount.
>
> In the long term their interests are likely to be better served by maintaining the natural link with their biological father provided that he lives up to his role by fostering their emotional and physical well-being.[44]

The ground of "failure to discharge parental duties" includes not only legal obligations towards the child, but also the natural and moral duty to show affection for and interest in the child, but the failure must be culpable, grave and complete. In *Re D (minors) (adoption by parent)*[45] where the father had failed to provide for his daughter and had failed to see her for a year, the court refused to dispense with his consent on this ground.

In any adoption application before the court, the function of the judge is to determine the proceedings in a manner which will result in the welfare of the child being protected.[46] In the Barbados case of *A.B. v. The Social Welfare Officer,*[47] Stoby C.J. made it clear that the child's interest was supremely important. The case also illustrates the point that even if a parent consents to an adoption of his child, the court will refuse to accept it as a valid consent if the parent fails to appreciate the legal consequences of an adoption order. In this case, the paternal grandmother of two out-of-wedlock children, aged 5 and 6, applied to adopt them. The children's natural mother wished to emigrate to Canada to work and wished to have the children adopted in order to qualify for entry into Canada. The children lived with the grandmother who was the mother's neighbour. The mother saw the children regularly and expressed an intention to send money for their upkeep if she did go to Canada. The Social Welfare Officer refused to give permission for the grandmother to adopt them and she appealed to the Supreme Court of Barbados. The court held that it had to be satisfied that the natural parents genuinely desired to permanently surrender their children to another person. Since the mother intended to send money for the children, she was held not to have appreciated the legal implications of adoption. The court therefore held that in

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44. Ibid, pp. 347–49.
45. [1973] 3 All ER 1001.
46. In practice, the welfare issue and the consent issue should normally be heard together, see *Re K* (a minor) (adoption: procedure) [1986] 1 FLR 295.
47. (1960–61) 3 WIR 420.
48. Ibid, p. 422.

the circumstances, it was not in the children's interest to be adopted. Stoby C.J. stated:[48]

> Since an adoption order has the effect of depriving a parent of all future claim to the child, it is essential in considering whether a proposed adoption is for the welfare of the child to examine the circumstances which caused the application to be made . . . There is no substitute for a parent's love . . . In my view before an adoption order is made the court must be satisfied that the natural parents genuinely desire to surrender their children to another person for all time. In the present application I am not so satisfied. The mother told the Social Welfare Officer that she intended to send money for her children when she got to Canada. But if her children are adopted she no longer legally has children. She ought not to correspond with them. So far as her children are concerned she must become a non-existent person. I am convinced that the mother does not fully appreciate the implications of what she wishes to do and that it would not be in the children's welfare to place them in a position where their loyalties will be divided.

CONSENT OF THE PUTATIVE FATHER

In *Re M*[49] it was held that the consent of the father of an illegitimate child was not needed for the purposes of adoption. However, in view of recent trends in legislation affecting children, it may be argued that the consent of the putative father should be required where the father legally has parental rights over the child under relevant Acts. Where for example, paternity has been established under *status of children* legislation or under affiliation acts which has the consequence of recognizing the father in law and in placing upon him the legal responsibilities of parenthood, then the father of that out-of-wedlock child should be recognized as a parent for purposes of consenting to or refusing to consent to the adoption of his child. In *Re L*[50] for example, while it was held that the father of an illegitimate child was not required to agree to an adoption under the 1976 Adoption Act (UK) because he was not a "parent" within the meaning of the Act, his agreement would nevertheless be necessary where parental or custodial rights had been conferred on him by a court order so as to bring him within the definition of "guardian".

In Guyana, the Adoption of Children Act[51] was amended in 1997 by the Adoption of Children (Amendment) Act[52] to define "father" as including the father of an out-of-wedlock child in certain circumstances. Section 2 of the amendment provides that "father" in relation to a child born out of wedlock means:

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49. [1955] 2 All ER 911 CA.
50. [1991] FLR 171 CA.
51. Laws of Guyana, Cap. 46:04.
52. No. 23 of 1997.

- the man who has been adjudged to be the father of the child by a court of competent jurisdiction, or
- if there is no such man, the man who has acknowledged the child to be his, and has contributed to the child's maintenance before he exercises or seeks to exercise in respect of that child any rights or functions conferred on the father of such child by any provision of the act, and the word "parent" in so far as it refers to the father of such a child, is to be construed accordingly.

INTERCOUNTRY ADOPTIONS

This type of adoption appears to have more relevance in First World countries in which there has been a decline in the numbers of children available for adoption. The alternative appears to be directed at adopting children from poorer countries such as Africa, Asia and Latin America. From a Commonwealth Caribbean perspective, the subject is nevertheless relevant, especially in cases where nationals emigrate and later wish to adopt the child of a relative, friend or acquaintance in the country of origin, although there would be cases in which persons residing in the region might wish to adopt a child originating overseas. Some pieces of local legislation do make provision for intercountry adoptions, although these are not detailed.[53] In Barbados, for example, provision is made for the adoption of foreign infants, which may be gleaned from Section 16(4) of the Barbados Adoption Act, which provides *inter alia* that, " . . . a document signifying a person's consent to the making of an adoption order shall include a licence issued abroad by virtue of which a minor is brought into Barbados for adoption."

There are very few local cases reported on the subject, although the attitude of the local courts may be seen through an examination of the following two cases.

In *Re Hall et al.*[54] a Bahamian man had married a Jamaican woman and the couple had set up home in the Bahamas. The woman had two out-of-wedlock children of Jamaican nationality, aged 17 and 16. An application was made by the parties to adopt the two children. The issue was whether the proceedings were being used as a means of obtaining Bahamian nationality for the children. Strachan

53. On intercountry adoptions generally, see Article 21 of the United Nations Convention on the Rights of the Child (Appendix D, *infra*) which establishes a reasonable yardstick through which this type of adoption may be measured and safeguarded. See too relevant provisions of the Hague Convention, finalized in May 1993.

54. (Unreported) 28 July 1993, SC (Equity Side) Bahamas (No. 384 of 1990).

J. made the order for adoption on the basis that the 'welfare of the child' principle supported such a course.[55]

In *Re Delapenha*[56] a married couple applied to adopt the wife's half-brother. The child was 17 years old at the time and was born in Guyana but had been living with the couple in the Cayman Islands where he attended school as his parents were ill and unable to maintain him in Guyana. The issue for the court was whether the application was intended to confer nationality on the child who would have attained the age of majority within a few days of the application, or whether the application was genuine and the couple intended to stand *in loco parentis* to the child. The court granted the adoption order. Allen J. stated:[57]

> I can find no adverse consideration in the application. It is surely for the benefit and welfare of the child that he should have a settled family and a settled home with close blood relatives. It works out to be an extra bonus that he would have Caymanian status for the time that the law allows, and any benefit which may flow from it, but I do not think that that was the primary object of the application. I accordingly make the adoption order.

In addition to foreign infants being allowed to be adopted by the legislation, there is also provision for local infants to be adopted abroad. In Barbados for example, Section 37 of the Adoption Act makes provision for a licence to be granted by the High Court so that the child may be sent abroad for the purpose of adoption. Section 37(1), as amended by Section 22 of the 1981 Adoption (Amendment) Act provides that:

> A judge may grant a licence in the prescribed form, and, subject to such conditions and restrictions as he thinks fit, authorizing the care and possession of a minor for whose adoption arrangements have been made, to be transferred to a person who is a citizen of, and domiciled in, a country with which Barbados has diplomatic or consular relations and who is resident abroad.

But the court will only grant a licence if certain conditions are met:[58]

> (a) the applicant who is seeking to adopt must be a citizen of Barbados resident abroad, or a citizen of and domiciled in

55. See too *Re Bailey* (Unreported) 5 November 1993 SC (Equity Side) Bahamas (No. 49 of 1992).
56. [1986] CILR 126 (Cayman Islands).
57. Ibid, pp.131–32.
58. Conditions summarized by the Barbados Child Care Board, op. cit.; See too Section 37(2) of Barbados Adoption Act and Section 22 of the Adoption (Amendment) Act 1981.

a country with which Barbados has diplomatic or consular relations;

(b) the necessary entry documents by the Immigration Authorities must be granted for the purposes of finalizing the adoption of the child in the proposed adopter's country of residence;

(c) a satisfactory home study must be completed by a reputable Adoption Agency or a Consular Representative of Barbados; and

(d) the foreign adoption agency must accept responsibility for the transfer of the statutory six months' supervisory period and provide the Barbados Child Care Board with monthly progress reports.

If a foreign infant is adopted locally, the child can acquire citizenship if adopted pursuant to local law and the adopter is a national. Section 4 of the Bahamas Nationality Act,[59] for example, provides that:

> Where, under a law in force in The Bahamas relating to the adoption of children, an adoption order is made by a competent court in respect of a minor who is not a citizen of The Bahamas, then if the adopter, or in the case of a joint adoption, the male adopter, is a citizen of The Bahamas, the minor shall become a citizen of The Bahamas from the date of the order.

EFFECT OF ADOPTION

The legal effect of an adoption order is significant. In *Hitchcock v. W.B. & F.E.B.*[60] Lord Goddard C.J. stated that:

> An adoption order, however, is an order of the most serious description as it removes the child once and for all from his natural parents and gives him to the adopted parents as though they were and always had been his natural parents . . . once the adoption order is made the parents can never see their child again unless by permission of the adopting parents.

Sections 17–21 of the Guyana Adoption of Children Act summarizes parliament's position on the legal effect of an adoption order being made by the court. Section 17 sets out the rights and duties of adoptive parents, including their rights in relation to the marriage of an adopted child, and provides that:

> (1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted

59. Statute Laws of the Bahamas 1987, Chap. 178.
60. [1952] 2 All ER 119 at 121–22.

child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent of marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

Provided that in any case where two spouses are the adopters, such spouses shall in respect of the matters aforesaid and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother respectively.

(2) For the purpose of the law relating to marriage, an adopter and the person whom he has been authorized to adopt under an adoption order shall be deemed to be within the prohibited degrees of consanguinity; and the provisions of this subsection shall continue to have effect notwithstanding that some person other than the adopter is authorized by a subsequent order to adopt the same child.

Section 18 makes provision for the adoptive parent and the adopted child to be treated as parent and child for the purposes of industrial insurance, and for purposes of widows and orphans pension. Section 19 deals with the effect of affiliation orders where children born out of wedlock have been adopted and provides that such an order shall cease to have effect except where the child is adopted by its mother and the mother is a single woman.

Section 20 deals with the position of the adopted child in relation to wills and intestacy and provides that:

(1) Where, at any time after the making of the adoption order, the adopter or the adopted person or any other person dies intestate in respect of any movable or immovable property, that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person.

(2) In any disposition of movable or immovable property made, whether by instrument *inter vivos* or by will (including codicil), after the date of an adoption order -

(a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person;

(b) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them, shall, unless

the contrary intention appears, be construed as not being, or as not including, a reference to the adopted person; and

(c) any reference (whether express or implied) to a person related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person.

Finally, Section 21 provides, *inter alia*, that an adopted person, for the purposes of wills and intestacy, shall be deemed to be related to any other person being the child or adopted child of the adopter as brother or sister, whether he was adopted by one adopter or by two spouses jointly, and whether the child or adopted child of the adopter or adopters are of whole blood or half blood.

FURTHER COMMENTS AND PROPOSALS FOR REFORM

Some key statutory provisions in relation to adoption have been examined, as well as some decided cases on relevant issues. However, there are some other important issues which may arise in relation to the subject, and which may be considered useful fuel for law reformers. Some relevant questions which may be asked in this context are as follows: Should adoption orders be permanent or should they be revocable? Should there be secrecy surrounding the adoption,[61] or should the child have a statutory right of access to information which will allow him to know who his biological parents are? Should adoptive parents conceal the adoptive status of the child or should they be open about it from early on?[62] Should a birth parent have the right to access confidential information to enable him or her to later trace an adopted birth child?[63] If the court makes an adoption order, should the order be conditional so as to give the adopted child the right to maintain contact with a biological parent, brother or sister?[64]

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61. See *Re K (adoption: disclosure of information)* [1997] 2 FLR 74 on the principles and criteria to be applied in relation to disclosure of information in adoption cases.
62. In England, adopted children are permitted when they are 18 years old, to have access to their birth records and to pursue the possibility of establishing contact with their birth family. See Section 51(1) of 1976 Adoption Act, although access to birth records could be refused on public policy grounds, as was the case in *R v. Registrar-General, ex parte Smith* [1991] 2 QB 393.
63. See *D v. Registrar-General* [1997] 1 FLR 715.
64. Termed "open adoption" in some jurisdictions. The traditional approach in English law has been the "clean break" approach, although in *Re C (a minor) (adoption order: conditions)* [1988] 2 FLR 259 the House of Lords acknowledged that in suitable cases conditions could be attached which included the power to preserve personal contact between the adopted child and his brother(s) and/or sister(s), providing that all the relevant parties agreed to the arrangement.

Should our local laws be reformed to reflect positive answers to these questions? Or, should the *status quo* be preserved, reflected in negative answers to these questions and based on the "clean break" principle, on the basis that since the adoptive parents are now regarded as the child's legal parents, then the adoption order should reflect a permanent disconnection with the child's former ties.[65]

Further, an issue which is strongly connected to the social values of Commonwealth Caribbean societies relates to the requirement that parties applying jointly to adopt must be married. In our societies there are myriads of family units consisting of unmarried spouses, a reality given legal recognition to in Barbados under the Family Law Act, as well as in the 1998 Trinidad and Tobago Cohabitational Relationships Act, so that in practical terms, one has to wonder at the usefulness of requiring that joint applicants be married. In Guyana, some attempt has been made to modernize the law through the passage of the 1997 Adoption of Children (Amendment) Act which allows spouses in a common law union existing for at least seven years, to adopt jointly.[66] It is thus suggested that the future of adoption law in the region has great potential for stirring up much controversy over relevant modern-day issues which the law must necessarily address. The most significant relates to open adoptions, the second to the desirability of allowing access to sensitive information surrounding the adoption, and the third, to the question of bringing this area of law in line with recent developments in the wider field of family law, such as the legal recognition of spouses to unions other than marriage. There can be no doubt that the future of adoption law in the region is of extreme interest to all participants in family life.[67]

65. See Stephanie Daly, *Child and Family Law: Trinidad and Tobago*, for some useful criticisms of the Trinidad and Tobago Adoption of Children Act.
66. See Section 4(b).
67. For more on the future of adoption law, see A. Bainham, *Children: The Modern Law*, pp. 236–40.

There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships.
– Browne-Wilkinson V.C.[1]

Chapter 12

Care and Protection of Children

INTRODUCTION

The subject of *care and protection of children* is related to chapter 5 on *parental rights and duties*. However, while *parental rights and duties* fall largely within the realm of the parties' private dealings and the day to day life of the child, the subject of *care and protection* falls mainly within the arena of public law. As this chapter will show, where relevant parties fail to care for or protect a child when they are duty bound to do so, or where there is a positive infliction of harm or injury, the state, through the courts, has the power to impose sanctions against the guilty parties.

The subject involves a treatment of the issues from two perspectives:

(i) infliction of injury or harm whether intentional or negligent by the parent or guardian; and
(ii) infliction of injury or harm by a stranger or other third party.

In both instances the state through the courts and/or other public authorities, is prepared to intervene to protect the child.

1. *Surtees v. Kingston-upon-Thames Borough Council* [1991] 2 FLR 559 at 583.

In relation to harm resulting from parental conduct, one has to balance two competing interests, on the one hand, the need to protect children at risk, and on the other hand, the need to recognize the integrity of the family unit and to exercise restraint in the interference with this basic unit of society. Ideally, there should be a balance between child protection and the legitimate expectations and interests of parents and others concerned.

Mc K Norrie[2] vividly highlights the issues when he writes:

> It is a fact which must never be ignored that in every society children, who by and large thrive best by being brought up by their parents in a loving environment, are occasionally denied the benefits of physical and emotional security and sound development by the very people entrusted with their care. Every developed legal system has its own rules and procedures for dealing with such cases and for ensuring that children receive the protection that they have a right to expect. These procedures nearly always include a right or duty of the state to intervene in private domestic affairs and the granting to the state or its appropriate agencies the power to remove children, temporarily or permanently from their carers, if the danger to the child comes from that source.

What therefore are the legal limits to state interference? In what circumstances and to what extent should the state or a court of law intervene in the private lives of families? In what circumstances and to what extent should parents and those having parental responsibility be punished for failing in their duties? Should the parent be imprisoned in cases of serious irresponsibility? Should the child be taken away either temporarily or permanently and placed in a more favourable environment? These underlie some of the more important issues which arise under this head.[3] The following two cases illustrate the dilemma of the court in ruling upon issues affecting the private lives of families.

In *McCallion v. Dodd*[4] the New Zealand Court of Appeal had to rule upon the issue of whether a four-year-old boy could sue his father in tort if the negligence of the father caused the boy injuries. The court ruled that he could. This is because, where there is no express statutory duty to protect, the child may rely on the common law duty to protect owed to him by a parent, guardian or other person having charge of him.[5] The existence and nature of such liability was considered in the case and the court held that there was no rule of law which prevented the child from suing his parent in tort. On the facts

2. In "Child Protection Law Reform in New South Wales: A View from Scotland", 11 *Australian Journal of Family Law* 11, no. 3 (Dec. 1997), 248.
3. See Hall and Martin, "Crimes Against Children", 142 NLJ 902 (1992) .
4. [1966] NZLR 710, discussed in *Bromley's Family Law*, 8th ed. (Butterworths 1992), 317.
5. Ibid, p. 316.

of the case, the parents in question had disembarked from a bus one night, at about 11:00 pm, together with their two children, a boy of four, and his younger brother, who was then a baby. The mother, who suffered from partial deafness was not wearing her hearing aid at the time. She walked with the boy, holding him by the hand, and the father assumed the responsibility for carrying the baby. As they were walking along the road which was poorly lit, a car which was being driven by the defendant ran into the mother and the boy. This unfortunate collision resulted in the death of the mother and the boy was seriously injured. The boy sued the defendant by his guardian ad litem in negligence and the defendant issued a third party notice whereby he claimed contribution from the father on the ground that the father had breached a duty of care which the father owed to his son. The Court of Appeal held that the father had been negligent in permitting the boy to walk on the wrong side of the road and in the path of oncoming traffic. The father was thus held to be 20 percent liable for the injury to his son. At the trial of the action, Gresson J. of the Supreme Court, whose judgment was affirmed by the Court of Appeal, stated:

> I place on record that in my view McCallion senior was under a duty of care towards his son, as I stated in the course of my summing-up, and I quote, 'to at any rate supervise the manner of his walking along the road having regard to the child's safety.' It was not enough, in my view, to say, 'oh well, he is with his mother,' because his mother had the misfortune to be afflicted with at any rate partial deafness, and in those circumstances it seems to me that McCallion senior did owe a duty of care to his party, including the plaintiff.[6]

Turner J. at the Court of Appeal level had this to say on the issue of the father's liability:[7]

> I accept the submission . . . that a father who in fact has the charge and care of a child of the age of four and a half years on a highway at night has a duty of care to such a child, *the breach of which will give rise to an action by the child against the father for negligence.*[8] I do not think that this duty arises from the relationship of father and child, but from the fact that, be he the father, a more distant relation, or a stranger, he has at the relevant time assumed or accepted the care and charge of the child. Any person who has done this has, in my opinion, accepted a duty of care, the breach of which will be actionable in tort.[9]

6. Ibid, p. 713.
7. Ibid, p. 724.
8. Emphasis supplied.
9. See too *Ash v. Ash* [1698] Comb. 357; *Oliver v. Birmingham and Midland Omnibus Co. Ltd.* [1933] 1 KB 35; *Surtees v. Kingston-upon-Thames Borough Council* [1991] 2 FLR 559.

C v. C,[10] although factually different, is another case in which the parent's personal dealings with the child was in issue, in a situation in which his actions may have caused or have had the potential to cause damage even though he might have been unaware of the effect of his actions. This case illustrates the way in which the court attempts to balance competing interests without compromising the family unit. Here H and W had two daughters aged almost six, and two and three-quarters years old, respectively. The parties were separated and W had petitioned for divorce. A joint custody order had been made with care and control to the mother and access to the father. Subsequently, remarks and comments made by the elder child caused the mother to suspect that the child had been sexually abused by the father. On the direction of the court, the child was interviewed at a hospital which was videotaped, and a doctor was also instructed to report on the matter. The issues for the court were whether the father had in fact abused the child, and whether he should continue to have access to the children. It was held that while there was no sexual abuse in the full sense, the father nevertheless had engaged in vulgar and inappropriate horseplay with the child. However, since it was felt that he was a loving father and was now aware of the risks attendant upon such behaviour, access was not denied, but rather, the court ordered that his visits be supervised.[11]

PROBLEMS FACED BY CHILDREN

In many societies, children face a variety of problems and setbacks, which unfortunately, may map the course that their future development may take. These social and domestic problems include the following: alcoholism or drug abuse on the part of parents; alcoholism or drug abuse by children; physical abuse and violence including domestic violence; emotional abuse; sexual exploitation; neglect of health; ill treatment and cruelty; moral dangers; mental and developmental retardation due to family dysfunction.

To say that the law offers protection in all or most of these situations is to paint a "too rosy" picture of reality. As will be highlighted in the next few pages, there are many instances in which the law attempts to deal with the dangers affecting children, or dangers

10. [1988] 1 FLR 462.
11. For more insight into judicial consideration of the subject see *Re M (a minor)* [1994] 3 All ER 298 HL; *Newham London Borrough Council v. A.G.* [1993] 1 FLR 281 (violent mother); *W v. Nottinghamshire County Council* [1986] FLR 269; *L v. L* [1981] 2 FLR 48; *Re E (child abuse)* [1987] 1 FLR 297; *Summers v. Summers* [1986] 1 FLR 343; *Re N* (child abuse) [1987] 1 FLR 280; *Gopee v. Gopee* (Unreported 11 March 1991, HC, T&T (No. M935 of 1990) (application for exclusion order refused – insufficient evidence of harm to child).

to which they may be exposed. Yet many children continue to be abused, neglected, and continue to suffer at the hands of adults, including those who should have their interests and well-being at heart. The law can only lay down standards of behaviour and while serious criminal penalties may attach for breaches of the law's conditions, nevertheless, children will fall prey to society's imperfections. Many cases of abuse and neglect go unreported; in "sensitive" situations, as for example, in cases of sexual abuse in which families may be exposed, ruined, or disrupted, parties may be tempted to turn a blind eye. Even in cases which are reported and in which parties are prosecuted, the question of evidence to be given by child witnesses[12] is a difficult hurdle to climb. Thus, reality is to be injected into the constructive legal approach towards protecting children.[13]

COMMON LAW POSITION

The common law imposed a duty to protect the child, based on the general proposition of law that if someone voluntarily took it upon himself or herself to look after or care for another person who was unable or incapable of looking after himself, then there was a resulting duty to perform that undertaking properly and competently. Thus, for example, if a child's death is caused by a breach of this duty the parent may be guilty of murder.[14]

STATUTORY PROTECTION

Statute provides protection for the child in various situations and this protection is offered whether the offender is a parent or a stranger. This protection is generally concerned with crimes committed against children and the law's recourse here is to impose criminal penalties against the offender. Recourse may also be had of course to the general civil law in the form of damages.

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12. See for example, *Campbell v. R* [1977] 1 LRC 367 (Privy Council on appeal from Jamaica) in which a 10-year-old boy was called upon to give evidence in a case in which he witnessed the murder of his mother by his father. At times he remained silent during his testimony, as a consequence of which the judge reacted by questioning him in a robust manner, and told him on a number of occasions to "speak up". When the child was reduced to tears in the witness box the judge stated: "We have all the time in the world so you can cry as much as you want. We will wait until you finish crying. If it means until next year, the longer you cry the longer you stay here." Surely, this kind of treatment of child witnesses is unacceptable. See S. Daly, *Child and Family Law: Trinidad and Tobago* (Port of Spain: Government Printery 1992) where she suggests videotaped recordings of interviews with child witnesses as an alternative to courtroom testimony.
13. See Cathy Cobley, "Child Abuse, Child Protection and the Criminal Law" 4 JCL 78 (1992).
14. See *Gibbins and Proctor* [1918] 13 Cr. App. Rep. 134; Ania Wilczynski and Allison Morris, "Parents Who Kill Their Children", [1993] 1 Crim LR 31; R.D. Mackay, "The Consequences of Killing Very Young Children", [1993] 1 Crim LR 21.

Examples of instances in which protection is offered are the following:[15]

(a) *Physical injury*

Where a parent or other person inflicts unlawful or unreasonable physical injury[16] on a child or puts the child in fear that he will do so, that parent or person may be criminally liable for assault and/or battery or other more serious offence as provided by law. In Trinidad and Tobago, for example, the Offences Against the Person Acts[17] deals with offences such as assault occasioning actual bodily harm,[18] causing grievous bodily harm,[19] rape,[20] incest,[21] and buggery,[22] to name a few.

In relation to assault, one issue of practical relevance relates to the physical disciplining of children. Such an issue arose in the Barbadian case of *Mayers v. The Attorney General of Barbados et al.*[23] In this case an infant brought an action suing by her mother as *next friend* against the attorney-general and the principal of the school which she attended. She alleged that the principal assaulted her by flogging her with a leather strap so that she suffered pain and personal injury, loss and damage. She therefore claimed damages for assault and battery. Medical evidence indicated that her injuries were wheals on the right buttock and on the right groin area; and multiple abrasions on the groin area and on the upper aspect of the right thigh. The defence of the principal was that he had administered reasonable corporal punishment to the plaintiff in accordance with his statutory powers and that he had used no more force than was necessary in the circumstances. The reason why the plaintiff had been punished was allegedly because she had played a prank on a teacher by applying 'cow itch' to the teacher's desk. She knew of the effect of the substance coming into contact with the skin, and she admitted that she knew it was against the school rules to play such a prank. The court held that the plaintiff's claim failed, the reason being that the evidence did not disclose any degree of rage or hostility which made the actions of the principal illegal. Chase J. gave the judgment in this case, reviewing the authorities, at the end of which,

15. This list is by no means exhaustive, and merely illustrates by reference to a few countries, the general types of legislative provisions in force.
16. A parent or guardian may discipline the child by the infliction of reasonable corporal punishment. See *R v. Hopley* (1860) 2 F&F 202.
17. Laws of the Republic of Trinidad and Tobago, Chap. 11:08.
18. See Section 30.
19. See Sections 12 and 14.
20. See Section 31.
21. See Section 32.
22. See Section 59.
23. (Unreported) 27 July 1993, HC, B'dos (No. 1231 of 1991).

he gave his decision.[24] It is useful to reproduce that part of his judgment, which highlights the common law position, as well as the statutory position as obtains in Barbados. He stated:

> Administering of corporal punishment to minors is a matter that has engaged the attention of the judicial mind at an early period of the law. . . The early common law recognized that a father was entitled to correct his child by administering reasonable corporal punishment for the purpose of correcting the child during its development. The law also recognized that the father's right may be delegated to the schoolmaster who is entrusted to some extent with the child's upbringing and discipline as a contribution to its spiritual, moral, mental and physical development. . . [The] common law recognized the right of the head teacher to inflict corporal punishment on the pupils entrusted to his or her charge provided the punishment is moderate and reasonable in the circumstances of each case.
>
> Under the Education Act Cap. 41, of the Laws of Barbados and the regulations made thereunder, the right of the head teacher to maintain discipline in the school and to administer corporal punishment to the pupils under his or her charge is more particularly provided for as follows:
>
> 18. Every head teacher in public schools shall subject to the Act and these regulations . . .
>
> (i) ensure that discipline is maintained throughout the school at all times,
>
> (j) administer corporal punishment when necessary and delegate to the deputy head teacher and senior teachers, where applicable, the authority to administer corporal punishment.
>
> It is therefore patently clear from the terms of the current legislative provisions that every head teacher in Barbados is authorized to administer corporal punishment for a breach of discipline committed by any pupil attending his school . . . Given the situation relating to itching problems within the public school community in Barbados at the time, and the number of students [approximately 900] then on the roll at Coleridge and Parry who might have been affected by the presence of cow itch in the school, can it be reasonably said that the headmaster misperceived the situation as one deserving a public flogging of those responsible?
>
> To my mind his perception of the situation was not a mistaken one, and I find his decision to administer immediate punishment for the breach of discipline to be justified in the circumstances . . . It seems clear from all the evidence that, in the absence of any prescription by the Education Regulations the second defendant headmaster has selected the leather strap as the instrument to be employed whenever he finds it necessary to administer corporal punishment at the school; and I find it was his practice to use a leather strap when he had occasion to exercise his statutory powers of flogging at the school.

24. This judgment is useful for its discussion of the law in this area and its assessment of other cases on point. See *Cleary v. Booth* [1893] 1 QB 465; *R v. Hopley* [1860] 2 F&F 202; and *Mansell v. Griffen* [1908] 1 KB 150.

> What seems to arise for determination in the face of this finding is whether a leather strap is the proper instrument by which corporal punishment may be inflicted at a co-educational institution? In short, did the headmaster select an instrument of punishment which was improper for the purposes of administering corporal punishment at the school.
>
> Historically, the means by which corporal punishment may be inflicted on the individual would seem to include the birch rod, tawse, whip, stick, ferule, ruler, cane, strap and cat-o'-nine-tails . . . It seems therefore to follow that in the absence of any device being prescribed by the Education Regulations as to the instrument to be used in the exercise of his statutory powers of inflicting corporal punishment for a breach of discipline at the school, it was open to the headmaster to select any of the devices enumerated above . . .
>
> Against this background and in the face of the law as it now stands, I find that the leather strap was not an improper instrument for use by the second defendant in inflicting corporal punishment on the plaintiff, [the child] . . .
>
> I accept the evidence of the second defendant that he intended to strike the plaintiff on her buttocks, and I find as a question of fact that the full force of the strap did make contact with the plaintiff's right buttock with the tip of the strap unintentionally or accidentally coming into contact with the plaintiff's right groin area and upper right thigh . . . there is no issue raised for determination on the pleadings and supported by evidence that the so-called overreaching resulted from a negligent exercise by the second defendant of his statutory powers of administering corporal punishment at the school . . .
>
> On the totality of the findings on the evidence, this Court is not satisfied that the evidence adduced on behalf of the plaintiff establishes that in punishing the plaintiff, the second defendant used greater force than was reasonably necessary in the exercise of his statutory powers. I can find no evidence to establish that in punishing the plaintiff, the second defendant exhibited such rage or hostility towards the plaintiff as would take the punishment outside the realm of lawful discipline and into the field of an assault and battery.
>
> In the result, the plaintiff's claim fails.

It should be stressed that the person administering reasonable corporal punishment must be entitled or authorized to do so. If that person is not so entitled or authorized, then even if the punishment is reasonable, it may nevertheless be illegal. In *R v. Woods*[25] where an elder brother had administered corporal punishment to his younger brother, this was deemed to have amounted to an assault as the elder brother did not stand *in loco parentis* to his younger brother.

(b) *Abandonment, indecent assault, abduction, stealing of a child*

There are offences created by the various Offences Against the Person Acts. Under Section 21 of the Trinidad and Tobago Offences against

25. (1921) 85 JP 272.

Persons Act,[26] for example, a person may be guilty of an offence where he abandons or exposes a child under two years of age in a situation where the life of the child or its health is endangered or likely to be permanently injured. The penalty is imprisonment for five years.

Section 45(2) provides for indecent assault on young persons under 13 years of age, even if the child might have consented to the act of indecency. The penalty is imprisonment for three years.

Section 48 provides for the offence of abduction of a female under the age of 14 years of age from her parents or guardians. The penalty is imprisonment for two years. Section 54 deals with the stealing of a child under 10 years.

(c) *Cruelty, causing a child to beg, suffocation of a child, burning of a child*
A failure to feed, clothe, provide medical care, schooling or lodging for a child may amount to the offence of cruelty. Section 3 of the Trinidad and Tobago Children Act,[27] for example, provides, *inter alia*, that any person over 16 years of age who has the custody, charge or care of any child or young person who wilfully assaults, ill-treats, neglects, abandons, or exposes the child or young person, or causes or procures the child to be so treated in a manner likely to cause the child suffering or injury to health, is liable to a fine and imprisonment, and any parent or other person legally liable to maintain the child shall be deemed to have neglected the child in a manner likely to injure the health of the child if he fails to provide adequate food, clothing, medical aid, or lodging for the child. The offence under the section is referred to as cruelty.[28]

Section 4 provides for the offence of suffocation of an infant where a person under the influence of drink was in the same bed as the infant and caused the infant to be suffocated.

Section 5 makes it an offence for a person to cause a child to beg or receive alms and Section 6 makes it an offence for a person to expose a child under the age of seven years to the risk of burning from cooking or other fires.

(d) *Restrictions against employing children*
Sections 88–96 of the Trinidad and Tobago Children Act contain

26. Laws of the Republic of Trinidad and Tobago, Chap. 11:08.
27. Laws of the Republic of Trinidad and Tobago, Chap. 46:01.
28. See *Saunders v. Saunders* (unreported) 26 February 1993, SC, Bahamas (No.307 of 1990), where the court held that the abandonment of a boy by his mother amounted to cruelty. See too the Barbados Prevention of Cruelty to Children Act, Cap. 145, s. 5(1) and s. 10(A). Of interest is an article entitled "Local Laws do Protect Children" by Beverley J. Walrond carried in the *Weekend Nation* (Barbados) p. 11 (6 August 1999), on the subject of a father leaving his six-year-old son in a closed motor vehicle during an entertainment show at the National Stadium.

restrictions against the employment of children and provide for penalties against employers, as well as parents, who might be held to be guilty of neglect under Section 94.[29]

(e) *Domestic violence*

This term includes a reference to violence meted out to both adults (especially women) and children within families as well as in relationships of "caregiving". It refers to any kind of abuse, be it assault, neglect, sexual abuse, psychological abuse or harassment, which may occur between people who are connected by blood, affection, or trust. For a child, the effects of domestic violence can be traumatic. For the child, the safest place is his home and with his family and when he is subjected to abuse or violence, or if he is forced to witness violence directed at other family members by a member of his own family, he can no longer view his home as a place within which he can seek refuge or peace. The much-embraced concept of "home, sweet home" is thus forever destroyed. Many Caribbean countries have enacted domestic violence legislation, either recently or fairly recently, which gives jurisdiction to the Magistrate's Courts to grant *protection orders* and *occupation orders* for the benefit of the victim. The advantage of extending this power to magistrates is that it provides speedier and more effective relief to victims of such violence. The examination here will be limited to such protection as it relates to children.

In Jamaica, the Domestic Violence Act[30] allows the court, under Section 3, to grant a protection order or an occupation order where the respondent's conduct threatens a child. The application may be made by a parent or guardian, a person with whom the child resides, a person approved by the minister responsible for social services or a constable. Applications may be made to the Magistrate's Court or to the Family Court.

The protection order, under Section 4, may prohibit the respondent from entering or remaining in the household residence, from entering the place of education of the child, from entering or remaining in any particular place, from molesting the child by watching, following, making persistent telephone calls, or using abusive language or behaviour. These orders may be made *ex parte* in the absence of the respondent if deemed necessary for the personal safety of the child, and an order will only be made where the court is satisfied that the respondent has used or threatened to use violence against the child, or he has caused physical or mental injury to the child, and the order is necessary for the child's protection. Where the

29. See too Barbados Employment (Miscellaneous Provisions) Act, Cap. 346.
30. No. 15 of 1995.

respondent breaches an order, Section 5 imposes a fine of $10,000.00 or imprisonment for six months or both.

Under Section 7, an occupation order may be made if the court is satisfied that it is necessary for the protection of the child, or in the best interest of the child. This order, according to Section 9, excludes the respondent from occupying the household residence of the child.

Section 15 imposes the balance of probabilities test for the standard of proof to be applied.

In Trinidad and Tobago, the Domestic Violence Act[31] also offers protection to a child faced with domestic violence. Section 3 defines a domestic violence offence as including an offence committed by a person against a child of the person.

Under the Act, applications are to be made to the Magistrate's Court. Under Section 4 which adopts the balance of probabilities test, the court may make a protection order where the respondent has either committed a domestic violence offence, where such an offence is threatened, or where he has engaged in conduct of an offensive nature to the extent that the child or others mentioned in the section is fearful of physical or mental injury. Section 5 provides for various restrictions in the order which the court may impose, such as prohibiting the respondent from entering the residential premises, or premises of a particular locality, or engaging in conduct which is of an offensive and harassing nature; the court may also direct that the respondent ensure reasonable care of a child where his conduct results in wilful or reckless neglect of the child; or the court may order him to return or to prohibit him from taking possession of personal property used by the applicant. The court may also direct appropriate counselling or therapy.

Under Section 7 persons who may bring the application include a parent or guardian, a qualified person in social welfare being a public officer upon the approval of the Minister, a police officer, or a probation officer or medical social worker.

Section 14 makes provision for interim orders if necessary to ensure the safety of the subject.

Where the respondent breaches an order, Section 18 imposes a fine of $5,000.00 or imprisonment for six months or both.[32]

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31. No. 10 of 1991.

32. See too the Domestic Violence (Summary Proceedings) Act 1999, Antigua and Barbuda; the Sexual Offences and Domestic Violence Act 1991, Bahamas; the Domestic Violence (Protection Orders) Act 1992, Barbados; the Domestic Violence Act 1992, Belize; the Domestic Violence (Protection Orders) Act 1997, Bermuda; the Domestic Violence Summary Proceedings Act 1992, British Virgin Islands; the Summary Jurisdiction (Domestic Violence) Law 1992, Cayman Islands; the Domestic Violence Act 1996, Guyana; the Domestic Violence (Summary Proceedings) (Amendment) Act 1997, St. Lucia; the Domestic Violence (Summary Proceedings) Act 1995, St. Vincent.

(f) *Moral protection*

Various statutes seek to ensure the moral protection of children including protection from sexual abuse. In Barbados for example, Section 4(1) of the Sexual Offences Act 1992 provides inter alia, that it is an offence for a person to have sexual intercourse with a person under the age of 14 even if that person consented to the act and even if the offender believed the person to be over 14 years of age. If convicted, the penalty is imprisonment for life.

Under Section 5, if a person has intercourse with a child between the ages of 14 but under 16, even if the child consents, the offender is liable to ten years imprisonment if convicted. However, the accused will not be guilty if he honestly believed that the child was 16 or older and had reasonable cause for the belief, providing he is not older than 24 years and has no previous conviction for a similar offence.

Section 6 provides for the offence of incest; Section 7 provides for the offence of sexual intercourse with a stepchild, and Section 17 imposes criminal penalties where a householder permits the defilement of a minor under 16 years of age.

Section 21 provides that a person under the age of 12 is incapable of committing an offence under the Act. Under Section 28 no corroboration is required under the Act, except in cases of offences relating to minors, where under Section 31, corroboration of the minor's evidence is required. Under this section, children of tender years may give evidence if in the opinion of the court he or she is possessed of sufficient intelligence to justify the reception of the evidence, and he or she understands the duty of speaking the truth.[33]

Under the Barbados Protection of Children Act,[34] it is an offence to take indecent photographs of children. There is a maximum penalty of five years on indictment or two years if the action is brought summarily.

In Trinidad and Tobago, Section 7 of the Children Act[35] makes it an offence to allow children or young persons to be in brothels. Section 8 makes it an offence to cause, encourage, or favour the seduction or prostitution of young girls.

(g) *Marriage*

The need to protect children from entering too early into marriage is reflected in the legislation of various territories. In Guyana for example, the Marriage Act[36] provides in Section 31(1) as follows:

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33. See Barbados Evidence Act, No. 4 of 1994, Section 15; see too relevant provisions of the Protection of Children Act, Chap. 146A and the Punishment of Incest Act, Chap. 148. Of interest also is the Dominica Sexual Offences Act 1998.
34. No. 36 of 1990.
35. Laws of the Republic of Trinidad and Tobago, Chap. 46:01.

> Where either of the parties, not being a widower or widow, or a divorced person, is under the age of eighteen years, no marriage shall take place between them until the consent of the appropriate person or persons specified in the second Schedule has been first obtained.[37]

Section 32 provides that:

> (1) Notwithstanding section 31 and subject to subsection (2) a marriage shall be void if the parties or either of them is under the age of 16 in the case of a male or 14 in the case of a female.
> (2) If a female under the age of 14 years becomes pregnant or is delivered of a child, she may apply by petition to a judge of the High Court, for permission to be married under that age to a person not being a person under the age of 16 years or, if under that age, he admits to being the putative father of the child whether yet delivered or not, or is adjudged by a court of competent jurisdiction to be the father of the child; and the Judge of the High Court, if satisfied that the petitioner is pregnant or has been delivered of a child he shall, subject to Sections 29 and 33, judicially declare, by order in writing, that the marriage may be solemnized forthwith; and every marriage duly solemnized in pursuance or under the authority or direction of that Order shall be good, valid and effectual to all intents and purposes whatsoever as if both parties thereto had been above the age of 18 years.

Section 32, however, was amended in 1990 by the Equal Rights Act. Prior to 1990, the minimum age for a male and female respectively was 16 and 14. However, the 1990 act made the minimum age for members of both sexes 16. Below the age of 16, any purported marriage would be void, except in cases where a female below the stipulated age is pregnant and successfully petitions the court for permission to marry.

(h) *Alcohol and drug abuse*

In relation to alcohol and drug abuse, Section 70 of the Barbados Liquor Licences Act,[38] provides that it is an offence for the holder of a liquor licence or other person to sell, or supply intoxicating liquor to be consumed on licensed premises to a person under 16 years of age. Section 21 of the Barbados Drug Abuse (Prevention and Control) Act,[39] makes it an offence for a person to have a controlled drug in his possession, or within a radius of 100 yards of any school premises. Section 22 makes it an offence for a person to knowingly and

36. Laws of Guyana, Cap. 45:01.
37. Where however the person whose consent is required is absent, the court may give consent, and if the person whose consent is required is found to be withholding consent unreasonably, the court may over-rule the refusal.
38. Laws of Barbados, Cap. 182.
39. No. 14 of 1990.

intentionally employ, hire, use, persuade, induce or coerce a child to commit any offence related to the possession or abuse of drugs.

(i) *Juvenile justice*

The law offers special treatment to children charged with or convicted of crimes. This is premised on the principle that children accused of having committed criminal offences should, because of their immature condition, be treated differently from adults. Even in this context, the welfare of the child is an important factor. In Jamaica this is expressly stated in Section 4 of the Juveniles Act which provides that "Every court, in dealing with a juvenile who is brought before it either as being in need of care or protection or as an offender or otherwise, shall have regard to the welfare of the juvenile . . . " In Barbados the Juvenile Offenders Act also takes cognisance of the need to protect children in these situations.

Protection of young offenders includes restrictions on the classes of persons allowed to attend proceedings relating to them, and legislation also seeks to preserve their anonymity.

Additionally, the punishment meted out to juvenile offenders is often different from that meted out to an adult committing a similar or identical crime. In Barbados for example, where a child is found guilty of an offence for which punishment is imprisonment, the child may be sent to the Government Industrial School.[40] If he is sentenced to imprisonment, he is not allowed to associate with adult prisoners.[41] Further, a death sentence is not to be pronounced against a person under the age of 18 years. This is provided for by Section 14 of the Barbados Juvenile Offenders Act which decrees that:

> The sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years; but in lieu thereof the court shall, notwithstanding anything in this or in any other Act, sentence him to be detained during Her Majesty's pleasure, and if so sentenced, he shall be liable to be detained in such place and under such conditions as the Governor-General may direct and whilst so detained shall be deemed to be in legal custody.[42]

40. See the Reformatory and Industrial Schools Act, Chap. 169, Barbados.
41. Section 13(3), Juvenile Offenders Act, Barbados.
42. See *Greene Browne v. The Queen* (Unreported) 6 May 1999 (PC Appeal No. 3 of 1998 from C.A., St. Kitts & Nevis).

Chapter 13

Child Law in the Commonwealth Caribbean and the United Nations Convention on the Rights of the Child

Among all the prevailing images of 'the child', it is the child-as-victim which dominates the convention. As we move from the national to the international stage, however, it is not evil individuals who are seen as the instigators and perpetrators of crimes against children, but the generalized scourges of injustice, intolerance, inequality and failure to respect fundamental human rights and dignity.
– Michael King[1]

Introduction

The Convention on the Rights of the Child[2] was adopted by the United Nations as long ago as 1989[3] and it remains a highly relevant document on the subject of regional child law. Much literature has been written on its content and application,[4] and views concerning its usefulness are diverse and sometimes contradictory. It is reported

1. "Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention", 57 *Modern Law Review* 385 (1994).
2. See Appendix D, *infra.*
3. 20 November 1989.
4. See for example, Stephanie Daly, *Child and Family Law, Trinidad and Tobago* (Port of Spain: Government Printery 1992) (response to specific Terms of Reference by the National Family Services in conjunction with UNICEF); M. Freeman, "The Limits of Children's Rights"; and Heintz, "The UN Convention and the Network of International Human Rights Protection" in M. Freeman and P. Veerman (eds.), *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff 1992); "Initial Report by the Government of the UK to the UN Committee on the Rights of the Child: The UN Convention on the Rights of the Child" (London: Dept. of Health 1994); Lopakata, "The Rights of the Child are Universal" in Freeman and Veerman (eds), op. cit.; Olsen, "Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child" in P. Alston, S. Parker and J. Seymour (eds.), *Children, Rights and the Law* (Oxford: Clarendon Press 1992); H. Stewart, "The Convention on the Rights of the Child and the Role of UNICEF in its Implementation in the Commonwealth Caribbean" (UNICEF Caribbean Area Office, presentation to Family Law students, Faculty of Law UWI, Cave Hill, 27 March 1997, on file at Faculty of Law Library, Cave Hill); "Initial Report on the Convention on the Rights of the Child Draft Report", June 1997 Turks and Caicos Islands; Initial Report on the Implementation of the Convention on the Rights of the Child" (Barbados:

that 187 states have ratified the convention,[5] including the countries of the Commonwealth Caribbean. Now some ten years have gone by since the adoption of the convention by the UN, and at least half a decade has gone by since ratification by the Commonwealth Caribbean.[6] The critical question is, therefore, whether the governments of the region have taken any positive steps to put into effect within their domestic law, the provisions of the convention.

The convention, at the outset, was received with much optimism. Children[7] generally provide no economic or political threats to adults, therefore, it is inconceivable that, as adults, the members of the various governments would object to adopting anything which in theory would be for the benefit of children. It would be an act of selflessness, generosity, deepest humanity on their part. Yet, for the Commonwealth Caribbean, one may ask to what extent the provisions of the convention are in need of being implemented, and can be implemented, given not only the present state of child law in the region, but also the economic state of these countries. First World countries have the economic resources to invest in such a task, while for Third World countries there is a risk that optimism might easily turn into frustration. On the pressing agendas of most countries of the region would no doubt be the need to combat rising crime,[8] unemployment, natural disasters,[9] outbreaks of diseases,[10] political violence[11] and so forth. It would thus be all too easy to put the convention on the 'back burner', until some issue arose within domestic law, requiring a parliamentary scrutiny of a particular problem emerging in relation to children, although it is hoped that this would not be the general attitude. The fact that various countries of the region have completed reports on implementation of the convention[12] illustrates

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Child Care Board); Walsh, "The United Nations Convention on the Rights of the Child: A British View" 5 *International Journal of Law and the Family* (1991), 170; Carney, "The Convention on the Rights of the Child: How Fares Victorian Law and Practice?" (1991) 16 *Children Australia*, 22; McGoldrick "The UN Convention on the Rights of the Child" 5 *International Journal of Law and the Family* (1991), 132; M. Otlowski and M. Tsamenyi, "Parental Authority and the United Nations Convention on the Rights of the Child: Are the Fears Justified?" 6 *Australian Journal of Family Law* (1992), 137; Sanford J. Fox "Beyond the American Legal System for the Protection of Children's Rights" 31 *Family Law Quarterly* (1997–98), 237.

5. Stewart, op. cit., note 4, p. 3
6. Ibid, p. 8, "the region had universal ratification of the CRC by 1993 . . . "
7. By children we mean persons under the age of 18 years, as recommended for universal adoption by the convention, Article 1.
8. In Jamaica, for example, in 1997 there were over 1000 murders; by the middle of January 1998, over 20 murders had already occurred on the island (CBC Television News Report, Barbados) January 1998.
9. For example, the recent eruption of the volcano, Soufriere, in Montserrat.
10. For example, the outbreak of Dengue Fever in Barbados in 1995 and 1997.
11. For example, in Guyana, after the general elections in December 1997.
12. See, for example, regional countries listed in note 4.

that it is indeed on the agendas of countries which have ratified it.

In fact Belize has made the provisions of the convention law through the passage of the 1998 Families and Children Act.

THE CONVENTION

The backbone of the convention is the "foundation of freedom, justice and peace in the world",[13] the reaffirmation of faith in fundamental human rights and in the dignity and worth of the human person.

The preamble to the convention reaffirms the fact that children, because of their vulnerability, need special care and protection, and it places special emphasis on the primary caring and protective responsibility of the family. It also reaffirms the need for legal and other protection of the child before and after birth, the importance of respect for the cultural values of the child's community, and the vital role of international cooperation in securing children's rights.[14]

The content of the 54 articles of the convention deals with a variety of matters, from defining child,[15] to non-discrimination provisions;[16] declaring that in all actions concerning children, the best interest of the child is the primary consideration;[17] a direction to States to do all they can to implement the rights contained in the convention;[18] recognition of the right of parents or guardians to provide direction for the child consistent with the child's evolving capacities;[19] recognition of the right of the child to life, survival and development;[20] the right of the child to a name and nationality;[21] the preservation of the child's identity;[22] the right of the child to live with both parents or to maintain contact with one or both if separated;[23] the right of the child to leave the country for family reunification;[24] state obligation to prevent and remedy kidnapping or retention of children abroad;[25] the right of the child to

13. Preamble: "The State Parties to the Convention, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ."
14. Unofficial summary – marginal note to preamble. Unfortunately, the convention does not have an interpretation section which might have served the useful purpose of defining specific words and phrases used.
15. Article 1.
16. Article 2.
17. Article 3.
18. Article 4.
19. Article 5.
20. Article 6.
21. Article 7.
22. Article 8.
23. Article 9.
24. Article 10.
25. Article 11.

express his or her opinion freely, to receive and impart information regardless of frontiers;[26] freedom of thought, conscience and religion;[27] freedom of association and the protection of privacy;[28] to recognize that parents have joint responsibility for the raising of children;[29] protection from abuse and neglect;[30] protection of children without families;[31] to ensure that adoption procedures are in the best interests of the child;[32] to give special protection to refugee children or disabled children;[33] to ensure the provision of proper health services for children;[34] to effect periodic review of children placed by the state into care;[35] the right of the child to benefit from social security;[36] the right to a suitable standard of living;[37] the right to an education;[38] the protection of children of minorities or indigenous populations;[39] the right to engage in leisure, recreation and cultural activities;[40] protection from child labour, drug abuse, sexual exploitation and sale, trafficking and abduction of children;[41] protection from torture and deprivation of liberty;[42] the need to ensure that children under 15 years of age are not recruited into armed conflict;[43] provision of rehabilitative care and the proper administration of juvenile justice.[44]

In view of the above, the aims of the convention have been described as the "4 P's", namely, *prevention, protection, provision and participation.*[45]

The aims and intentions of the draftsmen are indeed noble. However, it may be that the text is not as detailed as it could have been in terms of the way in which the objects of the convention are to be achieved. The argument here would seem to be that since it is

26. Articles 12, 13 and 17.
27. Article 14.
28. Articles 15 and 16.
29. Article 18.
30. Article 19.
31. Article 20.
32. Article 21.
33. Articles 22 and 23.
34. Article 24.
35. Article 25.
36. Article 26.
37. Article 27.
38. Article 28.
39. Article 30.
40. Article 31.
41. Articles 32–36.
42. Article 37.
43. Article 38.
44. Articles 39 and 40.
45. See G. Van Bueren, "The UN Convention on the Rights of the Child" 3 JCL 63 (1991); A. Bainham, *Children: The Modern Law* (Bristol: Family Law, Jordan Publishing 1998), 59.

intended for a global village comprising varied cultures and traditions, political, social and religious institutions, of the States' parties, that of necessity, it must be vague so as to leave room for individual States' interpretation. If this is the case, is it at all possible for the provisions of the convention to become universal law justiciable in all domestic jurisdictions? The uniformity of children's rights from a global perspective is not a function of States' parties signing an important document. Rather, it would seem to be more a function of States' parties working out ways in which to effect a status quo in which all of the economies of the global village become uniformly consistent, politically stable, and technologically modern. According to some, these are the real underlying issues behind the convention.

CHILDREN'S RIGHTS IN THE COMMONWEALTH CARIBBEAN

Ratification of the convention has been described as "the international community's acceptance of a statement of children's rights which, in many respects, is considerably in advance of anything currently formulated in rights terms at the national level".[46] Accepting this description as a reflection of Commonwealth Caribbean States' attitude to the convention depends upon whether or not domestic law in the region as it relates to children is or is not presently equipped to provide for and to protect the region's children.

Commonwealth Caribbean states are democracies and children's rights in the Commonwealth Caribbean exist first of all, as a result of the various provisions of Commonwealth Caribbean constitutions guaranteeing certain fundamental human rights to individuals. Section 4 of the constitution of Trinidad and Tobago,[47] for example, provides:

> It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
> (b) the right of the individual to equality before the law and the protection of the law;
> (c) the right of the individual to respect for his private and family life;
> (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

46. P. Alston and S. Parker, "Introduction" in *Children, Rights and the Law*, edited by P. Alston, S. Parker and J. Seymour (Oxford: Clarendon Paperbacks 1992), vi.
47. Laws of the Republic of Trinidad and Tobago, Chap. 1:01.

(e) the right to join political parties and to express political views;
(f) the right of a parent or guardian to provide a school of his own choice for the education of his child or ward;
(g) freedom of movement;
(h) freedom of conscience and religious belief and observance;
(i) freedom of thought and expression;
(j) freedom of association and assembly; and
(k) freedom of the press.

In comparing these constitutional provisions[48] with the various articles of the convention, the convention resonates of a similar type of atmosphere created by the constitutional provisions as if the convention was intended to be a mini-constitution for minors.

In addition to these constitutional rights, various pieces of legislation in the Commonwealth Caribbean give specific rights to children. As explored in the various chapters herein, there is specific legislation providing for the maintenance of children, education, succession and property rights; legislation requiring the registration of their birth, immunization against disease; legislation imposing penalties for neglect, cruelty, physical abuse, sexual abuse and domestic violence. While the legislative provisions in the several states are not uniform, some having "old", others "newer", and others more "modern" legislation, nevertheless, the basic and more impor-tant rights are provided for. And, as we have seen, various laws of the region impose criminal penalties for neglect or refusal of the parents or guardians to fulfill the basic duties. In Guyana, for example, Section 92 of the Criminal Law (Offences) Act[49] provides that "Everyone who, being the guardian of a child, wilfully ill-treats, neglects, abandons, or exposes the child, in a manner likely to cause it unnecessary suffering, or injury to its health, or when the child is ill and needs attendance and provision, and being able to procure or provide them, wilfully neglects to procure for it the attendance of a duly qualified medical practitioner, or to provide it with suitable medicines and medical comforts and with proper food," shall be guilty of a misdemeanour and liable to a fine and imprisonment.

Other aspects of the law relating to children in the Commonwealth Caribbean are in many cases consistent or not very far removed from the ideals reflected in the convention. Article 3 dealing with the welfare of the child merely reinforces what is presently the

48. Note that in some Commonwealth Caribbean countries, the sections in constitutions dealing with the protection of fundamental rights and freedoms (the Bill of Rights) are non-justiciable and confer no enforceable rights. See for example, *Girard et al v. Attorney-General* (unreported) 17 December 1986, HC, St. Lucia (Nos. 371 and 372 of 1985).
49. Laws of Guyana, Cap. 8:01; see too chapter 12, *supra*.

law in the region. The welfare of the child is of paramount importance in custody cases, and in all cases of disputes involving children, the best interest of the child, highlighted by Article 9, is the overriding criteria in the region. In Trinidad and Tobago, the Family Law (Guardianship of Minors, Domicile and Maintenance) Act,[50] for example, provides in Section 3 that the court in deciding questions concerning the legal custody or upbringing of a minor, or the administration of any property belonging to or held in trust for a minor or the application of the income thereof, shall regard the welfare of the minor as the first and paramount consideration. This paternalistic orientation of the court in their dealings with children-issues, is illustrated in the Commonwealth Caribbean in a number of cases in which the interest and welfare of the child in question were given priority.[51]

As for other provisions of the convention touching on regional laws relating to children, Article 6(2) instructs states parties to ensure the maximum possible survival and development of the child. In the Commonwealth Caribbean region, the present law generally complies with this provision to the extent that the child has recourse to maintenance, education, health facilities, and so forth. Many acts provide for criminal penalties for a failure to perform these duties.

Article 8 declares the child to be entitled to an identity and a nationality. Present laws conform with this requirement. Article 10 provides for the right of the child to leave the country. This is presently complied with subject, of course, to immigration laws. Article 13 on freedom of expression is presently provided for and guaranteed by the constitution. Article 14 on freedom of thought, conscience and religion is also complied with, as well as Article 15 on freedom of association and peaceful assembly. Article 16 on the right to privacy is also complied with, although these items must, because of the immature condition of a child and especially a very young child, be controlled by its parent or guardian. Article 17 on the right of access to information must also take into account the age of the child and the nature of the information, which again should remain in the domain of the parent or guardian.

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50. Laws of the Republic of Trinidad and Tobago, Chap. 46:08.

51. See for example, *Durity v. Benjamin* (unreported) 30 July 1993 HC, T&T (No. 1596 of 1993); *Saunders v. Saunders* (unreported) 26 February 1993 SC, Bahamas (No. 307 of 1990); *Clement v. Graham* (unreported) 2 April 1993 HC, T&T (No. 2441 of 1991); *Campbell v. Campbell et al.* (unreported) 3 July 1993 HC, T&T (No. 719 of 1982); *Balraj v. Dewar* (unreported) 30 June 1994, HC, T&T (No. S-878 of 1993); *Nicholls v. Goulding et al.* (unreported) 1 September 1994, HC, B'dos (No. 352 of 1993); *Garcia v. Garcia (unreported)* 30 June 1997, HC, T&T (No. 795/95).

Article 19 provides for protection from violence, abuse, and neglect. Current legislation gives such protection, such as the various Offences Against the Person Acts, the Children Acts, the Sexual Offences Acts, and more recently, the Domestic Violence Acts of the region.[52]

Article 21 deals with adoption matters. In adoption matters in the region, the best interest of the child is already the first consideration.[53] In the Trinidad and Tobago Adoption of Children Act, for example, Section12(b) recognizes the welfare of the child principle, and Section 7 recognizes the best interest of the child as being important considerations.

Article 24 deals with health care. There are public hospitals and health clinics in the various territories of the region providing health care and legislation in individual countries, such as the Barbados Health Services Act[54] enables the relevant Minister to ensure that proper arrangements are made for the provision of such. In various jurisdictions legislation ensures that children attending school are immunized against communicable diseases, such as the Trinidad and Tobago Public Health (Nursery Schools and Primary Schools Immunization) Act.[55]

Article 30 provides for the rights of children belonging to minority or indigenous groups, which is already protected by constitutional provisions.

Article 32 places restrictions on the employment of children, which is already provided for by legislation, as for example, under Sections 88–96 of the Children Act of Trinidad and Tobago,[56] which impose various restrictions on the employment of young persons and prescribe penalties for a breach of the provisions. Section 90 (1) provides that "Any employer who employs a person under the age of 18 years at night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the family of the proprietor or owner are employed", is guilty of an offence. Section 91(1) provides that "children under the age of 14 years shall not be employed to work in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed; and any person who employs any such child," is guilty of an offence.

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52. See chapter 12, *supra*.
53. See chapter 11, *supra*.
54. Laws of Barbados, Cap. 44.
55. Laws of the Republic of Trinidad and Tobago, Chap. 28:03.
56. Laws of the Republic of Trinidad and Tobago, Chap. 46:01.

Article 34 seeks to protect children from sexual exploitation and sexual abuse. Various pieces of legislation already do this, as for example, the Offences Against the Person Acts, and the Sexual Offences Acts of the region.[57]

Article 40 seeks to protect children charged with crimes. Various pieces of legislation provide for this, such as Young Offenders Detention Acts and Juvenile Acts, to name a few.[58]

CONVENTION AS A POSITIVE INFLUENCE

The strong points for implementing the provisions of the convention in the Commonwealth Caribbean are many. First of all, if article 2 is implemented, this will ensure that all children will be treated equally. Article 2 provides, *inter alia*, that, "States Parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth or other status.*"

What is relevant here is the term *birth* status. As it is, there is still some discrimination against children born out of wedlock. While many Commonwealth Caribbean States have enacted *status of children legislation*[59] abolishing the legal distinction between children born in and out of wedlock, nevertheless, not all states have done so. In the Bahamas, for example, legislation seems to be lacking in this regard, so that rights to maintenance and property as would accrue normally to children born in wedlock, would not accrue to children born out of wedlock except in certain specified cases.[60] Under the Bahamas Affiliation Proceedings Act,[61] section 4 provides for the out-of-wedlock child's right to maintenance but this is dependant on the mother's willingness to make a claim against the alleged father within a specified limitation period.[62] For children born in wedlock, under different legislation, namely the Matrimonial Causes Act,[63] there is no such time limitation. Further, other discriminations encouraged by the law against the out-of-wedlock child, such as the rule of construction in wills and other instruments disabling out-of-wedlock children from sharing, and the limited rights of out-of-

57. See chapter 12, *supra.*
58. See chapter 12, *supra.*
59. See chapter 4, *supra.*
60. See chapter 1, *supra.*
61. Statute Law of the Bahamas 1987, Chap. 119.
62. See chapter 8, *supra.*
63. Statute Law of the Bahamas 1987, Chap. 111.

wedlock children to share on a parent's intestacy, are legal ills which are in desperate need of reform. The implementation of such an article would greatly enhance the position of the out-of wedlock child in countries which have not yet enacted *status of children* legislation or other legislation reversing the negative effects of illegitimacy.

An implementation of Article 3(3) and Article 18, which deal with the suitability of institutions for children will help to improve and enhance the existing facilities in countries in which these are lacking or inadequate. Problems of overcrowding, inadequate number of places, safety and health are all very prevalent[64] so that implementation will force governments of the region to work out a more effective plan which will assist in ameliorating the problems identified.

An implementation of Article 3 concerning the inherent right to life should provide pregnant women with more up to date and widely available information dealing with antenatal care, and should warn against the hazards of smoking, consuming alcohol, or abusing drugs during pregnancy. Implementation should also make the campaign against illegal abortions more effective.[65]

An implementation of Article 11 on taking more effective means to combat illicit transfer and non-return of children abroad should have the effect of causing governments of the region, which have not yet done so, to become parties to international conventions on child abduction.

Article 12 on the right of the child to express his views freely and especially in matters affecting him would cause the present law and practice to be modified so that children would have a greater say in these matters. Apart from this, implementation may cause the manner in which evidence is given by child witnesses to be reassessed and possibly modified so that the experience would be less traumatic for the child.[66] Daly suggests[67] that videotaped recordings of children talking to qualified professionals would be suitable as this could relieve the stress of courtroom testimony.

Implementation of Article 21 would be useful in that it would encourage a system of foster care to be put in place, in countries in which there is a need for this. An implementation of Article 23 relating to children with disabilities and special needs would also be useful as it would encourage the creation or growth of special facilities for the care and education of children falling within this description.

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64. See Daly, op. cit., note 4.
65. Ibid.
66. See for example, *Campbell v. R* [1977] 1 LRC 367 (Privy Council on appeal from Jamaica) where a boy of ten years was called upon to give evidence in a murder trial. The child was forced to endure harsh and insensitive treatment from the judge and fell into tears in the witness box.
67. Op. cit., note 4.

Article 26 would encourage the growth or creation of a more effective social security system to enable children to directly benefit from it. What comes to mind is the implementation of a scheme which would provide a modest but continuous monthly sum of money for the benefit of each child until the age of majority so that all children, regardless of class or status, would be assured some degree of maintenance.

Finally, an implementation of Article 39 would encourage the creation or growth of suitable rehabilitative facilities for children who have been neglected, exploited, abused, or subjected to other forms of cruelty, inhuman or degrading treatment or punishment, or who have been exposed to armed conflict.

Philip Alston has assessed the strong points of the convention thus:[68]

> The convention is of major significance for a number of reasons. In the first place, it is the single, most comprehensive statement of children's rights ever drawn up at the international level. Secondly it deals, often for the first time in such a context, with a wide range of issues which have only recently emerged on the international agenda. These include inter-country adoptions, child abuse and sexual exploitation, drug-related problems, rehabilitation for children who have been exposed to cruel or exploitative treatment, etc. Thirdly, the convention emphasizes the right of each child to be involved – to participate – in decision-making on matters that affect his or her interests and for the child's evolving capacities to be taken into account in that regard.

INADEQUACIES OF THE CONVENTION

The convention has been severely criticized by many. Some have argued that its terms are vague and ambiguous. There is a striking lack of explanatory provisions; it fails to define key concepts; it is imprecise and requires additional detail if it is to provide proper guidance. Because of this lack of precision and general vagueness, there is too much scope for different and conflicting interpretations.

Under domestic law, a child does not have full legal capacity, and in fact suffers from various legal disabilities and incapacities.[69] Naturally, the convention does not accord full legal capacity to the child and this, for obvious reasons, as a child does not have sufficient maturity and understanding to possess it. How does one then reconcile this *lack of full capacity* principle with the conferring of the varied civil and political rights to children by the convention? Article 15 for

68. *The UN Children's Convention and Australia*, edited by P. Alston and G. Brennan (Canberra: Human Rights and Equal Opportunity Commission, ANU Centre for International and Public Law 1991), Foreword p. iii.

69. See chapter 1, *supra*.

example, provides for the right of the child to freedom of association and peaceful assembly. It then goes on to state that, "no restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of *national security* or *public safety, public order,* the *protection of public health* or *morals or the protection* of the *rights and freedoms* of others." The problem with this Article is that it mentions nothing of the right of the parent to discipline and control the child. The convention seems to deal with the child as an alien being separate from its parent. If for example, a child of ten years decided that he wanted to associate with a group of other ten year-olds who all wished to form a *cartoon club,* and decided that they would "associate" four days a week for four hours at a time, to watch cartoons, then under the strict terms of the Article, a parent would have no right to prevent the child from so doing as such a restriction would not be for the protection of any of the items specified in the article. Further, in deciding to form this group, the child in question would also be exercising his right under Article 32 to leisure, recreation and cultural activities. Under this latter article, it is to be noted that no limit is placed on this right. What if a child wished to exercise this right at every waking moment? The convention does not address this, nor does it state that the parent has a right to administer necessary corporal punishment to a child who is disrespectful, rude, violent, or deserving of such punishment. Would it be wise to draft a "Convention on the Rights of the Parents in Relation to Children"?[70] In the Commonwealth Caribbean, legislation provides that reasonable corporal punishment may be administered. In Trinidad and Tobago for example, Section 22 of the Children Act[71] provides that "Nothing in this Part shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer reasonable punishment to such child or young person".

In relation to the *responsibilities of children,* which is addressed only briefly in the convention, the fifth paragraph of the preamble reads:

> Convinced that the family, as the fundamental group of society and the natural environment for the growth and well being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its *responsibilities*[72] *within the community.*

70. H.A. Finlay, Bradbrook and R.J. Bailey-Harris have noted one criticism of the convention as being "a dangerous erosion of parental authority" in *Family Law, Cases, Materials and Commentary,* 2d ed. (Butterworths 1993), 881
71. Laws of the Republic of Trinidad and Tobago, Chap. 46:01.
72. Emphasis supplied.

Nowhere in the convention does it state what the *responsibilities of children* are. Nor can one assume that the draftsmen intended to refer here to children's responsibilities when and after they become adults. This may be a logical reason why some are of the view that vagueness and ambiguity pervade the whole atmosphere of the convention.[73]

It is also thought that the convention contains a number of cultural biases. From a Commonwealth Caribbean perspective, the convention ignores certain cultural values in terms of the mutuality of the parent-child relationship. In the African and Indian cultures of the Commonwealth Caribbean, for example, children are brought up to respect their parents, and in some instances, the law stipulates that children are even obligated to maintain parents. If for example a seventeen-year-old male child, who is not academically inclined, gives up his right to an education because he prefers to find work and invests his time in a career, then it is assumed in our culture that that child will financially assist his weak and ailing mother who is unable to fend for herself. Section 4 of the Jamaica Maintenance Act[74] for example, creates obligations to maintain parents and grandparents. The section reads:

> Every person is hereby required to maintain his or her father and mother, grandfathers and grandmothers and if his father is not known, the man (if any) with whom the mother openly cohabited at the time of his birth if that man recognized and treated such person as his child during his or her infancy in case such father, mother, grandfather or grandmother or other person aforesaid is unable to maintain himself or herself.

The convention does not deal with duties of the child except in the context of Article 29(c) which provides that State Parties agree that the education of the child shall be directed, *inter alia*, to "The development of *respect for the child's parents*,[75] his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, or from civilizations different from his or her own . . .". However, in the one place where respect for parents is mentioned, it is mentioned merely in passing, and in conjunction with a host of other items having no relation to this issue in question.

Otlowski and Tsamenyi[76] highlighted various concerns of the

73. Support for this view may be had by looking at M. King "Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention", 57 *Modern Law Review* 385 (1994).
74. Laws of Jamaica, Vol. 12.
75. Emphasis supplied.
76. Op. cit., note 4.

population of Australia in relation to the convention. They reported thus :

> Claims have been made that the Convention is anti-family and particular concerns have been expressed about the creation and elevation of "children's rights" and resulting erosion of parental rights and interference with family life . . . At the heart of these concerns was the fear that the ratification of the Convention by Australia would have the effect of undermining parental rights and destroying the parent/child relationship. A number of organizations and individuals opposed to the convention conducted a concerted campaign of opposition, marked by student criticism of what they perceived as the negative consequences of the Convention. As a result, there has been a considerable amount of negative press associated with the Convention . . . Parents have been warned to be alert to these "anti-family" developments aimed at destroying the unity and rights of the family . . . Fears have also been expressed that the Convention is open to abuse and will result in unjustifiable state interference in the family.

As to the inconsistencies in the convention, one glaring example relates to the definition in Article 1 of "child". If the definition of child is any person below the age of 18 years, and if the convention seeks to protect all children in the varied situations highlighted therein, then one has to question why it is that Article 38 allows a child over the age of 15 to be engaged in armed conflicts. Again, this is a reflection of the cultural bias present throughout the convention. What is the emotional or psychological difference between a child who is 14 years old and the child who is 15 years and 1 day old? It is submitted, not much, if at all. Armed conflict is a first world tradition, not a Commonwealth Caribbean tradition. It would matter nought to the Commonwealth Caribbean if a provision such as this had never existed. Further, if the convention is to be consistent, and to treat all children as being equally entitled to the rights it projects as being important to uphold, then the draftsmen ought not to have discriminated between "children". What the convention is in fact saying, is that it is okay to allow certain children to be deprived of rights, and to suffer emotional trauma, physical harm and even death, if it is in pursuit of the political aspirations of States Parties. At this juncture one may note a double inconsistency in the convention as Article 39 exhorts States Parties to take appropriate measures to promote physical and psychological recovery and social reintegration of a child who has been the victim of "armed conflicts" and that "such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child." Surprisingly, the very injury which States might have caused to the child in this setting, is the very injury which the article is seeking to remedy by

ensuring the provision of rehabilitative care. Should this "double standard" be condoned?

The extent to which Commonwealth Caribbean States parties to the convention are in sync with the view of McGoldrick[77] that the convention "sets forth an international consensus in relation to matters that are considered to be central to the very nature and ordering of national societies in terms of their cultures and values" is yet to be determined and depends on how quickly and to what extent the provisions of the convention are implemented in the region.

While children in the Commonwealth Caribbean are entitled to basic rights under the law, there is nevertheless a need for much more to be done to provide adequately for all children. However, it does not follow that the United Nations Convention is necessarily an answer to all of our problems in the law relating to children. The UN Convention on the Rights of the Child is in need of reassessment and amendment, although the convention having been ratified by the vast majority of States, it is unlikely that this will ever be done.[78] However, before regional States Parties invest precious economic resources or additional resources into genuine efforts to implement the provisions of the convention, they must consider whether or not they can in good conscience commit to the fanciful suggestion that the pluralistic global community all have the same interest at heart in protecting children. Unless it is accepted that the convention is riddled with ambiguities, inconsistencies, and cultural biases, and unless this is addressed; unless it is accepted that the problems and setbacks of children cannot be remedied magically by signing and implementing the provisions of a mere piece of paper but by addressing deeper problems of economics, politics and technological deficiencies, it will be difficult to secure for children the entire rights intended by the convention. The basic rights to which children are and ought to be entitled to should of course be reflected in the laws of every nation. But the fabric from which these laws are and should be made must necessarily depend on the economic, political and religious state of the particular country which makes them. One example of a regional country which has implemented the convention into domestic law is Belize. The 1998 Families and Children Act, First Schedule, provides that "A child shall have the right to . . . all the rights set out in the UN Convention on the Rights of the Child with appropriate modifications to suit the circumstances of Belize."

77. Op. cit., note 4.

78. It should be noted, however, that Article 50 allows a state party to propose an amendment to the convention and under Article 52 a state party may denounce the convention by written notification to the Secretary-General of the UN.

This means that where there is a conflict or inconsistency with the domestic law, then the domestic law will prevail. One such inconsistency for example, is in relation to the *birth status of children.* While Article 2 of the convention declares that there should be no discrimination against children on the basis of, *inter alia, birth or other status,* and now that the convention has been implemented, Article 2 represents the law in Belize. However, the same Families and Children Act also retains certain discriminatory provisions against out-of-wedlock children,[79] which amounts to discrimination on the basis of *birth status,* so that since there is a direct conflict between the convention and domestic law, then the domestic law supporting discrimination, prevails. What is the use then of making the convention law in this context? This merely illustrates the difficulty with attempting to create a uniform system of child law for the whole world.

79. See Families and Children Act, Section 33(6).

APPENDIX A

LAWS OF TRINIDAD AND TOBAGO

CHAPTER 46:06

AGE OF MAJORITY ACT

ARRANGEMENT OF SECTIONS

An Act to amend the law relating to the age of majority, to persons who have not attained that age and to the time when a particular age is attained.

28 of 1973.

[15TH NOVEMBER 1973]

Commencement. 187/1973.

1. This Act may be cited as the Age of Majority Act.

REDUCTION OF AGE OF MAJORITY AND RELATED PROVISIONS

Reduction of age of majority from twenty-one to eighteen.

2. (1) Subject to this Act as from the date on which this Act comes into operation, a person shall attain full age on attaining the age of eighteen instead of on attaining the age of twenty-one; and a person shall attain full age on that date if he has then already attained the age of eighteen but not the age of twenty-one.

L.R.O. 1/1980.

(2) Subsection (1) applies for the purposes of any rule of law, and in the absence of a definition or of any indication of a contrary intention, for the construction of "full age", "infant", "infancy", "minor", "minority" and similar expressions in-

(a) this Act and any other written law whether passed or made before, on or after the date on which this Act comes into operation; and

(b) any deed, will or other instrument of whatever nature (not being a statutory instrument) made on or after that date.

(3) Notwithstanding any rule of law, a will or codicil executed before the date on which this Act comes into operation shall not be treated for the purposes of this section as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed on or after that date.

* (4) The President may by Order substitute for a reference to the age of twenty-one years in any written law a reference to the age of eighteen years.

Maintenance for children under Infants Act to continue to age twenty-one. Ch. 46:02.

3. (1) An order under section 4(4), 9(2) or 12 of the Infants Act for the payment of sums towards the maintenance or education of a minor may require such sums to continue to be paid in respect of any period after the date on which he ceases to be a minor but not extending beyond the date on which he attains the age of twenty-one; and any order which is made as mentioned above may provide that any sum which is payable thereunder for the benefit of a person who has ceased to be a minor shall be paid to that person himself.

(2) Subject to subsections (3) and (4), where a person who has ceased to be a minor but has not attained the age of twenty-one has, while a minor, been the subject of an order under any of the provisions of the Infants Act, the court may, on the application of either parent of that person or of that person himself, make an order requiring either parent to pay to the other parent, to anyone else for the benefit of that person or to that person himself, in respect of any period not extending beyond the date when he attains the said age, such weekly or other periodical sums towards his maintenance or education as the court thinks reasonable having regard to the means of the person on whom the requirement is imposed.

* An Order (G.N. 26/1975) has been made under this subsection. The Original Act contained a Schedule of enactments in which the substitution provided for in this subsection was made. The enactments concerned have been accordingly amended and the Schedule omitted.

(3) No order shall be made under subsection (2) and no liability under such an order shall accrue, at a time when the parents of the person in question are residing together, and if they so reside for a period of three months after such an order has been made it shall cease to have effect.

(4) No order shall be made under subsection (2) requiring any person to pay any sum towards the maintenance or education of any child of that person born out of wedlock.

(5) Subsection (2) shall be construed as one with the Infants Act. Ch. 46:02.

Construction for Part III of Wills and Probate Ordinance. Ch.8 No. 2 (1950 Ed.).

4. For the purposes of Part III of the Wills and Probate Ordinance, the dependants of a deceased person shall continue to include any son who has not attained the age of twenty-one.

Maintenance for wards of Court.

5. (1) In this section "the Court" means the High Court of Justice.

(2) Subject to the provisions of this section, the Court may make an order-

(a) requiring either parent of a ward of Court to pay to the other parent; or

(b) requiring either parent or both parents of a ward of Court to pay to any other person having the care and control of the ward, such weekly or other periodical sums towards the maintenance and education of the ward as the Court thinks reasonable having regard to the means of the person or persons on whom the requirement is imposed.

(3) An order under subsection (2) may require such sums as are mentioned in that subsection to continue to be paid in respect of any period after the date on which the person for whose benefit the payments are to be made ceases to be a minor but not beyond the date on which he attains the age of twenty-one, and any order made as mentioned above may provide that any sum which is payable thereunder for the benefit of that person after he has ceased to be a minor shall be paid to that person himself.

(4) Subject to this section, where a person who has ceased to be a minor but has not attained the age of twenty-one has at any time been the subject of an order making him a ward of Court, the Court may, on the application of either parent of that person or of that person himself, make an order requiring either parent to pay to the other parent, to anyone else for the benefit of that person or to that person himself, in respect of any period not extending beyond the date when he attains the said age, such weekly or other periodical sums towards his maintenance or education as the

Court thinks reasonable having regard to the means of the person on whom the requirement in question is imposed.

(5) No order shall be made under this section, and no liability under such an order shall accrue, at a time when the parents of the ward or former ward, as the case may be, are residing together, and if they so reside for a period of three months after such an order has been made it shall cease to have effect; but the foregoing provisions of this subsection shall not apply to any order made by virtue of subsection (2)(b).

(6) No order shall be made under this section requiring any person to pay any sum towards the maintenance or education of any child of that person born out of wedlock.

(7) The Court shall have power from time to time by an order under this section to vary or discharge any previous order thereunder.

Time at which a person attains a particular age.

6. (1) The time at which a person attains a particular age expressed in years shall be the commencement of the relevant anniversary of the date of his birth.

(2) This section applies only where the relevant anniversary falls on a date after that on which this Act comes into operation and, in relation to any written law, deed, will or other instrument, has effect subject to any provision therein.

Persons under full age may be described as minors instead of infants.

7. A person who is not of full age may be described as a minor instead of as an infant, and accordingly in this Act "minor" means such a person as aforesaid.

Funds in Court.

8. Any order or directions in force immediately before this Act comes into operation by virtue of any rules of court or other written law relating to the control of money recovered by or otherwise payable to an infant in any proceedings, shall have effect as if any reference therein to the infant's attaining the age of twenty-one were a reference to his attaining the age of eighteen or, in relation to a person who by virtue of this Act attains full age on the date this Act comes into operation to that date.

Wardship and custody orders.

9. (1) Any order in force immediately before this Act comes into operation-

(a) making a person a ward of Court; or

(b) under the Infants Act or under the Supreme Court of Judicature Act, for the custody, access to, any person, which is expressed to continue in force until the person who is the subject of the order attains the age of twenty-one, or any age between eighteen and twenty-one, shall have effect as if the reference to his attaining that age were a reference to his attaining the age of eighteen or, in

Ch. 46:02.
Ch. 4:01.

relation to a person who by virtue of this Act attains full age on the date this Act comes into operation.

(2) This section is without prejudice to so much of any order as makes provision for the maintenance or education of a person after he has attained the age of eighteen.

Adoption orders. Ch. 46:03

10. This Act shall not prevent the making of an adoption order or provisional adoption order under the Adoption of Children Act in respect of a person who has attained the age of eighteen if the application for the order was made before this Act comes into operation and in relation to any such case that Act shall have effect as if this Act had not been enacted.

Powers of trustees to apply income for maintenance of minor. Ch.8. No.3. (1950 Ed.).

Ch. 8. No. 1 (1950 Ed.).

11. (1) This Act shall not affect section 32 of the Trustee Ordinance-

(a) in its application to any interest under an instrument made before this Act comes into operation;

(b) in its application, by virtue of any rules of law, to the estate of an intestate (within the meaning of the Administration of Estates Ordinance) dying before that date.

(2) In any case in which (whether by virtue of this section or section 15) trustees have power under section 32(1)(a) of the Trustee Ordinance to pay income to the parent or guardian of any person who has obtained the age of eighteen or to apply it for or towards the maintenance, education or benefit of any such person, they shall also have power to pay it to that person himself.

Personal representative's powers during minority of beneficiary. Ch.8. No. 1 (1950 Ed.).

12. In the case of a beneficiary whose interest arises under a will or codicil made before this Act comes into operation or on the death before that date of an intestate (within the meaning of the Administration of Estates Ordinance), nothing in this Act shall affect the powers of the personal representatives regarding-

(a) investment of the residue of any moneys arising on a trust for sale; or

(b) other powers of management in the administration of estates,

at any time before the beneficiary attains the age of twenty-one.

Accumulation periods.

13. The change, by virtue of this Act, in the construction of any rule of law which lays down permissible periods for the accumulation of income under settlements and other dispositions shall not invalidate any direction for accumulation in a settlement or other disposition made by a deed, will or other instrument which was made before this Act comes into operation.

Limitation of actions. Ch. 5. No. 6. (1950 Ed.).

14. The change, by virtue of this Act, in construction of section 10 of the Limitation of Personal Actions Ordinance (limitation in case of person under disability) shall not affect the time for bringing proceedings in respect of a cause of action which arose before this Act comes into operation.

Statutory provisions incorporated in deeds, wills, etc.

15. This Act shall not affect the construction of any statutory provision where it is incorporated in and has effect as part of any deed, will or other instrument the construction of which is not affected thereby.

APPENDIX B

LAWS OF TRINIDAD AND TOBAGO

STATUS OF CHILDREN ACT, 1981

Arrangement of Sections

CHAPTER 46:07

STATUS OF CHILDREN ACT

An Act to remove the legal disabilities of Children born out of wedlock. 17 of 1981

[1ST MARCH 1983] Commencement L.N. 33/1983.

[*Assented to 24th July, 1981*]

Preliminary

1. This Act may be cited as the Status of Children Act. Short title.

Interpretation **2. (1)** In this Act -

"child" includes a person who has attained the age of eighteen years;

"child born in wedlock" means a child whose parents were married to each other when the child was conceived or born or between those times, and "child not born in wedlock" means any other child;

"marriage" includes a void or voidable marriage, and "marry" has a corresponding meaning;

"Minister" means the Minister to whom responsibility for the administration of this Act is assigned;

"Registrar General" means the person for the time being holding office as Registrar General under the Births and Deaths Registration Act and includes any person for the time being discharging the duties of that office; Ch. 44:01.

(2) For the purposes of sections 13 to 17 inclusive -

"blood samples" means blood taken for the purpose of blood tests;

"blood tests" means blood tests carried out and includes any test made with the object of

ascertaining the inheritable characteristics of blood;
"excluded" means excluded subject to the occurrence of mutation;
"tester" means a medical practitioner designated by the Minister to carry out blood tests.

Status of Children

All children of equal status.

3. (1) Notwithstanding any other written law or rule of law to the contrary for all the purposes of the law of Trinidad and Tobago -

(a) the status and the rights, privileges and obligations of a child born out of wedlock are identical in all respects to those of a child born in wedlock;

(b) save as provided in this Act, the status and the rights and obligations of the parents and all kindred of a child born out of wedlock are the same as if the child were born in wedlock; but this provision shall not affect the status, rights or obligations of the parents as between themselves.

(2) The rule of construction whereby in any will, deed, or other instrument words of relationship, in the absence of a contrary expression of intention, signify relationship derived only from wedlock is abolished.

(3) For the purpose of construing any instrument, words denoting a family relationship shall, in the absence of a contrary expression of intention, cease to be presumed to refer only to relationship by marriage and for the purpose of construing any instrument, in the absence of a contrary expression of intention, reference to a child or children includes a child or children whether or not born in wedlock.

(4) Subsections (1) to (3) shall apply with respect to every person, whether born before or after the commencement of this Act, and whether born in Trinidad and Tobago or not, and whether or not his father or mother has ever been domiciled in Trinidad and Tobago.

Application of this Act.

4. (1) This Act does not affect rights which became vested before its commencement.

(2) Save as provided in subsection (1) this Act applies to persons born and instruments executed before as well as after its commencement.

Protection of personal representatives and trustees.

5. For the purposes of the administration or distribution of the estate of any deceased person or of any property held upon trust -

(a) a person born out of wedlock shall be presumed not to have been survived by his father or any other paternal relative unless the contrary is shown;

(b) a person born in wedlock shall be presumed not to have been survived by a child of his father, father's mother, grandfather or mother's mother born out of wedlock unless the contrary is shown,

and no trustee or personal representative shall be liable to any such person of whose claim he has not had notice at the time of the conveyance or distribution, but nothing in this section shall prejudice the right of any person to follow the property or any property representing it into the hands of any person other than a *bona fide* purchaser without notice who may have received it.

Evidence as to Parenthood

Presumptions as to parenthood of child born during marriage.

6. (1) Subject to subsections (2) and (3), a child born to a woman during her marriage, or within ten months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the

contrary, be presumed to be the child of his mother and her husband, or former husband, as the case may be.

(2) Subsection (1) shall not apply if, during the whole of the time within which the child must have been conceived, the mother and her husband were living apart from each other whether as a matter of fact or under a decree or order of separation, or decree nisi of divorce, made by a competent court or authority in Trinidad and Tobago or elsewhere.

(3) Subsection (1) shall not apply where a child is born within ten months after the dissolution of the marriage of his mother by death or otherwise, and after she has married again, and in such case there shall be no presumption as between the husband of the mother and her former husband that either is the father of the child, and the question shall be determined on a balance of probabilities in each case.

Recognition of paternity.

7. The relationship of father and child, and any other relationship traced in any degree through that relationship shall be recognised only if-

(a) the father and the mother of the child were married to each other at the time of his conception or birth or between those times; or

(b) paternity has been registered in a register of births pursuant to the Births and Deaths Registration Act or established by any of the modes specified in section 8 or 10 of this Act.

Ch. 44:01.

Evidence and proof of paternity. Ch. 44:01.

8. (1) If, pursuant to section 21 of the Births and Deaths Registration Act the name of the father of the child to whom the entry relates has been entered in the register book of births (whether before or after the commencement of this Act) a certified copy of the entry made or given and purporting to be signed in accordance with section 46 of that Act shall be *prima facie* evidence that the person named as the father is the father of the child.

(2) A paternity order within the meaning of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act, shall be *prima facie* evidence of the fact of paternity in any subsequent proceedings whether or not between the same parties.

Ch. 46:08.

(3) A paternity order made under section 10 shall, for all purposes, be *prima facie* proof of the matters contained in it.

(4) An order made in any country outside Trinidad and Tobago declaring a person to be the father or putative father of a child, being an order to which this section applies, shall be *prima facie* evidence that the person declared to be the father or putative father, as the case may be, is the father of the child.

(5) The President may from time to time, by Order published in the *Gazette*, declare that subsection (4) applies with respect to orders made by any court or public authority in any specified country outside Trinidad and Tobago or by any specified court or public authority in any such country.

Acknowledgments may be filed with Registrar General.

9. (1) Any statutory declaration made by the mother of a child and by any person acknowledging that he is the father of the child and further declaring that such person exhibited evidence of identification together with a statement specifying the nature of such evidence or a duplicate or attested copy of any such statutory declaration may, in the prescribed manner and on payment of the prescribed fee, if any, be filed in the office of the Registrar General.

(2) In the case of a person who is in Trinidad and Tobago the authorities before whom a statutory declaration for the purposes of subsection (1) may be made are a notary public, a Magistrate or some other person lawfully authorised under the Oaths Act to administer oaths.

Ch. 7:01.

(3) In the case of a person who is not in Trinidad and Tobago the authorities before whom a statutory declaration for the purposes of subsection (1) may be made are a Trinidad and Tobago diplomatic agent or a consular officer or a notary public or some other person lawfully authorised to administer oaths in the country or place where the declaration is made.

(4) The Registrar General shall upon the request of any person who he is satisfied has a proper interest in the matter and, on receipt of the prescribed fee, if any, cause a search of any index of statutory declarations filed with him under subsection (1) to be made, and shall permit any such person to inspect any such declaration or any duplicate or copy thereof.

(5) Where the High Court makes a paternity order under section 10 of this Act or where a Magistrate's Court makes a paternity order within the meaning of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act, the Registrar of the Supreme Court or the Clerk of the Peace, as the case may be, shall forward a copy of such order to the Registrar General for filing in his office under this section, and on his receipt of any such copy the Registrar General shall file it accordingly as if it were an instrument of the kind prescribed in subsection (1).

Ch. 46:08.

Power of Court to make paternity order.

10. (1) Any person who-

(a) being a woman, alleges that any named person is the father of her child;

(b) alleges that the relationship of father and child exists between himself and any other person;

(c) alleges that he is the father of an unborn child; or

(d) being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons,

may apply in such manner as may be prescribed by rules of court to the High Court for a declaration of paternity, and if it is proved to the satisfaction of the court that the relationship exists the Court may make a paternity order whether or not the father or child or both of them are living or dead.

(2) An application under this section may be brought on behalf of the child by any person acting on his behalf.

(3) The High Court has jurisdiction under this section if at the date of the making of any application under this section-

(a) the child to whom the application relates is actually present in Trinidad and Tobago or, if deceased, was born

in Trinidad and Tobago or was domiciled in Trinidad and Tobago at the date of his death; or

(b) the alleged parent of the child against whom the application is brought is actually present in Trinidad and Tobago or, if deceased, was born in Trinidad and Tobago or domiciled in Trinidad and Tobago at the date of his death,

and the High Court also has jurisdiction under this section where -

(a) the child, though absent from Trinidad and Tobago at the time of the proceedings, is a citizen of Trinidad and Tobago; or

(b) the alleged parent of the child against whom the application is brought, though absent from Trinidad and Tobago at the time of the proceedings, is a citizen of Trinidad and Tobago.

(4) No proceeding under this section shall affect any final judgment or decree already pronounced or made by a court of competent jurisdiction.

(5) Where on an application to the High Court under this section the Court has made or has refused to make an order there shall be the same rights of appeal as are in force or exist for the time being in respect of civil proceedings in the High Court and the provisions of the Supreme Court of Judicature Act, and Rules of the Supreme Court, and the Court of Appeal Rules, shall apply to such appeals. Ch. 4:01.

Notice of application for paternity order.

11. (1) Unless the Court otherwise directs, notice of an application for a paternity order shall be given-

(a) the person claimed to be a child or any person named by law to be served on his behalf, and

(b) the person alleged to be the father or mother, as the case may be, of the child, and the person having custody of the child, or

(c) the committee of a mentally incompetent person or the committee of a mentally incompetent child or in the absence of such a committee the Attorney General; and

(d) any other person claiming to be a parent.

(2) Upon application the Court shall-

(a) consider whether or not any other person should receive notice; and

(b) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

Duration of paternity order.

12. (1) A paternity order remains in force until it is set aside under this section.

(2) An application to set aside a paternity order may be made with leave of the Court to the Court by which the order was made.

(3) Notice of the application shall be given to the person specified in section 11.

(4) The Court may confirm the order or set it aside.

(5) The setting aside of a paternity order shall not, unless the Court otherwise directs, affect rights which vested while the order was in force.

Blood Tests

Power of Court to require use of blood tests.

13. (1) In any civil proceedings in which the paternity of any person (hereinafter referred to as "the subject") falls to be determined by a court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of the subject and for the taking, within a period to be specified in the direction, of blood samples from the subject, the mother of the subject and any party alleged to be the father of the subject or from any, or any two, of those persons.

(2) A court may at any time revoke or vary a direction previously given by it under this section.

(3) The person responsible for carrying out blood tests taken for the purpose of giving effect to a direction under this section shall make to the court by which the direction was given a report in which he shall state-

(a) the results of the tests;

(b) whether the person to whom the report relates is or is not excluded by the

results from being the father of the subject, and

(c) if that person is not so excluded, the value, if any, of the results in determining whether that person is the subject's father, and the report shall be received by the court as evidence in the proceedings of the matters stated therein.

(4) Where a report has been made to a court under subsection (3), any party to the proceedings may, with the leave of court, or shall, if the court so directs, obtain from the person who made the report a written statement explaining or amplifying any statement made in the report, and that statement shall be deemed for the purposes of this section to form part of the report made to the court.

(5) Where a direction is given under this section in any proceedings, a party to the proceedings shall not be entitled to call as a witness the person responsible for carrying out the tests taken for the purpose of giving effect to the direction, or any person by whom anything necessary for the purpose of enabling those tests to be carried out was done, unless-

(a) within fourteen days after receiving a copy of the report he serves notice on the other parties to the proceedings, or on such of them as the court may direct, of his intention to call that person; or

(b) the court otherwise directs,

and where any such person is called as a witness the party who called him shall be entitled to cross-examine him.

(6) Where a direction is given under this section the party on whose application the direction is given shall pay the cost of taking and testing the blood samples for the purpose of giving effect to the direction (including any expenses reasonably incurred by any person in taking any steps required of him for the purpose), and of making a report to the court under this section, but the amount paid shall be treated as costs incurred by him in the proceedings.

(7) In this section "civil proceedings" include any proceedings under the Family Law (Guardianship of Minors, Domicile and Maintenance) Act. Ch. 46:08.

Consents, etc., required for the taking of blood samples.

14. (1) Subject to the provisions of subsections (3) and (4), a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under section 13 shall not be taken from that person except with his consent.

(2) The consent of a minor who has attained the age of sixteen years to the taking from himself of a blood sample shall be as effective as it would be if he were of full age; and where a minor has by virtue of this subsection given an effective consent to the taking of a blood sample it shall not be necessary to obtain any consent for it from any other person.

(3) A blood sample may be taken from a person under the age of sixteen years, not being such a person as is referred to in subsection (4), if the person who has the care and control of him consents, or, in the absence of such consent, or, where that consent is unreasonably withheld, if the court so directs.

(4) A blood sample may be taken from a person who is suffering from mental disorder and is incapable of understanding the nature and purpose of blood tests if the person who has the care and control of him consents and the medical practitioner in whose care he is has certified that the taking of a blood sample from him will not be prejudicial to his proper care and treatment.

(5) The foregoing provisions of this section are without prejudice to section 15.

Failure to comply with direction for blood tests.

15. (1) Where a court gives a direction under section 13 and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances.

(2) Where in any proceedings in which the paternity of any person falls to be determined by a court hearing the

proceedings there is a presumption of law that that person is the child of another, then if-

(a) a direction is given under section 13 in those proceedings; and
(b) any party who is claiming relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any steps required of him for the purpose of giving effect to the direction,

the court may adjourn the hearing for such period as it thinks fit to enable that party to take that step, and if at the end of that period he has failed without reasonable cause to take it the court may, without prejudice to subsection (1), dismiss his claim for relief notwithstanding the absence of evidence to rebut the presumption.

(3) Where any person named in a direction under section 13 fails to consent to the taking of a blood sample from himself or from any person named in the direction of whom he has the care and control, he shall be deemed for the purposes of this section to have failed to take a step required of him for the purposes of giving effect to the direction.

Penalties for personating another re blood tests and for tampering with blood sample.

16. (1) If for the purpose of providing a blood sample for a test required to give effect to a direction under section 13 any person personates another, or proffers a child knowing that it is not the child named in the direction, he is liable-

(a) on conviction on indictment, to imprisonment for two years; or
(b) on summary conviction, to a fine of one thousand dollars or to imprisonment for six months.

(2) If a person wilfully and maliciously-

(a) breaks the seal of or opens or causes to be opened any container with a blood sample which is to be delivered to a tester; or
(b) does any act or thing whereby the due delivery of such container to the tester is prevented or impeded; or
(c) in any manner tampers with such container,

he is liable on summary conviction to a fine of one thousand dollars or to imprisonment for six months.

Regulations re blood tests.

17. The Minister may by Regulations make provision as to the manner for giving effect to directions under section 13 and, in particular, any such Regulations may-

(a) provide that blood samples shall not be taken except by such medical practitioners as may be designated by the Minister;

(b) regulate the taking, identification and transport of blood samples;

(c) require the production at the time when a blood sample is to be taken of such evidence of the identity of the person from whom it is to be taken as may be prescribed by the regulations;

(d) require any person from whom a blood sample is to be taken, or in such cases as may be prescribed by the Regulations, such other person as may be so prescribed to state in writing whether he or the person from whom the sample is to be taken, as the case may be, has during such period as may be specified in the Regulations suffered from any such illness as may be so specified or received a blood transfusion of blood;

(e) provide that blood tests shall not be carried out except by such person, and at such places, as may be appointed by the Minister;

(f) prescribe the blood tests to be carried out and the manner in which they are to be carried out;

(g) regulate the charges that may be made for the taking and testing of blood samples and for the making of a report to a court under section 13;

(h) make provisions for securing that so far as practicable the blood samples to be tested for the purpose of giving effect to a direction under section 13 are tested by the same person;

(i) prescribe the form of the report to be made to a court under section 13.

General

Regulations.

18. (1) The Minister may, from time to time, make Regulations for all or any of the following purposes:

(a) prescribing fees and forms for the purposes of this Act;

(b) providing for such other matters as are contemplated by or necessary for giving full effect to this Act, and for its due administration.

(2) Where the Registrar General is empowered to do any act for which a fee is payable, he may refuse to do the act until the fee is paid.

Existing laws.

19. (1)The existing laws shall, as from the date of commencement of this Act, be construed with such adaptations as may be necessary to bring them into conformity with this Act.

(2)The Minister may, from time to time, by Order, make such amendments to any existing law as may appear to him to be necessary for bringing that law into conformity with the provisions of this Act.

(3) For the purposes of this section, the expression "existing law" means any Act, Ordinance, Rule, Regulation, Order or other instrument which has effect as part of the Law of Trinidad and Tobago immediately before the commencement of this Act.

(4) An order made under this section shall be subject to affirmative resolution of Parliament.

Repeal and consequential amendments Ch. 5, no. 13.

20. (1) The Legitimation Ordinance is hereby repealed.

(2) The Enactments specified in the first column of the Schedule are amended to the extent specified in the second column thereof.

Section 20(2)

SCHEDULE

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment
Adoption of Children Ordinance, Ch. 29, no. 7	A. 9 In section 2 for the definition of the word "relative" there shall be substituted- "relative" in relation to any child, means father, mother, son, daughter, brother, sister, uncle, aunt, grandfather, grandmother, grandson, granddaughter whether of the full blood, or of the half blood, or by affinity." B. In section 11- (i) For subsection (3) there shall be substituted: "(3) Before the Court makes any interim order under section 13, or makes any adoption order without first making any such interim order, consents to the Adoption Order by all persons (if any) whose consents are required in accordance with subsection 3A of this section shall be filed in the Court." (ii) In section 11 the following subsection shall be inserted after subsection (3) - "(3A) The persons whose consents to any such order in respect of any child are required as aforesaid, unless they are dispensed with by the Court under subsection (4A), shall be- (a) where there is no adoption order in force in respect of the child the parents or the surviving parent or the guardian or guardians, as the case may be.

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment
	(b) where there is an adoption order in force in respect of the child the adopting parents or parent or the surviving adopting parent.
	(iii) In section 11 the following subsection shall be inserted after subsection (4)- "(4A) The Court may dispense with any consent required by subsection (3A) if it is satisfied- (a) in the case of a parent or guardian of the child, that he has abandoned, neglected or persistently ill-treated the child; (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the child that he has consistently neglected or refused so to contribute; (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld; (d) in any other case where the Court sees fit."
	C. For section 15 there shall be substituted the following section-
"Effect of Adoption Order"	15 (1) For all purposes, as from the date of the making of an adoption order-

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment

(a) the adopted child becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted child; and
(b) the adopted child ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child,

as if the adopted child had been born in lawful wedlock to the adopting parent.

(2) The relationship one to another of all persons whether the adopted child, the adopting parent, the kindred of the adopting parent, the parent before the adopting order was made, the kindred of the former parent or any other person, shall for all purposes, be determined in accordance with subsection (1).

(3) Subsections (1) and (2) do not apply for the purpose of the law relating to incest and the prohibited degrees of marriage to remove any persons from a relationship in consanguinity that, but for this section, would have existed.

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN		SECOND COLUMN
Enactment		Extent of Amendment
The Age of Majority Act, 1973 Act No. 28 of 1973		A. For the words figures and symbols "sub-sections (3) and (4) occurring in the first line of subsection (2) of section 3 there shall be substituted "subsection (3)". B. Subsection (4) of section 3 is repealed. C. Subsection (6) of section 5 is repealed.
The Births and Deaths Registration Ordinance Ch. 29, no. 1.	Child of unmarried mother	A. For section 20 there shall be substituted- 20. (1) The Registrar shall not enter the name of any person as the father of a child born out of wedlock except- (a) at the joint request of the mother and the person acknowledging himself to be the father of the child (in which case that person shall sign the register together with the mother) or (b) at the request of the mother on production of - (i) a declaration in the prescribed form made by the mother stating that the said person is the father of the child; and (ii) a statutory declaration made by that person acknowledging himself to be the father of the child.

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment
	(2) If on registration of the birth of a child no person has been entered in the register as the father, the Registrar may re-register the birth so as to show a person as the father- (a) at the joint request of the mother and of that person (in which case the mother and that person shall both sign the register) in the presence of the Registrar; or (b) at the request of the mother on the production of- (i) a declaration in the prescribed form made by the mother stating that the person in question is the father of the child; and (ii) a statutory declaration made by that person acknowledging himself to be the father of the child, but no birth shall be re-registered as aforesaid except with the authority of the Registrar General and any such re-registration shall be effected in such manner as may be prescribed.

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment

(3) If at any time after the registration of the birth of a child whose father's name is not registered the Registrar General is satisfied that a paternity order in respect of the child has been made by the High Court, or by a Magistrate's Court or that the child's parents were married after the registration he shall authorise the entry in the register of the father and such other particulars relating to the father as are supplied to him."

B. The following section shall be inserted immediately after section 20 as sections 20A and 20B.

"Father's particulars"

20A. Where the birth of any child whose parents were not married to each other at the time of the child's birth is registered pursuant to section 15, the name of or any other particulars relating to the father shall not thereafter be entered in the register unless the Registrar General is satisfied that-

(a) the parents of the child were married to each other; or

(b) a paternity order in respect of the child has been made by the High Court or by a Magistrate's Court or both the mother and the person acknowledging himself to

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment
	be the father of the child consent to the entry: Provided that in the last mentioned case, if the mother is dead or cannot be found, the consent of the father alone shall be sufficient.
"Register of Statutory Declarations and Orders"	20B. (1) the Registrar General shall, from the records and registers in his office, make and keep a correct register in respect of- (a) all statutory declarations of the kind described in subsection (1) of section 9 of the Status of Children Act, 1981, filed in his office or of the duplicates or attested copies of such instruments; (b) all copies of paternity orders made under section 10 of the Status of Children Act,1981, forwarded to him in accordance with section 9 of the said Act, by the Registrar of the High Court; (c) all copies of orders made by a Magistrate's Court forwarded to the Registrar General in accordance with section 9 of the Status of Children Act, 1981, by any Clerk of the Peace for filing in the office.

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment
	(2) For the purposes of subsection (1) the Registrar General shall cause the registration of all declarations and duplicates and copies of declarations filed in his office to be numbered and otherwise systematically filed according to each calendar year and such register shall contain such other particulars as may be prescribed.
	(3) The Registrar General shall cause all such statutory declarations and duplicates and copies of declarations to be indexed according to each calendar year and each index shall contain the number and such other particulars of the registration as may be prescribed.
	(4) The Registrar General shall cause any certified copy of any such instrument, declaration or order as is referred to in the register kept in accordance with subsection (1) to be sealed and any such sealed copy shall be received as evidence relating to the birth to which it relates without any further or other proof of the instrument, declaration or order, as the case may be, and no certified copy purporting to be given in the said office shall be of any force or effect which is not so sealed."

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment
The Children Ordinance, Ch. 4, no. 21	A. In section 44- (i) delete from paragraph (c) of subsection (1) the words "or in the case of an illegitimate child his mother"; (ii) delete from paragraph (f) of subsection (1) the words "whether legitimate or illegitimate" wherever they occur. B. In section 65- (i) for the words "the putative father of an illegitimate child" in subsection (1) there shall be substituted the words "the father of a child born out of wedlock"; (ii) for the words "an illegitimate child" in subsection (2) there shall be substituted the words "a child born out of wedlock".
Citizenship of the Republic of Trinidad and Tobago Act 1976 Act No. 11 of 1976	A. In section 2 for the definition of the expression "responsible parent" there shall be substituted- "responsible parent" in relation to any child means the father but- (a) where the father is dead or (b) where custody of the child has been awarded to the mother; or (c) paternity of the child is not admitted or established in accordance with the Status of Children Act, 1981, the expression "responsible parent" means the mother.

Section 20(2)

SCHEDULE -CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN		SECOND COLUMN
Enactment		Extent of Amendment
Compensation for Injuries Ordinance, Ch. 5. No. 5		B. By repealing subsections (3) and (4) of section 2.
Marriage Ordinance Ch. 29, No. 2		Paragraph (c) of section 2(2) is repealed.
	"Consent to marriage of minors"	For sections 22 and 23 there shall be substituted- 22. Consent to the marriage of a minor shall be obtained in accordance with the following provisions- (a) if both the minor's parents are alive and living together, consent shall be obtained from both parents; (b) if the minor's parents are living apart and he is living with one parent, consent shall be obtained from the parent with whom he is living; (c) if the parents are living apart and the minor is not living with either, consent shall be obtained from both parents unless the consent of one parent is dispensed with by a Judge of the High Court; (d) if one of the parents is dead consent shall

Section 20(2)

SCHEDULE - CONTINUED

AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Enactment
	be obtained from the surviving parent and any other person who is the legal guardian of the minor; (e) if both parents are dead consent shall be obtained from any person who is the legal guardian of the minor.
Power of Judge to dispense with consent	23. In case any person whose consent is required by law to any marriage, is absent from Trinidad and Tobago, or is unable or refuses to give such consent, or is of unsound mind or in any other case where the court sees fit the persons desirous of contracting such marriage may apply by Petition to a Judge of the High Court who may proceed upon the Petition in a summary way, and, in case the marriage proposed shall upon examination appear to him to be proper, the Judge shall judicially declare by order in writing that such marriage may be solemnized and the order shall, for the purposes of this Ordinance, be deemed equivalent to such consent as aforesaid.
Income Tax Ordinance, Ch. 33. No. 1	In section 15 for the definition of "child" in subsection (7) there shall be substituted the following definition- "child" means any child whether or not born in wedlock, and includes step-child or adopted child.

Section 20(2)

SCHEDULE -CONTINUED
AMENDMENTS TO ENACTMENTS

FIRST COLUMN	SECOND COLUMN
Enactment	Extent of Amendment
The Workmen's Compensation Ordinance, No. 24 of 1960.	A. In subsection (1) of section 2 insert next after the definition of "adult" the following- "child of a workman's family" means any child of a workman and his wife; and includes any other child (whether or not a child of the workman or of the wife) who is a member of the family of the workman; B. For the definition of "dependents" in the said subsection (1) of section 2 there shall be substituted- "dependants" means such child of a workman's family and such other members of a workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent; and includes a dependent female and any other person whom the workman at the time of his death treated as under a duty by him to support in whole or in part. However a person shall not be considered to be a partial dependent of a workman unless he was dependent partially on contributions from the workman for the provision of the ordinary necessaries of life suitable for persons in his class and position; "dependant female" means a woman who, for not less than twelve months immediately before the date on which the workman died or was incapacitated as a result of the accident, although not legally married to him, lived with him as his wife and was dependent wholly or in part upon his earnings.

Passed in the House of Representatives this 6th day of May 1981.

R.L. GRIFFITH
Acting Clerk of the House

Passed in the Senate this 19th day of May, 1981.

M. CARRINGTON
Acting Clerk of the Senate

APPENDIX C

LAWS OF ANTIGUA AND BARBUDA

DOMESTIC VIOLENCE (SUMMARY PROCEEDINGS) ACT 1999

ARRANGEMENT OF SECTIONS

Domestic Violence (Summary Proceedings) Act 1999.

[L.S.]

I Assent,
James B. Carlisle,
Governor-General.

18th February, 1999.

ANTIGUA AND BARBUDA

No. 3 of 1999

AN ACT to provide protection by means of summary proceedings in cases involving domestic violence and for related matters.

[25th February, 1999]

ENACTED by the Parliament of Antigua and Barbuda as follows:

PRELIMINARY

1. This Act may be cited as the Domestic Violence (Summary Proceedings) Act, 1999. Short title.

2. In this Act, unless the context otherwise requires Interpretation

"applicant" means any person who applies or on whose behalf application is made, pursuant to this Act, for an order;

"child" means a person under the age of 18 years who
(a) is born to both parties to a marriage;
(b) has been adopted by one or both parties to a marriage;
(c) whether or not born to either party to a marriage is or have been living in the household residence as a member of the family;

(d) is born to man and woman who, although not married to each other are living or have lived together in the same household;
(e) whether or not born to the man and woman referred to in paragraph (d) or either of them
  (i) is or has been a member of their household; or
  (ii) who resides in that household on a regular basis; or
  (iii) is a person of whom either the man or the woman is guardian;

"cooling off period" means a period not exceeding two days;

"court" means a court of summary jurisdiction;

"common law spouse" means a single person who is living together with another single person of the opposite sex in the same household as husband and wife without being legally married to each other;

"dependant" means a person over the age of 18 years who normally resides or resides on a regular basis with another person and that person is responsible for the maintenance of the first mentioned person;

"domestic violence" means any act of violence whether physical or verbal abuse perpetuated by a member of a household upon a member of the same household which causes or is likely to cause physical, mental or emotional injury or harm to the abused party or any other member of the household;

"*ex parte* application" means an application made without notice to the respondent;

"household residence" means in relation to both spouses, the dwelling house, apartment or other living quarters that is or was last habitually used by both parties or either of them as the only or principal family residence together with any land, buildings or improvements appurtenant to it used wholly or mainly for the purposes of the household;

"Minister" means Minister responsible for the administration of this Act;

"occupation order" means an order or interim order made under section 7;

"parent" includes
(a) the parent of a child of the household;
(b) the parent or grandparent of a spouse;
(c) the parent or grandparent of a respondent, either by consanguinity or affinity;

"protection order" means an order or interim order made under section 4;

"respondent" means a person against whom an order is granted pursuant to this Act;

"specified person" means the spouse of the respondent, a parent, a child or dependant;

"spouse" includes a former spouse, common law spouse and former common law spouse;

"tenancy order" means an order made under section 11 or an interim order made under section 12; and

"tenant" in relation to any dwelling house, includes any person

(a) whose tenancy has expired or has been determined; and
(b) who is for the time being deemed under or by virtue of any enactment or rule of law to continue to be the tenant of the dwelling house, and the term "tenancy" has a corresponding meaning.

Persons entitled to apply under this Act.

3. (1) An application for an order other than a tenancy order under this Act may be made by

(a) the spouse of the respondent who is the person on whom the alleged conduct has been, or is likely to be perpetrated by the respondent;
(b) any member of the household on his own behalf or on behalf of any other member of the household; or
(c) the parent of the specified person or of the respondent though not residing in the household, on behalf of the specified person.

(2) Where the alleged conduct involves a child or dependant, the application under subsection (1) may be made by

(a) a person with whom the child or dependant normally resides or resides on a regular basis or any other member of the household; or
(b) a parent or guardian of the child or dependant; or
(c) a person holding the office or performing the duties of a probation officer or medical social worker.

(3) Where the dependant is mentally disabled, the application under subsection (1) may be made by

(a) a person experienced or qualified in social welfare;
(b) a police officer; or
(c) a person holding the office or performing the duties of a probation officer or medical social worker.

(4) An application for a tenancy order may be made by the respondent's spouse as mentioned in subsection (1) (a) or by a parent or guardian of a child or dependant.

PROTECTION ORDERS

Application for protection order. Form 1. Schedule.

4. (1) Application may be made to the court in accordance with Form 1 of the Schedule for a protection order prohibiting the respondent

(a) from entering or remaining in the household residence of any specified person;

(b) from entering or remaining in a specified area where the household residence of a specified person is located;

(c) from entering the place of work or education of any specified person;

(d) from entering or remaining in any place where a a specified person happens to be; or

(e) from molesting a specified person by

(i) watching or besetting the specified person's household residence, place of work or education;

(ii) following or waylaying the specified person in any place;

(iii) making persistent telephone calls to or sending in writing any form of correspondence, whether in handwriting or by mechanical or electronic means, to a specified person; or

(iv) using abusive language to or behaving towards a specified person in any other manner which is of such nature and degree as to cause annoyance to, or result in ill-treatment of the specified person.

(2) On hearing an application under subsection (1) the court may make a protection order if it is satisfied that

(a) the respondent has used or threatened to use, violence against, or caused physical or mental injury to a specified person and is likely to do so again; or
(b) having regard to all the circumstances, the order is necessary for the protection of a specified person,

and the court may, if it thinks fit, attach a power of arrest to the order.

(3) A protection order may be made on an *ex parte* application if the court is satisfied that the delay that would be caused by proceeding on notice would or might entail

(a) risk to the personal safety of a specified person, or
(b) serious injury and undue hardship.

(4) Any protection order made on an *ex parte* application shall be an interim order.

(5) Where a protection order is granted on an *ex parte* application, the respondent may apply immediately for it to be discharged.

Breach of protection order

5. (1) Where a protection order or an interim protection order is made and

(a) it is served personally on the respondent, and
(b) the respondent contravenes the order in any respect, the respondent commits an offence and is liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months or both.

(2) Subject to the provisions of this section, where a protection order is in force, a police officer may arrest without a warrant a person who has committed or whom he has reasonable cause to suspect has committed, a breach of the order.

(3) No person shall be arrested under this section unless the police officer believes that the arrest of that person is reasonably necessary for the protection of the applicant.

(4) For the purposes of subsection (2), the police officer shall take into account

(a) the seriousness of the act which constituted the alleged breach;

(b) the time that has elapsed since the alleged breach was committed and whether there is any further need for a cooling off period; and

(c) the restraining effect of other persons or circumstances on the respondent.

(5) For the purposes of subsection 4 (b) a cooling off period in custody shall not exceed twenty-four hours.

(6) Notwithstanding this section a police officer may in the absence of a protection order take such steps as may be necessary and appropriate including the exercise of the power of arrest for the protection of any member of a household where he knows or has good cause to believe that a person is the subject of domestic violence and is likely to be further abused.

7) Where an arrest is made under this section

(a) the person arrested shall be entitled to make a telephone call to one person of his choice, other than the applicant or a specified person;

(b) it shall be the duty of the police officer who makes the arrest to ensure that the person arrested is informed, as soon as practicable after the arrest, of the right conferred by paragraph (a).

Duration and discharge of protection order.

6. (1) A protection order shall cease to have effect if a party to the proceedings in which the order was made applies to the court for it to be discharged.

(2) A copy of an application under subsection (1) shall be served personally on each person who was a party to the proceedings in which the original order was made.

(3) In determining whether to discharge a protection order the court shall have regard to the matters referred to in section 4 (2).

OCCUPATION ORDER

Application for a grant of occupation order. Form 2. Schedule.

7. (1) Application may be made to the court in accordance with Form 2 of the Schedule for an occupation order granting a specified person named in the order the right to live in the household residence.

(2) Subject to section 14 and subsection (3) of this section, the court may, on an application under subsection (1), make an occupation order granting to the applicant, for such periods and on such terms and conditions as the court thinks fit, the right to occupy the household residence.

(3) The court may make an occupation order under subsection (2) only if the court is satisfied that such an order

(a) is necessary for the protection of a specified person, or

(b) is in the best interest of a child.

Ex Parte application for occupation order.

8. (1) An occupation order may be made on an *ex parte* application if the court is satisfied that

(a) the respondent has used violence against or caused physical or mental injury to a specified person; and

(b) the delay that would be caused by proceeding on notice could or might expose the specified person to physical injury.

(2) An occupation order made on an *ex parte* application shall be an interim order.

(3) Where the court grants an occupation order on an *ex parte* application, the court shall at the same time make an interim protection order unless it considers that there are special reasons why the order should not be made.

(4) An occupation order which is made on an *ex parte* application while the specified person concerned and the respondent are living together in the same household residence shall expire

(a) on the discharge of the occupation order by the court;
(b) on the discharge of an interim protection order made pursuant to subsection (3); or
(c) in any other case, at the expiration of a period of seven days after the date on which the occupation order was made.

(5) Where an occupation order is made on an *ex parte* application, the respondent may apply for variation or discharge of that order.

Effect of occupation order.

9. (1) Where an occupation order is made the specified person to whose benefit it is made is entitled, to the exclusion of the respondent, personally to occupy the household residence to which that order relates.

(2) The conditions attached to an occupation order may include such arrangements as may be necessary for the financial support of the member of the household where appropriate.

Variation or discharge of occupation order.

10. The court may, if it thinks fit, on the application of either party, make an order

(a) extending or reducing any period specified by the court pursuant to subsection (2) of section 7; or
(b) varying or discharging any terms and conditions imposed by the court pursuant to that subsection.

TENANCY ORDERS

Tenancy order. Form 3. Schedule.

11. (1) An application may be made to the court in accordance with Form 3 of the Schedule for a tenancy order, vesting in the applicant, the tenancy of any dwelling house which, at the time of the making of the order

(a) the respondent is either the sole tenant or a tenant holding jointly or in common with the applicant; and
(b) is the household residence of the applicant or the respondent.

(2) Subject to section 16, the court may make an order on an application under subsection (1) if the court is satisfied that such an order

(a) is necessary for the protection of the applicant; or
(b) is in the best interests of a child or a dependant.

Grant of tenancy order on an *ex parte* application.

12. (1) A tenancy order may be made on an *ex parte* application if the court is satisfied that

(a) the respondent has used violence against or caused physical or mental injury to the applicant, child or dependant;
(b) the delay that would be caused by proceeding on notice would or might expose the applicant, child or dependant, to physical injury.

(2) A tenancy order made on an *ex parte* application shall be an interim order.

(3) Where the court makes a tenancy order on an *ex parte* application the court shall, at the same time, make an interim protection order unless the court considers that there are special reasons why the order should not be made.

(4) A tenancy order which is made on an *ex parte* application while the applicant and the respondent are living together in the same household shall expire

(a) on the discharge of the order by the court;
(b) on the discharge of an interim protection order made under subsection (3); or
(c) in any other case, at the expiration of a period of seven days after the date on which the order was made.

(5) Where a tenancy order is made on an *ex parte* application the respondent may apply for a variation or discharge of that order.

Effect of tenancy order.

13. (1) Where a tenancy order is made the applicant shall, unless the tenancy is sooner determined, become the tenant of the dwelling house subject to the terms and conditions of the tenancy in force at the time of the making of that order, and the respondent shall cease to be the tenant.

(2) Every tenancy order shall have effect and may be enforced as if it were an order of the court for possession of the land granted in favour of the applicant.

(3) Nothing in this Act or in any tenancy order

(a) limits or affects the operation of any enactment or rule of law for the time being applicable to any tenancy to which a tenancy order applies, or to the dwelling house held under the tenancy; or
(b) authorises the court to vary, except by vesting the tenancy pursuant to this section or revesting the tenancy pursuant to section 14, any express or implied term or condition of the tenancy.

Power to discharge enancy order and evest tenancy.

14. (1) The court may, if it thinks fit on the application of

(a) the applicant or respondent, or
(b) the personal representative of either party, make an order (in this section referred to as a "revesting order") reverting the tenancy accordingly.

(2) Where a revesting order is made under subsection (1), the person in whose favour it is made shall, unless the tenancy is sooner lawfully determined, become the tenant of the dwelling house subject to the terms and conditions of the tenancy in force immediately before the date on which the revesting order was made.

PROVISIONS RELATING TO OCCUPATION ORDERS AND TENANCY ORDERS

Procedure relating to occupation orders and tenancy orders.

15. (1) Before making an occupation order (other than an interim occupation order) or a tenancy order (other than an interim tenancy order), the court shall direct that notice be given to any person having an interest in the property which would be affected by the order.

(2) The person referred to in subsection (1) shall, upon being notified pursuant to that subsection, be entitled to appear and to be heard in the matter of the application for the occupation order or tenancy order as a party to that application.

(3) Where an application is made for an occupation order, the court may treat that application as an application for a tenancy order or an occupation order or both and may make a tenancy order (whether or not it makes an occupation order) if it is satisfied that

(a) it has jurisdiction to make the tenancy order and that the making of such an order is appropriate; and
(b) subsection (1) has been complied with in respect of the making of a tenancy order.

(4) Where an application is made for a tenancy order, the court may treat that application as an application for an occupation order or a tenancy order or both and may make an occupation order (whether or not it makes a tenancy order) if it is satisfied that

(a) it has jurisdiction to make an occupation order and that the making of such an order is appropriate; and
(b) subsection (1) has been complied with in respect of the making of an occupation order.

Power of Court to make ancillary order re: furniture.

16. (1) On or after making an occupation order or a tenancy order, the court may, subject to subsection (2), make an order granting to the applicant the use, for such period and on such terms and conditions as the court thinks fit, of all or any of

(a) the furniture;
(b) the household appliances; and
(c) the household effects,

in the household residence or other premises to which the occupation order relates or in the dwelling house to which the tenancy order relates.

(2) Notwithstanding subsection (1), an order made under that subsection shall continue in force for a period of three months beginning on the date on which the order is made, unless the court otherwise directs, but, in any event, shall expire if the occupation order made in relation to the household residence or other premises or the tenancy order made in relation to the dwelling house expires or is discharged.

Interim orders.

17. (1) Every interim order made under this Act on an *ex parte* application shall specify a date (which shall be as soon as reasonably practicable after the order is made) for a hearing on whether an order should be made in substitution for the interim order.

(2) The copy of an interim order which is served on the respondent shall notify the respondent that unless the respondent attends on the specified date to show cause why an order should not be made in substitution for the interim order, the court may discharge the interim order and make an order in substitution for it.

(3) At the hearing referred to in subsection (1) the court may

(a) discharge the interim order;
(b) discharge the interim order and make an order in substitution for it; or
(c) on good cause being shown, adjourn the hearing to a date and place the court may specify.

(4) Where a court hearing is adjourned under subsection (3)(c) the court shall, at the adjourned hearing, exercise either the power conferred by paragraph (a) or (b) of that subsection.

(5) In this section,

"interim order" means an interim protection order, an interim occupation order or an interim tenancy order, as the case may be;

"order" means a protection order, an occupation order or a tenancy order, as the case may be, not being or an interim order.

GENERAL

Conduct of proceedings.

18. (1) No person shall be present during the hearing of any proceedings under this Act except

(a) officers of the court;
(b) parties to the proceedings and their counsel;
(c) witnesses; or
(d) any other person permitted by the Magistrate (or presiding officer of the court however designated) to be present.

(2) Any witness shall leave the courtroom if asked to do so by the Magistrate (or presiding officer of the court however designated).

(3) Nothing in this section shall limit any other power of the court to hear proceedings *in camera* or to exclude any person from the court.

Evidence.

19. In any proceedings under this Act (other than criminal proceedings) including proceedings by way of appeal, the court may receive such evidence as it thinks fit whether it is otherwise admissible in a court of law or not.

Standard of proof.

20. Every question of fact arising in any proceedings under this Act (other than criminal proceedings) shall be decided on a balance of probabilities.

Restriction of publication of reports of proceedings.

21. (1) Subject to subsection (4), no person shall publish any report of proceedings under this Act (other than criminal proceedings) except with the leave of the court which heard the proceedings.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding ten thousand dollars.

(3) Nothing in this section limits

(a) the provisions of any other enactment relating to the prohibition or regulation of the publication of reports or particulars relating to judicial proceedings; or
(b) the power of the court to punish any contempt of court.

(4) This section does not apply to the publication of any report in any publication that

(a) is of a *bona fide* professional or technical nature; or
(b) is intended for circulation among members of the legal or medical professions, officers of the Public Service, police officers, psychologists, marriage counsellors or social welfare workers.

Orders by consent.

22. In any proceedings under this Act, a court may make any order with the consent of all the parties to the proceedings.

Counselling.

23. The court may, on making an order under this Act, recommend either or both parties to participate in counselling of such nature as the Court may specify.

Appeals.

24. (1) A person aggrieved by

(a) an order of the court; or
(b) the refusal of the court to make an order,

may, within twenty-eight days after the decision of the court, appeal to the Court of Appeal.

(2) Except where the court which makes an order under this Act otherwise directs, the operation of such order shall not be suspended by virtue of an appeal under this section, and every order may be enforced in the same manner and in all respects as if no appeal under this section were pending.

Protection of mortgagee.

25. (1) The rights conferred on any person in respect of any property by an order made under this Act shall be subject to the rights of any other person entitled to the benefit of any mortgage, security, charge, or encumbrance affecting the property if such mortgage, security, charge or encumbrance was registered before the order was registered or if the rights of that other person entitled to that benefit arise under an instrument executed before the date of the making of the order.

(2) Notwithstanding anything in any enactment or in any instrument, no money payable under any mortgage, security, charge or encumbrance shall be called up or become due by reason of the making of an order under this Act.

Rules of Court.

26. The Attorney General may make rules of court for the purpose of regulating the practice and procedure of the court in proceedings under this Act, providing for such matters as are necessary for giving full effect to the provisions of this Act and for its due administration.

Jurisdiction.

27. This Act shall be in addition to and not in derogation of any jurisdiction of the High Court in respect of matters referred to in this Act.

Property rights.

28. Nothing in this Act shall be construed as altering the right of a spouse to ownership of property.

ANTIGUA AND BARBUDA

Domestic Violence (Summary Proceedings) Act 1999.

No. 3 of 1999.

SCHEDULE
FORMS

FORM 1

Domestic Violence (Summary Proceedings) Act, 1999

(Section 4)

APPLICATION FOR PROTECTION ORDER/INTERIM PROTECTION ORDER

I.....
(Name of applicant)

of.....
(Address)

.....
hereby apply under section 4 of the Domestic Violence (Summary Proceedings) Act, 1999 for a protection order/interim protection order to be made by the Magistrate against

.....
(Name of respondent)

who is.....
(Specify relationship to the named respondent)

and who resides at.....
(Specify address of respondent)

in respect of the following conduct: (Specify details of alleged conduct).

.....
Signature of applicant.

Dated.....19.....

ANTIGUA AND BARBUDA

Domestic Violence (Summary Proceedings) Act 1999.

No. 3 of 1999.

FORM 2

Domestic Violence (Summary Proceedings) Act, 1999

(Section 7 or 8)

APPLICATION FOR PROTECTION ORDER/INTERIM PROTECTION ORDER

I.....
(Name of applicant)

of.....
(Address)

.....
hereby apply under section 7 or 8 of the Domestic Violence (Summary Proceedings) Act, 1999 for a protection order/interim protection order to be made by the Magistrate against

.....
(Name of respondent)

who is.....
(Specify relationship to the named respondent)

and who resides at.....
(Specify address of respondent)

in respect of the following conduct: (Specify details of alleged conduct).

.....
Signature of applicant.

Dated.....19.....

No. 3 of 1999. Domestic Violence (Summary Proceedings) Act 1999.

ANTIGUA AND BARBUDA

FORM 3

Domestic Violence (Summary Proceedings) Act, 1999

(Section 11or12)

APPLICATION FOR PROTECTION ORDER/INTERIM PROTECTION ORDER

I.....
(Name of applicant)

of.....
(Address)

.....

hereby apply under section 11 or 12 of the Domestic Violence (Summary Proceedings) Act, 1999 for a protection order/interim protection order to be made by the Magistrate against

.....
(Name of respondent)

who is.....
(Specify relationship to the named respondent)

and who resides at.....
(Specify address of respondent)

in respect of the following conduct: (Specify details of alleged conduct).

.....
Signature of applicant.

Dated.....19.....

ANTIGUA AND BARBUDA

Domestic Violence (Summary Proceedings) Act 1999.

No. 3 of 1999.

Passed the House of Representatives this 8th day of February, 1999.

B. Harris,
Speaker.

S. Walker,
Clerk to the House of Representatives.

Passed the Senate this 11th day February, 1999.

M. Percival,
President.

S. Walker,
Clerk to the Senate.

APPENDIX D
THE CONVENTION ON THE RIGHTS OF THE CHILD
Adopted by the General Assembly of the United Nations on 20 November 1989

Text

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the United Nations on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,"

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Unofficial summary of main provisions

Preamble

The preamble recalls the basic principles of the United Nations and specific provisions of certain relevant human rights treaties and proclamations. It reaffirms the fact that children, because of their vulnerability, need special care and protection, and it places special emphasis on the primary caring and protective responsibility of the family. It also reaffirms the need for legal and other protection of the child before and after birth, the importance of respect for the cultural values of the child's community, and the vital role of international cooperation in securing children's rights.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

Unofficial summary of main provisions

Definition of a child

A child is recognized as a person under 18, unless national laws recognize the age of majority earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Non-discrimination

All rights apply to all children without exception. It is the State's obligation to protect children from any form of discrimination and to take positive action to promote their rights.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Best interests of the child

All actions concerning the child shall take full account of his or her best interests. The State shall provide the child with adequate care when parents, or others charged with that responsibility, fail to do so.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Implementation of rights

The State must do all it can to implement the rights contained in the Convention.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	Unofficial summary of main provisions
Article 5 States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.	**Parental guidance and the child's evolving capacities** The State must respect the rights and responsibilities of parents and the extended family to provide guidance for the child which is appropriate to her or his evolving capacities.
Article 6 1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.	**Survival and development** Every child has the inherent right to life, and the State has an obligation to ensure the child's survival and development.
Article 7 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.	**Name and nationality** The child has the right to a name at birth. The child also has the right to acquire a nationality and, as far as possible, to know his or her parents and be cared for by them.
Article 8 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.	**Preservation of identity** The State has an obligation to protect, and if necessary, re-establish basic aspects of the child's identity. This includes name, nationality and family ties.
Article 9 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.	**Separation from parents** The child has a right to live with his or her parents unless this is deemed to be incompatible with the child's best interests. The child also has the right to maintain contact with both parents if separated from one or both.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	Unofficial summary of main provisions
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.	
Article 10	**Family reunification**
1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.	Children and their parents have the right to leave any country and to enter their own for purposes of reunion or the maintenance of the child-parent relationship.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.	
Article 11	**Illicit transfer and non-return**
1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.	The State has an obligation to prevent and remedy the kidnapping or retention of children abroad by a parent or third party.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.	
Article 12	**The child's opinion**
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.	The child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.	
Article 13	**Freedom of expression**
1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.	The child has the right to express his or her views, obtain information, make ideas or information known, regardless of frontiers.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	Unofficial summary of main provisions
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:	
(a) For respect of the rights or reputations of others; or	
(b) For the protection of national security or of public order (ordre public), or of public health or morals.	
Article 14	
1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.	**Freedom of thought, conscience and religion**
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.	The State shall respect the child's right to freedom of thought, conscience and religion, subject to appropriate parental guidance.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.	
Article 15	
1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.	**Freedom of association**
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.	Children have a right to meet with others, and to join or form associations.
Article 16	
1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.	**Protection of privacy**
2. The child has the right to the protection of the law against such interference or attacks.	Children have the right to protection from interference with privacy, family, home and correspondence, and from libel or slander.
Article 17	
States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:	**Access to appropriate information**
(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;	The State shall ensure the accessibility to children of information and material from a diversity of sources, and it shall encourage the mass media to disseminate information which is of social and cultural benefit to the child, and take steps to protect him or her from harmful materials.
(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;	
(c) Encourage the production and dissemination of children's books;	

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	Unofficial summary of main provisions
(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;	
(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.	
Article 18	**Parental responsibilities**
1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.	Parents have joint primary responsibility for raising the child, and the State shall support them in this. The State shall provide appropriate assistance to parents in child-raising.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.	
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.	
Article 19	**Protection from abuse and neglect**
1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.	The State shall protect the child from all forms of maltreatment by parents or others responsible for the care of the child and establish appropriate social programmes for the prevention of abuse and the treatment of victims.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.	
Article 20	**Protection of a child without family**
1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.	The State is obliged to provide special protection for a child deprived of the family environment and to ensure that appropriate alternative family care or institutional placement is available in such cases. Efforts to meet this obligation shall pay due regard to the child's cultural background.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.	
3. Such care could include, inter alia, foster placement, *Kafala* of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.	

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	*Unofficial summary of main provisions*
Article 21 States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.	**Adoption** In countries where adoption is recognized and/or allowed, it shall only be carried out in the best interests of the child, and then only with the authorization of competent authorities, and safeguards for the child.
Article 22 1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. 2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.	**Refugee children** Special protection shall be granted to a refugee child or to a child seeking refugee status. It is the State's obligation to co-operate with competent organizations which provide such protection and assistance.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	Unofficial summary of main provisions
Article 23	**Disabled children**
1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community.	A disabled child has the right to special care, education and training to help him or her enjoy a full and decent life in dignity and achieve the greatest degree of self-reliance and social integration possible.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.	
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.	
4. States Parties shall promote, in the spirit of international co-operation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.	
Article 24	**Health and health services**
1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.	The child has a right to the highest standard of health and medical care attainable. States shall place special emphasis on the provision of primary and preventive health care, public health education and the reduction of infant mortality. They shall encourage international cooperation in this regard and strive to see that no child is deprived of access to effective health services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:	
(a) To diminish infant and child mortality;	
(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;	
(c) To combat disease and malnutrition including within the framework of primary health care, through *inter alia* the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;	
(d) To ensure appropriate pre-natal and post-natal health care for mothers;	
(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;	
(f) To develop preventive health care, guidance for parents and family planning education and services.	

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text

Unofficial summary of main provisions

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Periodic review of placement

A child who is placed by the State for reasons of care, protection or treatment is entitled to have that placement evaluated regularly.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Social security

The child has the right to benefit from social security including social insurance.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Standard of living

Every child has the right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development. Parents have the primary responsibility to ensure that the child has an adequate standard of living. The State's duty is to ensure that this responsibility can be fulfilled, and is. State responsibility can include material assistance to parents and their children.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	Unofficial summary of main provisions
Article 28	**Education**
1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:	The child has a right to education, and the State's duty is to ensure that primary education is free and compulsory, to encourage different forms of secondary education accessible to every child and to make higher education available to all on the basis of capacity. School discipline shall be consistent with the child's rights and dignity. The State shall engage in international co-operation to implement this right.
(a) Make primary education compulsory and available free to all;	
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;	
(c) Make higher education accessible to all on the basis of capacity by every appropriate means;	
(d) Make educational and vocational information and guidance available and accessible to all children;	
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.	
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.	
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.	
Article 29	**Aims of education**
1. States Parties agree that the education of the child shall be directed to:	Education shall aim at developing the child's personality, talents and mental and physical abilities to the fullest extent. Education shall prepare the child for an active adult life in a free society and foster respect for the child's parents, his or her own cultural identity, language and values, and for the cultural background and values of others.
(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;	
b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;	
(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;	
(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;	
(e) The development of respect for the natural environment.	

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	Unofficial summary of main provisions
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.	
Article 30 In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.	**Children of minorities or indigenous populations** Children of minority communities and indigenous populations have the right to enjoy their own culture and to practise their own religion and language.
Article 31 1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. 2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.	**Leisure, recreation and cultural activities** The child has the right to leisure, play and participation in cultural and artistic activities.
Article 32 1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admissions to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.	**Child labour** The child has the right to be protected from work that threatens his or her health, education or development. The State shall set minimum ages for employment and regulate working conditions.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text	Unofficial summary of main provisions
Article 33 States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.	**Drug abuse** Children have the right to protection from the use of narcotic and psychotropic drugs, and from being involved in their production or distribution.
Article 34 States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.	**Sexual exploitation** The State shall protect children from sexual exploitation and abuse, including prostitution and involvement in pornography.
Article 35 States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.	**Sale, trafficking and abduction** It is the State's obligation to make every effort to prevent the sale, trafficking and abduction of children.
Article 36 States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.	**Other forms of exploitation** The child has the right to protection from all forms of exploitation prejudicial to any aspects of the child's welfare not covered in articles 32, 33, 34 and 35.
Article 37 States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age; (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;	**Torture and deprivation of liberty** No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty. Both capital punishment and life imprisonment without the possibility of release are prohibited for offences committed by persons below 18 years. Any child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so. A child who is detained shall have legal and other assistance as well as contact with the family.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text

Unofficial summary of main provisions

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Armed conflicts

States Parties shall take all feasible measures to ensure that children under 15 years of age have no direct part in hostilities. No child below 15 shall be recruited into the armed forces. States shall also ensure the protection and care of children who are affected by armed conflict as described in relevant international law.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Rehabilitative care

The State has an obligation to ensure that child victims of armed conflicts, torture, neglect, maltreatment or exploitation receive appropriate treatment for their recovery and social reintegration.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

Administration of juvenile justice

A child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, takes the child's age into account and aims at his or her reintegration into society. The child is entitled to basic guarantees as well as legal or other assistance for his or her defence. Judicial proceedings and institutional placements shall be avoided wherever possible.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text

Unofficial summary of main provisions

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Respect for higher standards

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

Wherever standards set in applicable national and international law relevant to the rights of the child that are higher than those in this Convention, the higher standard shall always apply.

(a) The law of a State Party; or

(b) International law in force for that State.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text

Unofficial summary of main provisions

PART II: Implementation and Monitoring

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of 10 experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

Implementation and entry into force
The provisions of articles 42-54 notably foresee:

(i) the State's obligation to make the rights contained in this Convention widely known to both adults and children.

(ii) the setting up of a Committee on the Rights of the Child composed of 10 experts, which will consider reports that States Parties to the Convention are to submit two years after ratification and every five years thereafter. The Convention enters into force - and the Committee would therefore be set up - once 20 countries have ratified it.

(iii) States Parties are to make their reports widely available to the general public.

(iv) The Committee may propose that special studies be undertaken on specific issues relating to the rights of the child, and may make its evaluations known to each State Party concerned as well as to the UN General Assembly.

(v) In order to "foster the effective implementation of the Convention and to encourage international co-operation," the specialized agencies of the UN - (such as the ILO, WHO and UNESCO) and UNICEF would be able to attend the meetings of the Committee. Together with any other body recognized as "competent', including non-governmental organizations (NGOs) in consultative status with the UN and UN organs such as the UNHCR, they can submit pertinent information to the Committee and be asked to advise on the optimal implementation of the Convention.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text | **Unofficial summary of main provisions**

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from the United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned,

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not in its subsequent reports submitted in accordance with paragraph 1(b) of the present article repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international cooperation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text | **Unofficial summary of main provisions**

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III: Final Clauses

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

THE CONVENTION ON THE RIGHTS OF THE CHILD

Text

Unofficial summary of main provisions

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Index