

THE POSITION OF EX-NUPTIAL CHILDREN IN VICTORIA

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[In this article, Mrs Neave makes a detailed study of the Status of Children Act 1974. Her principal concern is the extent to which the Act is effective in removing the legal disabilities suffered by ex-nuptial children in Victoria. However, the article also raises important issues of social policy.]

1. INTRODUCTION

During the last three or four years community attitudes to illegitimacy have changed dramatically. This is reflected in the increased number of unmarried mothers who keep their babies rather than give them up for adoption, in the more generous financial assistance from State and Commonwealth for unmarried mothers, in the greater social interest in the problems of unmarried mothers and their children, and in legislation passed by a number of Australian States. This legislation generally takes one of two forms. First, some States have now acted to remove some of the legal disabilities which have traditionally attached to the illegitimate child.¹ Secondly, some States have gone further by attempting to abolish the legal status of illegitimacy altogether, as well as the disabilities which flow from it. It is in this latter category that the Victorian Status of Children Act 1974 falls.

The Status of Children Act 1974 came into operation in Victoria on 1st March 1975. The Act substantially follows the form of legislation already passed in Tasmania and New Zealand.² The purpose of this article is to discuss the extent to which the Act is effective in removing the legal disabilities of ex-nuptial children, and to examine the disadvantages to which Victorian ex-nuptial children are still subject.

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¹ See e.g. The Succession Acts 1867 to 1968 (Qld.), ss. 89, 90-4; Inheritance Family and Dependants Provision Act 1972 (W.A.); Administration Act 1903-72 (W.A.), s. 12A; Wills Act 1970-71 (W.A.), ss. 29-31.

² Status of Children Act 1974 (Tas.). Status of Children Act 1969 (N.Z.). The provisions of the Tasmanian and New Zealand Acts are virtually identical to those of the Victorian Act. It is likely that New South Wales will follow the Victorian and Tasmanian example in the near future. See also Family Law Reform Act 1969 (Eng.), ss. 14-9, although this is legislation designed to remove disabilities rather than to abolish the status of illegitimacy. The latest legislation attempting to abolish the status of illegitimacy was recently passed in South Australia. See Family Relationships Act 1975 (S.A.). This Act deals not only with the status of ex-nuptial children, but with 'putative spouses'.

2. ABOLITION OF STATUS OF ILLEGITIMACY

Like its New Zealand precursor, the Act commences with a broad statement designed to abolish the status of illegitimacy.³ It provides that

for all the purposes of the law of Victoria the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other and all other relationships shall be determined accordingly.⁴

This provision is given its widest possible operation, subject to the territorial limitations upon the Victorian Parliament.⁵ Section 3(4) provides that the section shall apply in respect of every person, 'whether born before or after the commencement of this Act, whether born in Victoria or not, and whether or not his father or mother has ever been domiciled in Victoria'. It follows that if the status of the child must be determined for the purposes of domestic law, for example in construing a Victorian Act, the court will be bound by the provisions of the Status of Children Act discussed below.⁶ The provisions of the Status of Children Act cannot bind the Commonwealth, and in the application and interpretation of Commonwealth laws, the status of illegitimacy still remains relevant.⁷

It is also relevant to ask whether the above sub-section abrogates conflict of laws principles for a Victorian court, where extra-Victorian elements are present. Take for example, a question involving the construction of a will, in which the testator bequeaths a legacy to 'the children of Y'.⁸ At common law a *prima facie* presumption arose that such a gift included only Y's legitimate children.⁹ This rule of construction is abolished by the Victorian Act.¹⁰ If a Victorian court is asked to construe the will, and if the testator is domiciled in Victoria at the date of making his will and the date of his death, it is clear that an ex-nuptial child of Y can claim wherever that child is domiciled. Two different reasons can be given for his

³ The claim that it completely abolishes the legal consequences of illegitimacy is misleading, as will be seen from the discussion *infra*. See also Turner, *Improving the lot of children born outside marriage* (Pamphlet published by National Council for One Parent Families).

⁴ Status of Children Act 1974, s. 3(1). Hereinafter where the Victorian Act is referred to only the Victorian section number is given. Cf. Status of Children Act 1974 (Tas.), s. 3(1); Status of Children Act 1969 (N.Z.), s. 3(1); Family Relationships Act 1975 (S.A.), s. 6(1).

⁵ The Victorian Parliament has power to legislate 'in and for' Victoria. See 'An Act To Establish A Constitution In And For The Colony Of Victoria' 18 & 19 Vict. c. 55 (1855), Schedule 1, s. 1.

⁶ *E.g.* in interpreting the anti-lapse section contained in the Wills Act 1958, s. 31 the court would now extend the meaning of the words 'issue' and 'children' to relationships based upon illegitimacy (subject however to Status of Children Act 1974, s. 7). Similarly for the Trustee Act 1958, s. 39.

⁷ If a conflict arises between the provisions of a Commonwealth Act, and the Status of Children Act, s. 109 of the Commonwealth Constitution operates.

⁸ A similar problem could arise in numerous other areas, *e.g.* where a claim for damages in respect of the death of a father or mother under the Wrongs Act 1958, Part III was being made on behalf of an ex-nuptial child, and part of the facts upon which it was based arose outside Victoria.

⁹ *Hill v. Crook* (1873) L.R. 6 H.L. 265.

¹⁰ S. 3(2).

success. First, it can be argued that section 3(4) directs a Victorian court to ignore conflict of laws principles and to apply the Act regardless of the existence of extra-Victorian elements.¹¹ Secondly, even if this view is not taken, in these circumstances conflict of laws principles permit an ex-nuptial child of Y to take, wherever that child is domiciled. Questions of construction of a will are determined by the testator's domicile,¹² which is Victorian, and according to Victorian law, the legitimacy or otherwise of the child is now irrelevant.¹³

If the testator is domiciled outside Victoria, and the child is domiciled in Victoria, the situation is more complex. The question whether the Act overrides conflict of laws principles becomes crucial for a Victorian court. If the court takes the view that the provisions of the Status of Children Act are applicable, then the child can take despite the extra-Victorian element. It can be argued that the intention expressed by section 3(4) is an intention to override conflict of law rules. On the other hand section 3(4) does not refer to the domicile of the testator outside the State as a matter to be disregarded for the purposes of determining whether the Act applies.

If section 3(4) does not override conflict of laws principles, how is the problem solved? The better view is that the problem must be solved in two steps.¹⁴ First the will must be construed according to the law of the testator's domicile.¹⁵ If the testator is domiciled in Queensland where the *prima facie* construction of the gift is a gift to legitimate children, then Queensland law is applicable. However, it is next necessary to determine the child's status according to the law of the child's domicile. If the child is domiciled in Victoria, does Victorian law make the child legitimate, so the child can claim to share in the gift? It is difficult to say whether this is the case, for the Status of Children Act is more accurately characterized as an act making the question irrelevant.

On this issue Nygh says:

The law governing the principal issue, however, must decide whether the status conferred upon the child by the relevant domiciliary law is one of legitimacy or

¹¹ For a discussion of this problem see e.g. *Barcelo v. Electrolytic Zinc Co. of Australasia Ltd.* (1932) 48 C.L.R. 391; *Mynott v. Barnard* (1939) 62 C.L.R. 68. See also *Boissevain v. Weil* [1949] 1 K.B. 482, on appeal [1950] A.C. 327. In discussing the equivalent provision in the New Zealand Status of Children Act 1969, the South Australian Law Reform Committee took the view that the provision directed courts to ignore certain foreign laws and to apply instead the law of the forum. See South Australia, *Eighteenth Report of the Law Reform Committee to the Attorney-General* (1972) 12.

¹² Although this was originally thought to be his domicile at death, it appears that there is now a presumption in favour of domicile at date of making of will. *Wills Act 1958*, s. 20D. See Nygh P. E., *Conflict of Laws in Australia* (2nd ed. 1971) 695-9.

¹³ Subject to s. 7 discussed *infra*.

¹⁴ Nygh P. E., *Conflict of Laws in Australia* (2nd ed. 1971) 550, 556-7. See also *Re Goodman's Trusts* (1881) 17 Ch.D. 266; *Re Bischoffsheim* [1948] Ch. 79; *Attorney-General for Victoria v. Commonwealth* (1962) 107 C.L.R. 529, 553 (*per* Kitto J.), 568 (*per* Taylor J.), 596 (*per* Windeyer J.).

¹⁵ As already pointed out this is probably the domicile at the date of making of the will.

not. According to some legal systems, a recognized illegitimate child is given all, or most, of the rights of a legitimate child, but not the name of a legitimate child. The label given by the domiciliary law ought not to be decisive. The court must decide whether the child has, under the relevant domiciliary law, substantially the same position as a legitimate child under the law governing the principal issue.¹⁶

Certainly, a Victorian court is likely to hold that a child domiciled in Victoria is entitled to claim under the Queensland will in these circumstances. However the answer to the above question could be clarified by a more positive legislative statement of the status of the child.

Where the child is resident in Victoria but has a domicile out of Victoria, the problem is slightly different. (This could occur if the child was an infant, with its domicile dependent upon the domicile of its father). In this situation the issue of the child's legitimacy is generally determined by the law of the father's domicile.¹⁷ If according to this law the child is illegitimate, then normal conflict of laws principles would prevent it from taking under the Queensland will. However if the question arose in a Victorian court, (for example because some of the estate was situated in Victoria) it would seem that the words of section 3(4) clearly override conflict of law rules in this situation, for the section applies whether or not the child's father or mother has ever been domiciled in Victoria. If of course a question involving a child's legitimacy arose in a court outside Victoria, normal conflicts principles would apply.

The above discussion is designed to illustrate that, despite the words of section 3(4), it is at least arguable that normal conflict of laws principles have not been entirely abrogated by the Status of Children Act. It is desirable that the Act contain a clear statement that whenever the status of a child is called into question in a Victorian court, the provisions of the Act override established conflict of laws rules. Such a provision, could of course operate only in so far as it was regarded as a law 'in and for' Victoria.¹⁸

Consequentially upon the abolition of the status of illegitimacy, various amendments are made to a number of other Acts. Frequently the effect of the amendment is simply to replace for the word 'illegitimate' the less opprobrious but more verbose 'a child whose parents were not married to each other at the time of its birth or at or after its conception'.¹⁹ Such

¹⁶ Nygh P. E., *Conflict of Laws in Australia* (2nd ed. 1971) 557.

¹⁷ There is a problem here. The child's status depends on the law of the child's domicile. However this begs the question, for if the child is legitimate his domicile is that of the father, whereas if he is illegitimate his domicile is his mother's. It appears that this circle has been broken by looking to the law of the domicile of the father to determine the child's status. The Status of Children Act 1974 does not appear to change the rule that an ex-nuptial child takes his mother's domicile.

¹⁸ Cf., e.g., Adoption of Children Act 1964, ss. 6, 7, and see the broader provision contained in Family Relationships Act 1975 (S.A.), s. 6(4), which seems more satisfactory.

¹⁹ Some of these amendments may be criticized. In the Schedule to the Status of Children Act 1974, the words 'an unmarried father' are substituted for the words 'a father of an illegitimate child', and a similar amendment is made in the case of the mother. As a matter of drafting this is clumsy, for the father or mother of an ex-nuptial child may well be married, although not to the other parent.

an amendment is important as evidence of a change in the attitudes of the community, and perhaps as a stimulus to further change. Whether it will result in a change in the terminology used by the general community is more questionable. Of itself the change does little to remove the existing legal disabilities of ex-nuptial children.²⁰ This is accomplished by more substantial amendments, discussed in detail below. The general abolition of the status of illegitimacy is qualified in practice by a number of more specific provisions.

3. PROPERTY RIGHTS OF EX-NUPTIAL CHILDREN

(a) *Construction of wills and deeds*

While no rule of public policy precluded an illegitimate child from taking under a will or deed,²¹ such a child was disadvantaged by the rule of construction laid down in *Hill v. Crook*.²² In *Hill v. Crook* it was held that a gift to children as a class was *prima facie* to be construed as a gift to legitimate children. The presumption was rebutted by showing that the settlor or donor intended to benefit illegitimate children. The naming of the child, or the express inclusion of illegitimate children within the class would clearly rebut the presumption, and so, arguably, would an argument derived from the external circumstances of the testator and his family.²³ Certainly if it was shown that at the time of execution of the will or deed it was impossible for legitimate children to take under it, this was sufficient to rebut the presumption.²⁴ The rule of construction enunciated in *Hill v. Crook* applied not only to gifts to 'children', but to gifts to any class of people described by reference to a relationship. In some jurisdictions the principle has been abolished by the courts, on the basis that community attitudes to illegitimacy have altered and the *prima facie* meaning of a word may change with the times.²⁵

Section 3(2) of the Status of Children Act abolishes the rule of construction laid down in *Hill v. Crook*. In the case of deeds or wills executed after

²⁰ E.g. the amendment made to the Adoption Act is simply a replacement of the opprobrious 'illegitimate child' with child 'whose parents were not married to each other at the time of its birth or at or after its conception'. With the change in status of the ex-nuptial child it may be questioned whether the rights of the putative father of such a child should be correspondingly enlarged. This question arises in the context of adoption, where it might be argued that a putative father who has recognized his ex-nuptial child should be obliged to consent before an adoption can take place. See *infra* p. 347.

²¹ A gift to illegitimate children to be born in the future was void as contrary to public policy, since such a gift was said to promote immorality. *Hill v. Crook* (1873) L.R. 6 H.L. 265, 278 per Lord Chelmsford.

²² (1873) L.R. 6 H.L. 265.

²³ See Hogg P. W., 'Comment on *Re Herlichka* (1969) 3 D.L.R. (3d) 700' (1972) 50 *Canadian Bar Review* 531 in which Hogg argues that *Hill v. Crook* itself admitted evidence of the external circumstances of the testator and his family in order to rebut the *prima facie* construction. Cf. Morris J. H. C., 'Palm Tree Justice in the Court of Appeal' (1966) 82 *Law Quarterly Review* 196, 197.

²⁴ *In re Dicker* [1947] Ch. 248.

²⁵ See e.g. *Re Hogbin* [1950] 3 D.L.R. 843; *Re Nicholls* [1953] 2 O.R. 33.

the commencement of the Act, the settlor or testator must clearly evidence an intention to *exclude* an ex-nuptial child, and the mere use of the words 'legitimate' or 'lawful' will be insufficient to show such an intention.²⁶ The Act does not go so far as to outlaw attempts to discriminate against an illegitimate child, but ensures that such a discrimination is clearly conceived and spelt out by the settlor or testator.²⁷ This is consistent with the position of children born within a marriage, who can be omitted from the will of their parents, or other relatives, subject to the testator's family maintenance legislation. The Act does not specifically abolish the somewhat uncertain rule of public policy that gifts to future-born illegitimate children are void, though the rule is clearly abolished by implication.²⁸

It should be noted that instruments executed before the commencement of the Act, are to be governed by the law in operation at that time.²⁹ This applies to wills, even where the testator dies after the commencement of the Act. If a testator executes a will containing a gift to his children in 1973, and does not die till 2000, the gift will at that time be construed as a gift to legitimate children.³⁰ The provision is designed to effectuate the testator's intention which was expressed before the legislation came into force. But in the circumstances of this case section 4 achieves a harsh result. The ex-nuptial child of the testator is not advantaged by a law which in 2000 has been in force for twenty-five years. The result thwarts the purpose of the Act which is to equalize the position of all children. A balance of fairness between testator and ex-nuptial child would be achieved by providing that on a fixed future date the provisions of the Act would apply to all wills whenever executed. This would enable a testator to alter his will so as to exclude an illegitimate child if he wished, but if he failed to do so, the provisions of the Act would apply from the specified date. It would be more difficult to make such a provision for deeds, where there is no time gap between execution and coming into operation, although such a provision could apply to future interests which had not vested in possession when the Act came into force.

(b) *Distribution on intestacy*

The provisions of the Administration and Probate Act 1958 regulating distribution on intestacy,³¹ discriminated against the ex-nuptial child. Such

²⁶ S. 3(3). For a discussion of drafting to exclude an ex-nuptial child see Cameron, 'The Twilight of Illegitimacy' [1969] *New Zealand Law Journal* 621.

²⁷ In its October 1974 submission to the Attorney-General of Victoria on the Status of Children Bill, the National Council for the Single Mother and Her Child suggested that a provision outlawing such discrimination should appear in the Act.

²⁸ Cf. Family Law Reform Act 1969 (Eng.), s. 15(7).

²⁹ S. 4.

³⁰ This was the subject of adverse comment in the debate on the Status of Children Bill. See Victoria, *Parliamentary Debates*, Legislative Assembly, 16 October 1974 1210-1 per Mr B. Jones M.L.A. It was also the subject of a submission to the Attorney-General of Victoria by the National Council for the Single Mother and Her Child in October 1974.

³¹ Administration and Probate Act 1958, Part I, Division 6. This division did,

a child was entitled to succeed to his intestate mother's estate, only if she had no other legitimate issue. If the mother was survived by a husband, and had no legitimate children, the share of the ex-nuptial child was not two-thirds of the intestate estate, as it would have been if he had been legitimate, but one-half, the other half passing to the husband.³² The mother of an illegitimate child who died intestate, had the same rights in the child's estate as she would have had if the child had been legitimate.³³ An illegitimate child had no right to share in the distribution of his intestate father's estate, and nor had a putative father the right to share in the distribution of the estate of his illegitimate child. Where a person dies after the commencement of the Status of Children Act, the position of an ex-nuptial child is the same as the position of a child born within a marriage, for the purposes of succession on intestacy. This is subject to the provisions of section 7, which is discussed below.

(c) *Testator's family maintenance*

Since 1962³⁴ an illegitimate child has been able to apply to the Supreme Court for further provision from the estate of a deceased father or mother where the distribution of the estate, either by will, or by operation of the intestacy provisions 'is such as not to make adequate provision' for the child's 'proper maintenance or support'.³⁵ Thus, although an illegitimate child could not claim a share in the intestate estate of his father as of right, he could make a claim under Part IV of the Administration and Probate Act. However his position still differed from that of a legitimate child. The legitimate child could apply to the Court by virtue of the existence of the relationship between himself and the deceased, although the claim might be unsuccessful for reasons such as the child's maturity and independent means. For the illegitimate child to make a claim he had to show his dependency upon the deceased immediately before death. The purpose of this restriction was clearly to limit applicants to those who had been recognized by the deceased father before his death. In the case of a claim on the estate of the mother, the limitation had less justification, since in that situation there is no difficulty in proving a biological relationship.

The effect of the Status of Children Act upon Part IV of the Administration and Probate Act is curious. The schedule to the Status of Children Act repeals the word 'illegitimate' in section 91.³⁶ This section now reads:

For the purposes of this section . . . children includes children of the deceased totally or partially dependent upon or supported by the deceased immediately

however, ameliorate the position of an ex-nuptial child at common law, for at common law the child had no right to the estate of its mother or father.

³² Administration and Probate Act 1958, s. 52(2)(a).

³³ Administration and Probate Act 1958, s. 52(2)(b).

³⁴ Administration and Probate (Family Provision) Act 1962, s. 5.

³⁵ Administration and Probate Act 1958, s. 91. For the matters a court takes into account in hearing the application of an ex-nuptial child see *Re Wren* [1970] V.R. 449.

³⁶ S. 12.

before his death or in respect of whom there was then in force against the deceased any order for the payment of maintenance or confinement expenses.

What is the effect of the clause beginning with the word 'includes'? The clause could be regarded as meaningless, in which case all children whether born within or outside a marriage could apply under the Act, subject to proof of paternity. Alternatively it could be argued that the position of children born within a marriage has been reduced to bring it in line with the position of ex-nuptial children. This interpretation would produce harsh results. A woman deserted by, or separated from, her husband, might choose to maintain their infant child by her own efforts, and might not obtain a maintenance order against the husband for the upkeep of the child. If her husband died, the child would be unable to apply under Part IV, if the father made no provision for the child in his will. The child's position would be prejudiced by the mother's decision not to seek maintenance against the father, and the child could not claim under Part IV, no matter how unjustly he had been treated, and regardless of proof of paternity.

Since some of the difficulties caused by proof of paternity are now specifically dealt with by the Status of Children Act, the above clause has little justification and should be repealed. It is difficult to believe that it was intended by the repeal of the word 'illegitimate' to reduce the rights of all children to claim adequate provision from the estates of their parents.

4. PROOF OF PATERNITY

The rights conferred upon an ex-nuptial child by the Status of Children Act in respect of his father's estate are of only theoretical value if paternity cannot be proved. The Act could have simply remained silent on this point, conferring rights upon the child equal to those of the child of a marriage, but leaving him to establish his entitlement by supporting his claim in court. This is the English approach.³⁷ But the Act does more, by placing a number of obstacles in the path of an ex-nuptial child who asserts a claim to his father's estate. These obstacles, and their rationale, are discussed below.

(a) *Presumption of Paternity*

At common law it was presumed that a child born or conceived during a marriage was legitimate.³⁸ This presumption of legitimacy obviously subsumes the notion that the wife's husband was the father of the child. Originally the presumption may have been irrebuttable, but later it could be rebutted by evidence showing that the husband and wife did not have intercourse at a time when 'the husband could, according to the laws of nature, be the father of such child'.³⁹ The presumption could only be

³⁷ Family Law Reform Act 1969 (Eng.), Part II.

³⁸ *Banbury Peerage Case* (1811) 1 Sim. & St. 153; 57 E.R. 62.

³⁹ *Banbury Peerage Case* (1811) 1 Sim. & St. 153, 158; 57 E.R. 62, 64.

rebutted by evidence beyond a reasonable doubt,⁴⁰ the heavy burden of proof deriving from the gravity of a holding that the child was illegitimate.⁴¹

While legitimacy is no longer in issue in Victoria, section 5 of the Status of Children Act contains a presumption of paternity, rather similar to the common law presumption of legitimacy. It provides as follows:

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 its mother and her husband, or former husband as the case may be.

Unlike section 7, section 5 is framed generally and its purpose is not limited to claims relating to succession to property. Its drafting may be criticized on a number of grounds. The section does not cover the case of a child born or conceived in a marriage later held to be void, for in that case the marriage is not 'dissolved'.⁴² If a couple go through a ceremony of marriage, and co-habit, and a child is born during the period of co-habitation or within ten months of co-habitation ceasing, it is reasonable to presume the child is a child of the mother and 'her husband'. Moreover, if the presumption is extended to cover the case of a child born to such a man and woman, who may be aware their marriage is void, there is little reason for excluding the presumption where a man and woman simply live together as husband and wife at least where the relationship has continued for a reasonable time. It is suggested that the Act should contain a provision that where a man and woman have co-habited for a period of at least twelve months, a child born or conceived during the period of co-habitation or within ten months of the cessation of co-habitation⁴³ is a child of those parents.

Where the marriage is dissolved by divorce, the date of dissolution is

⁴⁰ *Morris v. Davies* (1837) 5 C1. & Fin. 163; 7 E.R. 365.

⁴¹ In *Rejtek v. McElroy* [1965] 39 A.L.J.R. 177, the High Court of Australia stated (*obiter*) that Matrimonial Causes Act 1959 (Cth), s.96(1) meant that proof on the balance of probabilities was now sufficient. The Family Law Act 1975 (Cth), repealing Matrimonial Causes Act 1959 (Cth), Matrimonial Causes Act 1965 (Cth), and Matrimonial Causes Act 1966 (Cth), contains no provision equivalent to s.96(1). The Family Law Act 1975 (Cth) came into operation in January 1976. The Family Law Act 1975 (Cth) presumably does not contain a similar provision, since proof of adultery is no longer relevant. However this creates a dilemma. While *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336 decided that the standard of proof of adultery in a matrimonial suit was the civil standard of proof, this did not apply where the finding of adultery had the effect of bastardizing a child, see *Watts v. Watts* (1953) 89 C.L.R. 200. Does this mean that the presumption of legitimacy can only be rebutted by evidence beyond a reasonable doubt, after the Family Law Act 1975 (Cth) comes into operation? See also *Blyth v. Blyth* [1966] 1 All E.R. 524.

⁴² In the case of a void marriage such a child is deemed to be legitimate where at the time of conception, or the time of the marriage, whichever is later, either party believes on reasonable grounds that the marriage is valid, Marriage Act 1961 (Cth), s. 91. The question of legitimacy is not in issue under the Status of Children Act 1975, and it does not appear that there is any inconsistency between the sections. See also Matrimonial Causes Act 1959 (Cth), s. 51 relating to voidable marriages. The concept of the voidable marriage vanishes under Family Law Act 1975 (Cth). Cf. also Status of Children Act 1974 (Tas.), s. 2.

⁴³ Cf. Maintenance Act 1967 (Tas.), s. 16; Family Relationships Act 1975 (S.A.), s. 11.

generally regarded as the date of the decree absolute. It is rare for a husband and wife to live together or have intercourse after a decree nisi has been obtained, so that it appears that a child born ten months after the decree absolute is likely to be born thirteen months after the decree nisi was made. There is little ground for presuming that the child was a child of the husband in these circumstances.⁴⁴ Thus the ten months should date from the decree nisi.

The words 'in the absence of evidence to the contrary' are unclear. What kind of evidence is sufficient to rebut the presumption? In the case of the common law presumption of legitimacy proof beyond a reasonable doubt was required,⁴⁵ though probably the ordinary civil standard of proof is now applicable. On the other hand it could be argued that the word 'evidence' in contradistinction to 'proof' may suggest that any evidence to the contrary will rebut the presumption. It is suggested that evidence showing on the balance of probabilities that the husband is not the father of the child, should be sufficient to rebut the presumption and the Act should make a specific provision to this effect.⁴⁶

A difficult situation arises where a wife re-marries very quickly after her husband dies, or after she obtains a divorce. In that case the section presumes that the child is the child of the former marriage. This is consistent with the common law position in the case of the presumption of legitimacy.⁴⁷ As a matter of policy it might be worthwhile considering

(a) excluding the presumption in a case where the mother has re-married within ten months of the termination of the previous marriage.

or

(b) presuming that the child is the child of the second husband unless evidence is obtained showing on the balance of probabilities that the child is the child of the first husband. This would relieve the mother of the unpleasant burden of showing that her adultery during the first marriage led to the conception of the child, in a case where it was claimed that the child was a child of the second husband.

(b) *Limitations on the right of succession*

Section 7 also deals with the relationship of paternity, but its purpose is limited to cases related to succession to property on death, or under

⁴⁴ The period of gestation accepted by the courts has varied. In England 349 days of non-access by husband to wife was held insufficient to rebut presumption of legitimacy in *Hadlum v. Hadlum* [1949] P. 197. See Litherland J. C., *Maintenance of Wives and Children* (2nd ed. 1959) 230-1.

⁴⁵ See p. 331, n. 8 *supra*.

⁴⁶ Cf. Matrimonial Causes Act 1959 (Cth), s. 96(1) which provides 'For the purposes of this Act, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court'. Cf. also Wills Act 1970-71 (W.A.), s. 31(2)(a).

⁴⁷ *Maturin v. Attorney-General* [1938] 2 All E.R. 214; *Re Leman's Will Trusts; Public Trustee v. Leman* (1945) 61 T.L.R. 566; *Knowles v. Knowles* [1962] P. 161; *Re Heath; Stacey v. Bird* [1945] Ch. 417.

instruments creating a trust. It is worthwhile to set out the section in full:

7. (1) The relationship of father and child and any other relationship traced in any degree through that relationship shall, for any purpose related to succession to property or to the construction of any will or testamentary disposition or of any instrument creating a trust or for the purpose of a claim under Part IV of the *Administration and Probate Act 1958*, be recognized only if—

- (a) the father and the 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 (expressly or by implication) by or established against the father in his lifetime and, if the father is a beneficiary of the child, paternity has been so admitted or established while the child was living.

(2) In any case where by reason of the provisions of sub-section (1) the relationship of father and child is not recognized at the time the child is born the occurrence of any act, event, or conduct which enables that relationship and any other relationship traced in any degree through it to be recognized shall not affect any estate right or interest in any real or personal property to which any person has become absolutely entitled, whether beneficially or otherwise, before the act, event, or conduct occurred.

Section 7(1)(a) covers the case of the child conceived during a marriage, and that of the child legitimised under the Commonwealth Marriage Act by the subsequent marriage of his parents.⁴⁸ It does not cover the case of the child whose parents have contracted a void marriage, though such a child would be legitimate under the Marriage Act, if at the time of the marriage or the time of the conception, whichever was the later, either party to the marriage believed on reasonable ground that the marriage was valid.⁴⁹ Section 7 should be amended to provide for this situation, or otherwise a child who is legitimate for the purposes of Commonwealth law will still have to satisfy the requirements of section 7(1)(b). If section 5 is amended to extend the presumption of paternity to the child born to people co-habiting section 7(1)(a) should be further amended to accommodate this change.

It is in the property field that ex-nuptial children have been traditionally subject to discrimination. Section 7 means that the child still labours under a significant disadvantage. If an ex-nuptial child wants to share in the estate of his father he must show that paternity has been admitted expressly or by implication or established against the father in the *father's lifetime*. Thus a child who discovers the truth about his paternity only after his father's death, is unlikely to succeed. Although section 10 of the Act provides that an application may be made to the Supreme Court for a declaration of paternity, whether or not the father, or child, or both of them, are living, such a declaration obtained after the death of the father, will be generally useless for any of the purposes enumerated in section 7. Moreover this barrier exists not only where the claim is on the estate of

⁴⁸ Marriage Act 1961 (Cth), s. 89.

⁴⁹ Marriage Act 1961 (Cth), s. 91. There appears to be no conflict between the provisions of the Commonwealth Marriage Act 1961, and the Victorian Status of Children Act 1975, such as would attract the Commonwealth Constitution s. 109. Commonwealth law makes certain children legitimate who would otherwise be illegitimate. Victorian law makes the legitimacy or otherwise of a child irrelevant in certain contexts.

the father, but where a claim is being made upon any other estate and the success of the claim depends upon the establishment of a relationship of father and child.

The section was probably prompted by a fear that claims might be made after the death of an alleged father, when the father was no longer in a position to refute the claim. It is true that it is easy to allege paternity and difficult to disprove it after one of the principal actors is dead, but it may be questioned whether the fear that a flood of litigation would follow is a realistic one. The Supreme Court has jurisdiction to make declarations of paternity after death, and it seems that the expense and difficulty in obtaining such a declaration would deter claimants whose allegations had little evidence supporting them.⁵⁰ It should be noted that where a declaration is made after the death of the father of the child, the Court may at the same time, or any subsequent time make a declaration determining whether any of the requirements of section 7(1)(b) have been satisfied. Thus a child who obtained a declaration after the death of his father, could also obtain a declaration that his father had admitted the fact of paternity during his lifetime, but in many cases this would be difficult or impossible to prove.

The other justification for the section is that if a father has not admitted paternity or had it established against him, he is unlikely to turn his mind to the existence of the child when making a testamentary disposition or executing a trust deed. In such a document he may exclude the child simply because he is unaware of its existence, or has no relationship with it at all. The same argument may be made about the testamentary disposition of relatives other than the father. But the argument has no substance where the child wishes to share in an intestate distribution. Generally a person who can show a sufficiently close relationship to the intestate is entitled to share in the intestate distribution, regardless of whether or not the intestate was aware of his existence during his life-time.

It is accordingly argued that little justification exists for the disability placed upon the ex-nuptial child by section 7. The English Family Law Act 1969 contains no such restriction,⁵¹ and the Report of the South Australian Law Reform Committee on the introduction of similar legislation specifically recommends against its inclusion.⁵² Where the father is claiming

⁵⁰ The Status of Children Act 1974, s. 10 contains no direction as to the standard of proof required for the Supreme Court to make a declaration of paternity. Presumably this would require satisfaction of the normal civil standard of proof *i.e.* proof upon the balance of probabilities.

⁵¹ Family Law Reform Act 1969 (Eng.), ss. 14, 15, 18.

⁵² South Australia, *Eighteenth Report of the Law Reform Committee of South Australia to the Attorney-General relating to Illegitimate Children* (1972) 6. See also Western Australia, *Report of the Western Australian Law Reform Committee on Illegitimate Succession* (1970) 11. The recent Family Relationships Act 1975 (S.A.) adopts an entirely different approach to this problem. Section 7 provides as follows:

7. A person shall be recognized as the father of a child born outside marriage only if—
(a) he is recognized as father of the child by reason of legitimation of the child, or under the law relating to the adoption of children;

in the child's estate, there may be more justification for requiring the father to establish his claim during the life-time of the child, although logically speaking the arguments made above are applicable to his claim as well. There is something repellent in a father claiming in his child's estate, simply on the basis of a biological relationship, where the father had no real paternal relationship to the child during the child's life-time.⁵³

For the child to make a claim under section 7 he must show either that

(a) paternity has been admitted expressly or by implication

or

(b) paternity has been established against the father.

The provision for an express admission in section 7(1)(b) constitutes a statutory exception to the hearsay rule. At common law a simple statement of paternity was not of itself an admission against interest and could not as such be admitted as an exception to the hearsay rule.⁵⁴ Section 7(1)(b) appears to contemplate written⁵⁵ as well as oral admissions.

More difficulty arises in the construction of the words 'by implication'. If a father brought the child up within his family, or supported the child this might be an implied admission of paternity, but what of a promise (unfulfilled) to marry the mother? What of a provision in the will of the alleged father simply conferring a benefit upon a named person, who later alleges paternity for the purposes of a claim on a partial intestacy. Presumably a body of law will evolve as to the meaning of 'an implied admission' but as

(b) he has acknowledged in proceedings for registration of the birth of the child (either in this State or in some other place) that he is the father of the child;

(c) he has been, during his lifetime, adjudged by a court of competent jurisdiction (either of this State, or of some other place) to be the father of the child;

or

(d) he has been adjudged under this Act to be the father of the child.

Note that this section means that court orders, and acknowledgments of paternity do not constitute mere *prima facie* evidence of paternity but conclusive evidence. Cf. Status of Children Act 1974, s. 8.

⁵³ The English Family Law Reform Act 1969 deals with the administrative and probative difficulties of a putative father claiming in his ex-nuptial child's estate by providing that 'an illegitimate child shall be presumed not to have been survived by his father unless the contrary is shown', s. 14(4).

⁵⁴ *Ward v. Pitt* [1913] 2 K.B. 130 held that statements by a deceased person that he would marry the mother (of his alleged child), that he admitted paternity, and that he intended to maintain the child, were not declarations by a deceased person against his pecuniary interest; nor was his statement that he was the father a fact of which he had direct personal knowledge. See also *In re Jenion, Jenion v. Wynne* [1952] 1 Ch. 454 and *B. v. Attorney-General* [1965] P. 278. Note however that a statement of paternity while maintenance proceedings were pending would presumably be regarded as an admission. *Moore v. Mahony* (1901) 27 V.L.R. 166; and could also provide corroboration of the mother's evidence. Cf. the approach in *Re Davy* [1935] P. 1. Note that Bourke J. P. and Fogarty J. F., *Maintenance Custody and Adoption in Victoria* (3rd ed. 1972) 76-8 appear to take the view that such evidence would be admissible.

⁵⁵ Such a written statement would not appear to have been admissible under the Evidence Act 1958, s. 55(1)(a), since the alleged father would not appear to have 'personal knowledge' of paternity, but only of intercourse. See also s. 55(4).

yet there are no cases on the point in any of the jurisdictions with similar legislation. The words 'established against' are also confusing. Clearly a declaration of paternity by the Supreme Court would satisfy this section. It would seem that an order for maintenance or confinement expenses under the Maintenance Act 1965 should also amount to 'establishing paternity' against the father, although section 8 states only that such an order is *prima facie* evidence of paternity. This raises the question of the interaction between section 7 and section 8 which is discussed below.

Section 7(2) provides for the case where at the time a child is born, the relationship of father and child is not recognized, and property is distributed before such recognition takes place. The later occurrence of an act allowing the relationship to be established does not affect entitlement to property which has already taken effect. Given the existence of section 7(1), section 7(2) obviously serves a useful purpose.

(c) *Prima Facie Evidence of Paternity*

Section 8 lists a number of circumstances to be regarded as *prima facie* evidence of paternity. These are: a certified copy of the entry of the name of the father of the child upon the Register of Births; an instrument signed by the mother of the child, and the person acknowledging paternity, if the instrument is executed as a deed, or in the presence of a solicitor; an order for maintenance or confinement expenses under section 10 or section 12 of the Maintenance Act 1965; an order made outside Victoria in another State, a Territory of the Commonwealth or in New Zealand, that the person is the father of the child, and a similar order made by a Court or public authority of a country specified by the Governor-in-Council. Section 8 is not limited to the purposes laid down in section 7, for example evidence of a person's entry as the father of the child in the Register of Births could be adduced in a claim under the Maintenance Act for maintenance expenses for the child or confinement expenses for the mother.⁵⁶ Several relatively minor comments may be made about section 8 at this stage. First, it would appear that the section should clearly apply to facts and events occurring before the commencement of the Act, for example an order under the Maintenance Act made before March 1975. A provision to this effect would put the matter beyond doubt. Secondly, there seems little justification for the formality of the requirement that the instrument acknowledging paternity be executed as a deed in the presence of a solicitor.⁵⁷ Surely the attestation of a signature should be sufficient to provide *prima facie* evidence of paternity? Thirdly, there seems little reason for confining orders under the Maintenance Act, to orders for maintenance or confinement expenses. Section 15 of that Act enables the court to order

⁵⁶ Maintenance Act 1965, ss. 10, 12. (Confinement expenses are referred to as preliminary expenses under the Victorian Act.) S. 8 of the Status of Children Act 1974 would not seem to override the requirement of corroboration contained in s. 27.

⁵⁷ S. 8(2).

a putative father to pay funeral expenses for the mother if the mother dies during or in consequence of her pregnancy or in consequence of the birth of the child. Such an order cannot be made unless the court is satisfied that the defendant is the father of the child. A holding under section 15 of the Maintenance Act should also constitute *prima facie* evidence of paternity.

The interaction between sections 7 and 8 is curious. Some of the matters alluded to in section 8 as constituting *prima facie* evidence of paternity would seem to amount to admissions under section 7. For example, before a father can be registered as the father of an ex-nuptial child, the particulars of birth must be given by both the mother and the father, or by the father with the mother's consent.⁵⁸ Since the person or persons giving the particulars of birth must sign the prescribed form,⁵⁹ a signature by the father clearly appears to amount to an admission of paternity. Moreover, if the father signs an acknowledgment of paternity as a deed, or in the presence of a solicitor, this would also appear to amount to an admission satisfying section 7.⁶⁰ It would also appear that a court order against the father under the Victorian Maintenance Act, or equivalent legislation in another State, would amount to an establishment of paternity for the purposes of section 7.

In other words, the matters described in section 8 can be important in two contexts. An ex-nuptial child who wishes to claim on the intestacy of his father must satisfy two requirements:

(a) He must prove paternity. The matters to which section 8 alludes are *prima facie* evidence of paternity, but no more. The relatives of the alleged father could introduce evidence to show that despite the fact that there was a maintenance order against him, he was not in fact the father. Only a declaration from the Supreme Court would establish paternity conclusively.⁶¹

and

(b) He must show that paternity was admitted by, or established against, the putative father during his lifetime. It appears that the matters to which section 8 alludes could amount to admissions or establishments of paternity for the purposes of section 7,⁶² although they would not relieve the court

⁵⁸ Registration of Births Deaths and Marriages Act 1959, s. 25. See also s. 13. Where the birth of an ex-nuptial child has been registered the Government Statist may later endorse the father's name and relevant particulars in the margin of the Register, if the father desires to be registered and the mother consents.

⁵⁹ Registration of Births Deaths and Marriages Act 1959, s. 26.

⁶⁰ Although even a document not satisfying the requirements of s. 8(2), e.g. because it is not executed as a deed, could presumably amount to an admission by the father satisfying s. 7.

⁶¹ S. 8(4).

⁶² The interaction is clearer in the Status of Children Act 1969 (N.Z.), s. 7, which specifically refers to s. 8, equivalent to the Victorian s. 8, and also in Status of Children Act 1974 (Tas.), s. 7(1)(b). The Family Relationships Act 1975 (S.A.) adopts an entirely different course. See n. 52.

from determining independently whether the alleged father was the father of the child.

Section 8 does not make this dichotomy clear, and it could be argued that the use of the words '*prima facie* evidence' in that section prevents the enumerated matters from satisfying the requirements of section 7. It is suggested that section 8 should contain a statement that the listed matters could amount to admissions or establishments of paternity sufficient to satisfy section 7, if section 7 is retained.

5. RECORDS

Though the Status of Children Act has theoretically placed the ex-nuptial child, and the child born within a marriage, on equal footing, it will still be important for the ex-nuptial child to prove his paternity. In this context the keeping of accurate records of the information which is available is important. Section 9(1) provides that an acknowledgment of paternity, or a copy thereof, may be filed in the office of the Government Statist. The Government Statist is to keep indexes of such instruments, and may permit a party to the instrument, a child referred to in the instrument, or a guardian or relative of the child to search the index and inspect the instrument 'if he is satisfied that the person has a direct or proper interest in the matter'. The section also provides for the keeping of records of declarations of paternity and orders under the Maintenance Act. Section 9 enables a father to regularize and record his relationship with the child by recording an acknowledgment of paternity. It is suggested that where a person does make an acknowledgment of paternity it should be obligatory to file the acknowledgment or a copy of it, thus ensuring that the records are as complete as possible. It is also argued that the statement of people permitted to search the index may be too narrow. For example an executor might wish to search the index, in order to discover whether an ex-nuptial child was entitled to claim under a will. The section could be amended by the addition of the words 'or any other person', after 'guardian or relative of that child'.

In some cases an ex-nuptial child may have no relatives to protect its interests, or to make claims on its behalf. It is suggested that the Family Welfare Division of the Social Welfare Department might play some part in making claims on behalf of an ex-nuptial child to the estate of its putative father. It is suggested that officials of the Department might also be listed as persons who can search the index for the purposes of making claims on behalf of the child. However, the information obtained in that way should only be used for the purposes of making claims on behalf of the child, and not for any other purpose. This would protect the privacy of the mother, if she did not want the facts of paternity to be known, but would also ensure that the child's rights could be protected in a case where the mother did not wish to pursue them. It is also suggested that such an

official should be authorized to apply to the Supreme Court for a declaration of paternity.⁶³

6. PROTECTION OF EXECUTORS, ADMINISTRATORS AND TRUSTEES

The purpose of section 6 of the Status of Children Act is to protect executors, administrators and trustees who distribute property in ignorance of the existence of an ex-nuptial child. The section provides that an executor, administrator, or trustee 'is not under any obligation to enquire as to the existence of any person who could claim an interest in the estate or property by reason only of the provisions of this Act'. It also protects executors, administrators and trustees against actions by any such person where a distribution of property has been made and at the time of the distribution the executor, administrator or trustee had no notice of the relationship upon which the claim is based.

The section, like section 7, illustrates a very practical distinction between the position of the ex-nuptial child and the child born within a marriage. While it is only reasonable that an executor or person in a similar position should be protected to some extent, against the difficulty of discovering the existence of an ex-nuptial child, it is questionable whether the protection should be as wide as that in section 6(1). There seems no reason why the executor *etc.* should not be obliged to make reasonable enquiries as to the existence of any ex-nuptial child.⁶⁴ If he makes such enquiries fruitlessly, and then distributes property, clearly he should be protected against an action in respect of a claim he would not reasonably have discovered. This would protect him in the case where the existence of the ex-nuptial child has been concealed by the testator and the child's mother.

7. THE POSITION OF THE FATHER *VIS A VIS* HIS EX-NUPTIAL CHILD

This article deals with the position of ex-nuptial children in Victoria and the extent to which it is improved by the Status of Children Act 1974. It is worthwhile however, to consider briefly the position of the putative father after the passing of the Act. At common law the child was *filius nullius*. Not only did this affect his rights in relation to his parents, but his parents', and more particularly his father's, rights in relation to him. Although even before the passing of the Status of Children Act some inroads had been made into the *filius nullius* doctrine, the rights of the father in relation to his child were very limited. It is the mother's consent which is required before the child can be adopted.⁶⁵ Although the father

⁶³ See also the suggestions relating to maintenance actions made *infra* p. 354 *et seq.*

⁶⁴ *Cf.* Trustee Act 1958, s. 33, which protects a trustee who distributes property after having advertised his intention to make a distribution.

⁶⁵ Adoption of Children Act 1964, s. 23(3). A father's views might be heard by the court in deciding whether to make an adoption order. *Re Adoption Application No. 41/61* (No. 2) [1963] 2 All E.R. 1082. *Cf.* Status of Children Act 1969 (N.Z.), Schedule amending Adoption Act 1955 (N.Z.), s. 7.

has the right to apply for custody or access to the child, his right of custody is inferior to that of the mother.⁶⁶ Since the mother generally has custody it is for her to determine the manner of the child's upbringing, and the religion it will adopt. It is also for her to decide whether to consent to the child's marriage if the child is a minor.⁶⁷

The Status of Children Act enables the father to acknowledge paternity of the child.⁶⁸ In addition a father can apply for a declaration of paternity, then establishing that the relationship of father and child exists.⁶⁹ But despite the bold statement 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.⁷⁰

the establishment of paternity has little consequence in so far as the above matters are concerned. The child's domicile continues to follow its mother, the mother retains a superior right to custody, the mother still controls the child's upbringing, and it is only the mother's consent which is required for an adoption. It is at least arguable that if the father acknowledges paternity his rights should become equivalent to those of a married father in relation to the children of a marriage. This reform would benefit the father, and incidentally the child,⁷¹ since it would make his position closer to that of a child in a two parent family.

8. THE ECONOMIC POSITION OF THE EX-NUPTIAL CHILD

Despite the fact that the Australian birth rate shows a tendency to decrease, the percentage of ex-nuptial births to total births continues to rise.⁷² The relationships which cause the birth of ex-nuptial children are

⁶⁶ Marriage Act 1958, s. 147. See also *Edwards v. Hamment* [1948] V.L.R. 110; *Re Billows* (1900) 26 V.L.R. 390. *Re C.* [1966] 1 All E.R. 838, affirmed in Court of Appeal [1966] 1 All E.R. 849; *Re B.W.C.* [1969] 1 N.S.W.R. 100.

⁶⁷ Marriage Act 1961-73 (Cth) and Schedule. But this is not a matter with respect to which the State can make an inconsistent provision since the Commonwealth has legislated in the area.

⁶⁸ Status of Children Act 1974, s. 8(2).

⁶⁹ Status of Children Act 1974, s. 10.

⁷⁰ Status of Children Act 1974, s. 3(1). But note that the Schedule to the Status of Children Act repeals Marriage Act 1958, s. 136 which empowered the mother of an illegitimate infant to appoint a guardian. What is the effect of the repeal of this provision upon the power of the mother to appoint a testamentary guardian? Has the father a power to appoint a testamentary guardian?

⁷¹ For the English and New Zealand approach to the problem, see *Guardianship of Minors Act 1971* (Eng.), ss. 3, 4, 5, 9, 10, 14 and *Guardianship Act 1968* (N.Z.), ss. 6 (2), (4), 11. See also *Adoption of Children Act 1966-75* (S.A.), ss. 4 (3), 21; *Guardianship of Infants Act 1940-75* (S.A.), ss. 3 (2), 4, 5.

⁷² *Australian Ex-nuptial Births: Numbers, Proportion and Rates.*

	1966-70	1967	1968	1969	1970	1971
Number	18,937	17,734	19,171	19,585	21,367	25,629
Rates	1.57	1.50	1.60	1.60	1.71	2.01
Proportion of total births %	7.88	7.73	7.96	7.83	8.30	9.27

Crude Birth Rates
Average Annual Rates

1946-50	23.39
1951-55	22.86

diverse, ranging from the casual encounter, to the affair lasting weeks or months, and the stable *de facto* marriage which may last for years and result in the birth of several children. Thus ex-nuptial children do not form a homogeneous group. The expansion of sex education programmes, the greater availability of abortions,⁷³ and the removal of restrictions on the advertisement of contraceptives⁷⁴ may result in a diminution in the rate of ex-nuptial births at least where the first two situations are concerned.⁷⁵ It is less likely to reduce the number of children born to a couple in a stable, though unmarried, relationship. For the present, the existence of a substantial number of fatherless children in the community presents society with a number of problems.

The Status of Children Act 1974 attempts to solve some of the legal aspects of these problems by assimilating the rights of ex-nuptial children to the rights of children born to a married couple. It does this by removing many of the legal disabilities to which ex-nuptial children have traditionally been subject. To the extent that the Act represents a change in community attitudes, and a stimulus to further change in the way in which ex-nuptial children are regarded, it also improves their social position. However, even after the passing of the Act, the ex-nuptial child may still be disadvantaged in ways which no Act of Parliament can entirely abolish.

In a case where the child lives with his mother alone it is debatable whether his emotional development is threatened by his lack of a permanent

<i>Crude Birth Rates^(a)</i>	
<i>Average Annual Rates</i>	
1956-60	22.59
1961-65	21.34
1966-70	19.95
<i>Annual Rates</i>	
1968	20.04
1969	20.38
1970	20.55
1971	21.62
1972	20.39

(a) Number of births per 1,000 of mean population. Excludes particulars of full-blood Aborigines before 1966.

These tables are compiled from information contained in the Commonwealth Year Book 1973.

⁷³ See *Age*, 29 November 1975. The article discusses the extensive abortion practice of Dr Bertram Wainer at his Fertility Control Clinic in Melbourne. Dr Wainer has not been prosecuted.

⁷⁴ On 8 December 1972 the Australian Government removed the 27.5 per cent sales tax on contraceptives, and later placed them on the pharmaceutical benefits list. The Victorian Government has lifted the ban on contraceptive advertising, as has the Australian Government in the A.C.T. See Australian Information Service, *The Status of Women 1975 Reference Paper 9*.

⁷⁵ Although in a survey carried out on two hundred mothers at the Queen Victoria Hospital in Melbourne it was demonstrated that a large proportion of married women (who had not had ex-nuptial conceptions) had pre-marital intercourse without practising any contraception, or practising unreliable contraceptive methods. The sexual behaviour of unmarried mothers and of married women before marriage was not dissimilar. See Wood C., Shanmugan N. and Meredith E., 'The Risk of Premarital Conception' *Medical Journal of Australia* 1969, 2: 228. See also Shanmugan N. and Wood C., 'Unwed Mothers: A Study of 100 Girls in Melbourne, Victoria' (1970) 6 *Australian and New Zealand Journal of Sociology* 51.

father figure, and by his experience of his 'difference' from other children.⁷⁶ Of more fundamental significance is the fact that he is likely to suffer from economic disadvantages and that these will place severe strains on the mother, who is attempting to bring him up singlehanded.⁷⁷

An ex-nuptial child may be the wanted child of a single mother who because of her socio-economic status has adequate means to support him. He may be the product of a stable family relationship between a man and woman who continue to live together after his birth. In both of these cases he may not suffer from any significant financial hardship. But where he is the child of a deserted *de facto* wife, or of an unmarried mother who does not live with the father, the situation is different. The Report of the Henderson Commission of Inquiry into Poverty stated that:

The incidence of poverty among fatherless families [this included widows and separated wives, as well as unmarried mothers] was extremely high; approximately 50 per cent were either very poor or rather poor.⁷⁸

Approximately 16% of all motherless families also had incomes below the poverty line, although the size of the survey sample did not permit further analysis of this group.⁷⁹ It is therefore likely that some deserted fathers (who previously had a stable *de facto* relationship with the mother) are experiencing financial difficulty in rearing their ex-nuptial children.

The Henderson Commission also referred to a special survey of mothers and dependent children conducted by the Bureau of Statistics. This survey demonstrated *inter alia* that:

Of all fatherless families, 4 per cent had neither cash savings nor other investments, whilst a further 41 per cent had liquid assets of less than \$50.00. Well over half the single mothers and deserted wives had liquid assets of less than \$50.00.⁸⁰

⁷⁶ In a survey conducted by Dr Nan Johns at the Royal Women's Hospital Melbourne in 1968 it was demonstrated that there was little significant difference between the health, birth history, growth and development of a group of ex-nuptial children kept by their single mothers, and the control groups of adopted ex-nuptial children, and children born to married women, at least during the children's first three years of life. The exception to this finding was that the children kept by their single mothers were, as a group, of shorter stature than those adopted at birth. An examination of the children's environment showed that the study children showed more changes in residence than the control groups, and had more frequent changes in the persons responsible for their day care. Johns N., *The Health of Babies Kept by their Single Mothers* (unpublished M.D. thesis, University of Melbourne, 1974).

⁷⁷ For a discussion of the social and economic situation of the illegitimate child in Great Britain see Crellin E., Pringle M. L. K., and West P., *Born Illegitimate: Social and Educational Implications* (1971).

⁷⁸ *First Main Report* (April 1975) 199 — and Table 12.1, parts of which are extracted below.

Single parent families: annual income in relation to the poverty line

Families, and number of children	Units	Annual income as % of poverty line			Total
		0-100%	100-120%	Over 120%	
<i>One parent families</i>					
Fatherless families	132	37.5	12.6	49.9	100.00
Motherless families	28	15.9	5.6	78.5	100.00
All one-parent families	160	33.8	11.4	54.8	100.00

The tables were based on a national survey of incomes carried out by the Australian Bureau of Statistics in August 1973.

⁷⁹ *Ibid.*

⁸⁰ Australia, *Henderson Commission of Inquiry into Poverty, First Main Report* (April 1975) 200-1.

In addition 5 per cent of single mothers had debts exceeding \$500. In conclusion the Henderson Report said:

The above analysis has illustrated the extremely difficult position of many fatherless families. In fact about 16 per cent of these families were forced to sell physical assets which they did not replace. When this running down of physical assets is added to the running down of liquid assets, we find that only 44 per cent of fatherless families were effectively saving or living within their means. Furthermore, 28 per cent of fatherless families were spending about \$4 more than they received each week — they were effectively dissaving.⁸¹

There is an increasing tendency for unmarried mothers to keep their children, rather than giving them up for adoption.⁸² In Australia, women tend to be employed in positions of lower status and earn lower wages than males.⁸³ A single mother with a child under school age must arrange for

⁸¹ *Ibid.*

⁸² The author corresponded with eleven of the adoption agencies which are approved for the purposes of the Adoption of Children Act 1964, s. 17. All these adoption agencies confirmed that they were handling fewer adoptions than in the past, and that this was caused by the increasing numbers of unmarried mothers who kept their children. In some cases the adoption agency had closed the waiting list for adoptive parents, for an indefinite period, due to the small number of babies available for adoption. The figures supplied by four of the larger agencies were as follows:

Agency	Babies placed for adoption				
	1971	1972	1973	1974	1975
Royal Womens' Hospital	400	344	217	163	115 (projected figure)
Mission of St. James and St. John	100	88	77	60	37 (to 11th November 1975)
Child Care Service of Methodist and Presbyterian Churches	Figures not supplied	149	82	61	33 (January-June only)
Catholic Family Welfare Bureau (These figures relate to finalized adoptions)	260	240	198	150	Figures not complete.

The numbers of adoptions arranged by the family welfare division of the Social Welfare Department also confirm this trend. Victoria, *Social Welfare Department Annual Report 1973-4*, Table 14.

	Placed with view to adoption			Legally finalized adoptions		
	Wards	Non-wards	Total	Wards	Non-wards	Total
1970-71	47	305	352	73	239	312
1971-72	50	325	375	86	359	445
1972-73	58	291	349	41	261	302
1973-74	49	136	185	47	203	250

Of course not all adoptions are adoptions of children of unmarried mothers. However these children make up by far the largest group of children 'accepted for adoption' by the Social Welfare Department and by private adoption agencies. Victoria, *Social Welfare Department Annual Report 1973-4*, Table 13.

⁸³ Australian Information Service, *The Status of Women 1975 Reference Paper 9* where it is stated:

'The latest available data concerning distribution of full-year full-time workers show that in 1968-9 only 7.7 per cent of females earned incomes in excess of the upper limit of the median income group applicable to males. The comparable proportion of males was 47.9 per cent.'

The position may improve due to the phasing in of equal pay for work of equal value, and of an equal minimum wage for both males and females, which became effective on 30 June 1975. The Women's Bureau was unable to provide more recent figures than those used above.

the care of the child while she works. If she has no relatives who are willing to care for the child, the cost of a day nursery is substantial.⁸⁴ Once the child is at school, the problem of after school care remains, for part-time jobs are not easy to find. If she decides not to work, or to work only part-time, she is dependent on assistance from the father of the child, or on the State and Commonwealth pension schemes, in order to live and maintain her household. Whichever path she chooses it is likely that her life will be a constant struggle against financial hardship, and that she will be fortunate if she does not join the group of Australian families living below the poverty line.

It is by attacking the economic problems faced by a single mother that the consequent social position of her child is likely to be improved. The effectiveness of both private and public sources of support in alleviating the economic disadvantages of the ex-nuptial child are discussed below.

(a) *Private sources*

The Commonwealth Family Law Act 1975 now regulates maintenance proceedings for the support of children of a marriage.⁸⁵ Subject to questions about the constitutionality of the provision⁸⁶ it appears that the field of maintenance for children of a marriage has now come entirely within the federal sphere and maintenance questions will largely be determined in the new family courts⁸⁷ when they are established. Only the maintenance of

⁸⁴ Private day nursery fees range from about \$15-\$50 per week for full-time day care, though the average fee is usually between \$20-\$25. A number of municipalities run day nurseries in Melbourne. These municipal creches receive a subsidy from the Health Department, and generally from the municipal council, so the fee levels are lower than in private day nurseries. Fees in municipal nurseries are generally assessed no parental means, and can range from as low as 50c per week for a particularly needy parent to above \$15 per week.

As a very rough rule of thumb, the rate of payment is often assessed as \$1 per week for every \$10 of income.

There is generally a lengthy waiting list for a place in such nurseries, which apart from the level of their fees have the advantage of taking babies. It is often difficult to find places in private day nurseries for babies, which tend to favour children over the age of 2 years. The Victorian Association of Day Nurseries is responsible for the co-ordination of 7 day nurseries subsidized by the Health Department. Again fees depend on means as assessed, though the average is between \$10-\$15.

For comments on the shortage of day care see Australian Pre-Schools Committee, *Care and Education of Young Children*.

⁸⁵ Family Law Act 1975 (Cth), Part VIII. The Act commenced operation on 5 January 1976. Note that certain categories of ex-nuptial children of either the husband or wife may be deemed to be the children of the marriage for the purposes of the application of Part VIII. See s. 5. To this extent the Family Law Act 1975 affects the position of ex-nuptial children.

⁸⁶ The Australian Parliament has legislative power with respect to marriage (Constitution, s. 51(xxi)); divorce and matrimonial causes and in relation thereto parental rights and the custody and guardianship of children (Constitution, s. 51(xxii)). See also s. 51(xxxix).

⁸⁷ Family Law Act 1975 (Cth), Part IV; see also s. 41 regulating the establishment of State Family Courts. Note that ss. 39, 46 deal with the jurisdiction of courts of summary jurisdiction. For a discussion of the jurisdiction of summary courts under the Family Law Act 1975 see Watson R., 'Family Law Act 1975' (1975) 49 *Law Institute Journal* 407, 410-2.

ex-nuptial children will continue to be regulated by the Victorian Maintenance Act 1965.⁸⁸

Section 10 of the Maintenance Act 1965 provides that where the court on a complaint made on behalf of a child of unmarried parents is satisfied that the defendant is the father of the child and that he without just cause or excuse has neglected to provide the child with adequate means of support, or is about to move from Victoria without providing the child with adequate means of support, the court may order the defendant to pay a reasonable amount towards the maintenance of the child. Section 11 makes a similar provision for proceedings to be taken against the mother, although it is rare for proceedings to be instituted against her. As in the case of children of a marriage, no provision is made for proceedings to be instituted against other near relatives of the child.⁸⁹

Sections 10 and 11 do not define possible complainants since they merely refer to a 'complaint made on behalf of a child whose parents were not married to each other at the time of its birth or at or after its conception'.⁹⁰ Thus an officer of the Social Welfare Department could bring a complaint on behalf of the child. In practice this does not occur in Victoria.⁹¹ Since the passing of the Status of Children Act 1974, a maintenance order made against the father provides *prima facie* evidence of paternity. This may be extremely important in establishing an ex-nuptial child's rights to his father's estate. These rights should not depend upon whether or not the mother decides to sue for maintenance on behalf of the child. It is therefore argued that officers of the Social Welfare Department should play a more active role in suing for maintenance, both in taking proceedings against alleged fathers and enforcing orders obtained.

A complainant in affiliation proceedings under section 10 fails if she cannot prove, on the balance of probabilities, that the defendant is the father of the child. In addition her evidence that the defendant is the father of the child cannot be accepted without corroboration except where the defendant is in court and does not deny paternity on oath, or where he does not appear but has been served personally with a summons to attend.

⁸⁸ But see n. 85 *supra*.

⁸⁹ *Cf.* Community Welfare Act 1972-5 (S.A.), s. 98. But note that in Victoria an ex-nuptial child who is accepted by the mother's husband is a child of the family and formerly had a right to be supported by the mother's husband. Maintenance Act 1965, ss. 3, 7. See now Family Law Act 1975 (Cth), s. 5.

⁹⁰ It should also be noted that the Maintenance Act 1965, s. 12 empowers the court to make orders for preliminary expenses, which are defined in s. 3 as the expenses of the mother during a period immediately preceding the confinement, reasonable medical, surgical and hospital expenses during the confinement, and the expenses of the maintenance of the mother and child for a period of three months after the birth of the child. See also s. 13 (which provides for future maintenance orders in respect of an unborn child); s. 14 (funeral expenses for the child); s. 15 (funeral expenses for the mother); s. 16 (further order for medical or like expenses).

⁹¹ Sackville R. and Lanteri A., 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *Australian Law Journal* 5, 51. The National Council for the Single Mother and Her Child confirmed that this is still the case.

In these two cases the court may in its discretion accept the mother's evidence as to paternity, without any corroboration.⁹²

The provisions of the Maintenance Act, and in particular the corroboration requirement, have been extensively commented upon by a number of writers, and this ground will not be retraversed in detail.⁹³ It is sufficient to say that even where the corroboration requirement is liberally applied,⁹⁴ it is doubtful whether it is ever any more than a blunt and clumsy instrument for obtaining the truth. Paternity is easy to allege and difficult to disprove, and the fear of false accusations of paternity is probably a real one. But the existence of a corroboration requirement is unlikely to be an effective deterrent to such false accusations. A truthful complainant may be prevented from obtaining maintenance for her ex-nuptial child because her evidence is uncorroborated. A dishonest complainant may be prepared to produce witnesses who will confirm her false evidence.

The corroboration requirement discriminates against the ex-nuptial child in two ways. First, it suggests that unmarried mothers are more likely than plaintiffs in other civil cases to lie on oath,⁹⁵ and that special precautions must be taken against this tendency. The suggestion is certainly resented by single mothers, and adds to the unpleasantness of the proceedings. It heightens the adversary quality of the matter, and may distract the court from the fundamental purpose which is to protect the child's right to maintenance. Secondly, it places a barrier in the path of the ex-nuptial child who needs support from his father, even in the case where the child's mother had intercourse with only one man. At present the extent to which it actually prevents recovery of maintenance in deserving cases is uncertain. Sackville's survey⁹⁶ on affiliation proceedings in Victoria suggests that few complaints are dismissed through lack of corroboration, but that this may be because women whose evidence of paternity is uncorroborated are advised by clerks of courts, solicitors or officers of the Social Welfare Department not to commence proceedings, or having commenced them to discontinue them.

⁹² Maintenance Act 1965, s. 27.

Note that this provision is stricter than that contained in the Maintenance Act 1958, s. 19. Under that section corroboration was required only if the defendant denied paternity on oath. The present section puts the matter in the reverse way.

⁹³ See e.g. Bourke J. P. and Fogarty J. F., *Maintenance, Custody and Adoption Law* (3rd ed. 1972) 73-80.

Holmes J. P., 'A Note on Corroboration' (1934) 8 *Australian Law Journal* 284. Sackville R., 'Affiliation Proceedings in Victoria' (1972) 8 *M.U.L.R.* 351.

⁹⁴ As e.g. in *Mash v. Darley* [1914] 1 K.B. 1; *Kenny v. Hornberg* (No. 2) (1963) 37 A.L.J.R. 162. For a detailed discussion of the corroboration requirement in affiliation proceedings see *Popovic v. Derks* [1961] V.L.R. 413.

⁹⁵ It is a comment upon our legal system that the civil cases in which corroboration is required as a matter of law generally involve evidence as to sexual or closely related matters given by women. For instance, corroboration is required as a matter of law in affiliation proceedings, in actions for breach of promise of marriage (in all States except Victoria) and in Tasmania in an action for seduction. See Gobbo J. A., *Cross on Evidence* (1970) 209 n. 40.

⁹⁶ Sackville R., 'Affiliation Proceedings in Victoria' (1972) 8 *M.U.L.R.* 351, 368-9.

A growing trend in family law is to reduce the adversary nature of proceedings to the minimum. A growing trend in society is to cease to punish the ex-nuptial child for his parents' socially disapproved behaviour. The continued existence of the corroboration requirement obstructs both these aims. With the change in attitudes reflected in the Status of Children Act 1974, the time is now overdue for a consideration of the repeal of the corroboration requirements in the Maintenance Act 1965. It is anomalous that a statutory requirement of corroboration should exist in the case of proceedings under the Maintenance Act, while no similar requirement is made in the Status of Children Act provisions for declarations of paternity.⁹⁷ The suggestions relating to blood tests, which are made below would help to solve the problem of false accusations of paternity, if it is a real one.⁹⁸

The most outstanding omission in the Status of Children Act is the failure to provide for blood test evidence in proceedings where paternity is in issue. If there is a real fear that false accusations of paternity will be made in the absence of a corroboration requirement, provision for blood tests is the best way to allay it. The evidence provided by blood tests may be crucial in an application for a declaration of paternity as well as in proceedings under the Maintenance Act. Proof of paternity not only helps the child to enforce his private right of support by his father. It may also be valuable psychologically in giving him a sense of identity.⁹⁹ For that reason the absence of any provision relating to blood tests is to be deplored.

The taking of blood from a person without his consent is an assault, unless it has been authorized by a court order. This creates difficulties both in the case of the adult who refuses consent and the child who lacks capacity to consent. The extent of a superior court's power to order blood tests in Australia is uncertain,¹ but it seems clear that without legislative sanction, a magistrate in affiliation proceedings has no such power.

⁹⁷ Note, however, that as a matter of practice a claim against the estate of a deceased person is not generally allowed on the uncorroborated evidence of the claimant. *Plunkett v. Bull* (1915) 19 C.L.R. 544; *Morrissey v. Clements* (1885) 11 V.L.R. 13; (1891) 17 V.L.R. 467; *Re Mallows* (1926) 29 W.A.L.R. 62. These cases concern claims against the estate of a deceased person founded on the existence of some commercial relationship. However, it would seem that a similar practice could apply in a case where the claim was a claim to share in the distribution of a testate or intestate estate, and the claimant alleged that admissions of paternity had been made by the deceased during his life-time, sufficient to satisfy the Status of Children Act 1974, s. 7.

⁹⁸ The Commonwealth Serum Laboratories state, in explanatory notes, that approximately 12 per cent of men are exonerated where blood tests are taken and 'owing to the vagaries of natural selection . . . a further 10-12 per cent of men are unable to substantiate their innocence . . . which facts lead to the conclusion that the majority of accusations are justified'. Of course the experience of the Laboratories is based on testing of samples voluntarily supplied, and must be viewed in that light. Krause takes a more pessimistic view of the frequency of false accusations of paternity. See Krause H. D., *Illegitimacy: Law and Social Policy* (1971) 107-8.

⁹⁹ United Kingdom, *Report of the Law Commission on Blood Tests and the Proof of Paternity in Court Proceedings* (1968 No. 16).

¹ Although it appears that the Victorian Supreme Court has such a power, *R. v. Jenkins; Ex parte Morrison* [1949] V.L.R. 277. See also *Re L.* [1968] P. 119; *B.R.B.*

At the present stage of scientific knowledge a blood test cannot affirmatively prove who is the father of a child. However, if paternity is falsely alleged against X there is a 70 per cent chance that his innocence will be established by a blood test.² Clearly blood test evidence is more reliable than the corroboration requirement as a means of discouraging false allegations of paternity. It may also be possible to draw affirmative deductions from a blood test. Suppose for example that A alleges that X is the father of her child. X admits that he had intercourse with A at the relevant time, but produces Y who swears that he and A also had intercourse. There is no evidence that A has had intercourse with any other man. Blood test evidence may exclude Y as a possible father. In this case there is a strong likelihood that X is the father of the child.³ Despite the assistance that blood test evidence can clearly give to the court, it is rarely used in Victoria, since there is no provision for blood tests to be taken in a case where one or more of the parties is opposed to the procedure.⁴ The failure to provide for blood tests also explains the continued existence of section 27(2) of the Maintenance Act, which provides that no order for maintenance may be made when the court is satisfied that at about the time when conception occurred, the mother had intercourse with men other than the defendant. While the section is designed to take into account the difficulty of determining the father in these circumstances, it takes no account of the role which blood tests might play. The section applies as a complete prohibition against an order, even if it seems entirely clear that the 'other men' could not have fathered the child (for example because the child,

v. *J.B.* [1968] 2 All E.R. 1023; *S. v. McC.* [1970] 3 W.L.R. 366; *T. v. T.* [1971] 1 All E.R. 580. *S. v. McC.* [1970] 3 W.L.R. 366 concerned the question of whether a blood test should be ordered upon a child whose guardian *ad litem* had refused consent. The House of Lords also considered the power of the English High Court to order blood tests upon a non-consenting adult. Lord McDermott thought that the court did have power to order such a test. Lords Reid, Morris and Guest thought that the court had no such power but that inferences could be drawn from such an adult's refusal.

² United Kingdom, *Report of the Law Commission on Blood Tests and the Proof of Paternity in Civil Proceedings* (1968 No. 16) implemented in the Family Law Act 1969 (Eng.). See also evidence of Dr Judith Hay to the Law Reform Committee of South Australia in the *Eighteenth Report of the Law Reform Committee Relating to Illegitimate Children*; Bartholomew G. W., 'The Nature and Use of Blood Group Evidence' (1961) 24 *Modern Law Review* 313; Fisher D. E., 'Serological Evidence and the Question of Paternity' (1969) 6 *University of Queensland Law Journal* 14; Sackville R., 'Affiliation Proceedings in Victoria' (1972) 8 *M.U.L.R.* 351, 376.

In Victoria the systems used by the Commonwealth Serum Laboratories give approximately a 53 per cent chance of exonerating a man falsely accused of paternity. It is possible by the use of other systems to bring the exclusion rate as high as 72 per cent. This information is contained in explanatory notes issued by the Commonwealth Serum Laboratories.

³ See *Sinclair v. Rankin* [1921] S.C. 933. Sackville R., 'Affiliation Proceedings in Victoria' (1972) 8 *M.U.L.R.* 351, 376. As Sackville also points out, a non-exclusion result for the alleged father may also have value as affirmative proof of paternity if rare blood groups are involved. See also Bartholomew G. W., 'The Nature and Use of Blood Group Evidence' (1961) 24 *Modern Law Review* 313, 316. United Kingdom, *Report of the Law Commission on Blood Tests and the Proof of Paternity in Civil Proceedings* (1968 No. 16).

⁴ Sackville R., 'Affiliation Proceedings in Victoria' (1972) 8 *M.U.L.R.* 351.

mother, and alleged father are white, and the 'other men' are black).⁵ The provisions of the Maintenance Act dealing with the ex-nuptial child's private right of support should be dedicated to the principle that the needs of the child are of paramount importance. Given the role which blood tests could play, section 27(2) comes dangerously close to punishing the mother for her 'immorality' and thereby depriving the child of his support, even where there is little doubt as to his paternity.⁶ If provision for compulsory blood tests is made, section 27(2) should clearly be repealed.

In drafting legislation which provides for blood tests, some assistance may be found in the legislation of England, New Zealand and South Australia.⁷

The South Australian Act provides as follows:

112. . . .

(2) In this section 'blood test' means a test for the purpose of ascertaining the inheritable characteristics of blood.

(3) A court of summary jurisdiction shall, at the request of the defendant in an affiliation case, direct that the illegitimate child in respect of whom the complaint was made, the mother of the child and the defendant submit to blood tests.

(4) No such direction shall be given unless the child has been born and the child, the mother and the defendant are all living.

(5) In any such direction, the court shall nominate a medical practitioner to take such blood samples as may be necessary for the purpose of making the blood tests and an analyst to make the blood tests and shall also fix a period within which the child, the mother and the defendant shall attend upon the medical practitioner to enable him to take the samples.

(6) [The period may be extended.]

(7) [The analyst must be approved.]

(8) Subject to subsection (10) of this section, the fees of the medical practitioner and the analyst nominated in the direction and the costs and expenses in connection with the blood tests shall, in the first instance, be paid by the Minister.

(9) Where a direction has been given by a court pursuant to this section—

(a) the proceedings in connection with the affiliation case shall be stayed until the expiration of the period or extended period fixed under subsection (5) or subsection (6) of this section;

(b) if the mother and child referred to in the direction do not, or either of them does not, within that period or extended period, attend upon the medical practitioner nominated in the direction and permit him to take the necessary blood samples for the purposes of the blood tests, the

⁵ Although the courts do not always take cognizance of the evidence provided by racial characteristics. See *e.g.* *Ah Chuck v. Needham* [1931] N.Z.L.R. 559.

⁶ Various other solutions could be adopted to the problem of the mother who has had intercourse with more than one man around the time when conception occurred. *E.g.*, all the men could be regarded as possible fathers, and all of them could be required to contribute to the child's maintenance. See Community Welfare Act 1972-5 (S.A.), ss. 109-10. Defects in this solution were discussed in United Kingdom, *Report of the Law Commission on Blood Tests and the Proof of Paternity in Civil Proceedings* (1968 No. 16). See also Arnholm C. J., 'The New Norwegian Legislation Relating to Parents and Children' (1959) 3 *Scandinavian Studies in Law* 9. It was suggested that it might be more harmful to the child to think that his mother was promiscuous, and had intercourse with several men, than to be deprived of his right of support. Alternatively, if it were shown that a man had intercourse with the mother at a time likely to lead to conception, the burden of proof could shift to him, to prove on the balance of probabilities that he was not the father. Either of these two solutions would protect the child's financial needs more effectively.

⁷ Family Law Reform Act 1969 (Eng.), Part III; Domestic Proceedings Act 1968 (N.Z.), s. 50; Community Welfare Act 1972-5 (S.A.), s. 112.

complaint, if made by or on behalf of the mother, shall be dismissed, but otherwise shall be set down for hearing; and

- (c) If the defendant does not within that period or extended period attend upon the medical practitioner so nominated and permit him to take the necessary blood samples for the purposes of the blood tests, the complaint shall be set down for hearing.

(10) If, at the hearing, the court is satisfied that the facts alleged against the defendant are proved, the defendant shall reimburse the Minister to the extent of all moneys paid by the Minister under subsection (8) of this section in connection with the blood tests referred to in the direction, including the amount of the fees so paid to the medical practitioner and the analyst, and those moneys may be recovered by the Minister as a debt due to him by the defendant.

(11) [The medical practitioner must forward blood samples to the nominated analyst. The analyst must make lists and embody the results in a certificate in the prescribed form.]

(12) The analyst shall forward the certificate to the clerk of the court that made the direction who, within seven days after the receipt by him of the certificate, shall furnish a copy thereof to the complainant and to the defendant.

(13) The certificate shall be admissible as evidence in any proceedings under this Part and shall be evidence of the facts and conclusions stated therein, but the court shall on the application of the complainant or the defendant, or may of its own motion, order the medical practitioner or the analyst to attend as a witness in the proceedings to be examined on such issues relating to the blood test and in such manner as the court thinks necessary and proper in the interests of justice.

The following comments may be made about the section. First, in drafting Victorian legislation some consideration should be given to the question of the admissibility of anthropological evidence as proof of paternity. The English Law Commission in its *Report on Blood Tests and Proof of Paternity*⁸ refused to recommend that courts should have power to order anthropological tests on the ground that at this stage the medical profession still doubted their accuracy. The Commission did point out that there was no authority making such evidence inadmissible if tendered voluntarily. The New Zealand legislation provides for the compulsory making of 'genetic tests' which would appear to extend to tests other than blood tests.⁹ Secondly, like the New Zealand legislation, the South Australian Act provides only for blood tests in affiliation proceedings. The evidence provided by blood tests would clearly be helpful in actions for declarations of paternity and the provision should be extended to cover this situation.¹⁰ Thirdly, the provision operates where the defendant makes a request for blood tests. It appears that the court should have power to direct tests on the child, the defendant, or the mother, of its own motion.¹¹ Fourthly, some consideration should be given to the question of exempting from blood tests any person whose health would be affected by the procedure.¹² Fifthly,

⁸ See South Australia, *Eighteenth Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Illegitimate Children* (1972); evidence of Dr Manock. Dr Manock referred to finger prints, bone structure, eye colour, and congenital diseases as genetic evidence which could be of assistance in determining paternity.

⁹ Domestic Proceedings Act 1968 (N.Z.), s. 50.

¹⁰ Cf. Family Law Reform Act 1969 (Eng.), s. 20.

The Supreme Court of Victoria would presumably have power to order such tests. See *R. v. Jenkins: Ex parte Morrison* [1949] V.L.R. 277; but the matter should be put beyond doubt.

¹¹ Cf. Domestic Proceedings Act 1968 (N.Z.), s. 50(1).

¹² Cf. Domestic Proceedings Act 1968 (N.Z.), s. 50(1).

section 112(9)(b) provides that if the mother and child do not attend for the taking of blood tests the complaint shall be dismissed. This means that the enforcement of the child's right of support always depends upon the mother's willingness to attend a medical examination. In the case of a young child, the decision will always be made by the mother, and may not necessarily be in the best interests of the child. If the purpose of the affiliation proceeding is to benefit the child it might be better to follow the form of the English Act, which provides that failure to comply with the court's direction *may* lead to the court making an adverse inference.¹³ Alternatively the court should have power to dispense with the consent of the mother on behalf of the child. The South Australian Act provides that if the defendant does not attend for the taking of blood samples, the complaint is to be set down for hearing. Again it is suggested that the court should be specifically authorized to draw adverse inferences from the defendant's conduct. Sixthly, provision should be made that a child over the age of sixteen years has capacity to consent to the taking of a blood sample. In the absence of this provision some doubt may be raised about the effectiveness of such a consent.¹⁴ Finally, it is noted that the South Australian Act provides a procedure for the taking and analysis of blood samples. The analyst must be approved by the Minister. Such a provision is imperative if the accuracy of the tests is to be guaranteed.¹⁵

Even if the abandonment of the corroboration requirement and the introduction of compulsory blood tests made affiliation proceedings a more effective means of establishing the child's right of support against his father, the problem of enforcement still remains. Recent Victorian surveys¹⁶ have demonstrated that complainants in maintenance proceedings in general and affiliation proceedings in particular have great difficulty in enforcing the orders which they obtain. If an order is obtained against the father, and is not satisfied, the father may be threatened with jail or even imprisoned. From the point of view of cost to the community, weighed against financial benefits to the recipient,¹⁷ affiliation proceedings may be wasteful and more generous state support for ex-nuptial children may prove more economical in the long term. A cost-benefit analysis is beyond the scope of this article, but the expenses of a court hearing, coupled with the costs of enforcement of an order, are not the only disadvantages of the affiliation proceedings. The mother must issue a summons against the father, containing details of

¹³ Family Law Reform Act 1969 (Eng.), s. 23(1). Note that the New Zealand legislation provides that if the defendant does not comply with the direction, his failure may be regarded as corroboration of evidence of paternity. Domestic Proceedings Act 1968 (N.Z.), s. 50(3).

¹⁴ Family Law Reform Act 1969 (Eng.), s. 21(2).

¹⁵ See the more detailed provision in Family Law Reform Act 1969 (Eng.), s. 22.

¹⁶ Sackville R., 'Affiliation Proceedings in Victoria' (1972) 8 *M.U.L.R.* 351. Kovacs D., 'Getting Blood out of Stones: Problems in the Enforcement of Maintenance Orders from Magistrates Courts' (1974) 1 *Monash University Law Review* 67.

¹⁷ The amount of maintenance orders obtained was examined in Sackville R., 'Affiliation Proceedings in Victoria' (1972) 8 *M.U.L.R.* 351, 381, although these figures may now be somewhat outdated.

her relationship with him, including the dates when it is alleged sexual intercourse took place. She must present her case in court, frequently without the benefit of legal representation,¹⁸ and be prepared to submit to cross-examination the details of the relationship. Even with a sympathetic magistrate it is likely that the proceedings will be a considerable ordeal, which she may have to suffer at a time when she is depressed as the result of her pregnancy or recent delivery. The ordeal will be the greater if she is not pursuing the father for maintenance because she actively desires to do so, but because she is required to as a pre-condition for eligibility for State family assistance or a Commonwealth supporting mother's benefit.

If it is assumed that the purpose of the Maintenance Act provisions is primarily to ensure the child is adequately supported, and that the Act is not designed to punish the father or bring home to the mother a consciousness of her position, it appears that the above disadvantages of the affiliation order procedure may outweigh its virtues.

On this matter Sackville and Lanteri¹⁹ said:

There are no figures readily available in Australia that would assist in assessing the efficacy of affiliation proceedings, as a means for the enforcement of the illegitimate child's right to support from his father. An investigation would probably reveal that the amount of maintenance paid by fathers, either voluntarily or as a result of court proceedings on behalf of the child, is but a small percentage of the total expenditure of private persons (mostly mothers) and the State for the support of illegitimate children. Accepting this assumption to be true, it may then be necessary to re-evaluate the rationale of proceedings designed to secure private support for illegitimate children. If the sole aim of such proceedings is to provide maintenance for the child and consequently to relieve the mother from the whole burden of support, it may be thought that unless their effectiveness can be improved dramatically, the proper solution is to abandon the notion of private support altogether in favour of State support. On the other hand, it may be argued that, even if proceedings for private support are inefficient as maintenance devices, they ensure that 'the father of an illegitimate child [cannot] shirk the responsibilities involved in procreation'. In other words a duty of support is imposed upon the father, despite the fact that he may not have intended the child to be born and has not, unlike a married man, undertaken the support of the child. The duty is imposed because he has engaged in conduct which could result in the birth of an infant who obviously will be dependent upon *someone*, and as between the father (or perhaps possible fathers) and the rest of the world the 'responsibility' should fall upon him. Expressed in this way, the argument contains overtones of deterrence in the sense that the prospect of liability for the maintenance of a child for many years may well be designed either to deter men from engaging in extramarital intercourse or, if they do, to encourage them to ensure that no child is born. Of course the argument so expressed runs counter both to the current

¹⁸ To some extent these problems may be overcome by the greater availability of legal aid through the Australian Legal Aid Office. In the future unmarried mothers may be referred to the A.L.A.O. by clerks of courts. At present, the Social Welfare Department plays little part in assisting the mother to take affiliation proceedings, although she is informed that she must take such proceedings before she can obtain assistance from the Department. A change in this approach would also assist the mother. The Victorian approach should be contrasted with that taken by the South Australian Department of Social Welfare which conducts affiliation proceedings on behalf of both applicants for assistance and of any mother who wishes to take proceedings against the putative father. Note that the persons who may be present at the hearing are restricted. See Maintenance Act 1965, s.111. See Sackville R., 'Affiliation Proceedings in Victoria' (1972) 8 *M.U.L.R.* 351, 360.

¹⁹ Sackville R. and Lanteri A., 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *Australian Law Journal* 5, 13.

proscription on abortions for other than medical reasons and to legislation restricting the dissemination of information relating to contraception.

However, the most powerful point in favour of the retention of proceedings for private support is that the legitimate child is entitled to support from private sources. A denial of that same entitlement to the illegitimate child smacks of renewed discrimination against him merely because of the circumstances of his birth. It would seem that a likely short-term approach lies in improving the effectiveness of existing private support procedures, an approach that will require careful investigation into the reasons for their inefficiency. In the long term it is difficult to resist the suggestion of the Society of Public Teachers of Law that support of all children should depend upon the fact of parenthood (basically the present position) and that radical changes need to be made in the process by which parenthood is established.

In weighing the arguments above, three further matters should be taken into account.

1. The continued existence of affiliation proceedings has obviously not proved a deterrent to procreation, since the proportion of children born out of wedlock continues to rise.
2. Both State and Commonwealth welfare authorities still appear to regard community responsibility to support the ex-nuptial child as only secondary to the father's duty of support. This is reflected in the requirement that the mother (often without any assistance from welfare authorities in preparing or presenting her case) pursue the father for maintenance as a pre-condition to her eligibility for State or Commonwealth assistance.²⁰ The requirement often causes resentment and pain to unmarried mothers. Moreover, the view that the State's duty to support the child is secondary to the father's duty may prevent the levels of government support from reaching a more realistic level.²¹ On the other hand if the maintenance action was instituted by State Welfare authorities independently of the mother, some of the weight of this objection would disappear.
3. The role of the provisions of the Maintenance Act 1965 in establishing paternity is important. A number of members of the National Council for the Single Mother and Her Child expressed the view that it was of great importance for an ex-nuptial child to be aware of his father's identity, and of the fact that his father was contributing some amount (however small) to his upkeep. This was seen as important in reducing the child's feeling of

²⁰ Social Welfare Act 1970, s. 16. Social Services Act 1947-75 (Cth), s. 83AAD. The State requirement is still stringently enforced, but of late the Australian Social Services Department have enforced the Commonwealth provision more leniently. Whether this attitude will change in the light of Senator Guilfoyle's 'tough' approach to social welfare recipients is questionable. The existence of the provision means that a woman seeking State assistance, but not desirous of suing the father for maintenance, has three unpleasant choices:

- (a) she can attempt to live without claiming a pension;
- (b) she can state untruthfully that she is unaware of the identity of the father or his whereabouts. The Victorian Social Welfare Department is likely to approach such a claim with some incredulity. The mother may be subjected to rigorous questioning by a special magistrate, see Social Welfare Act 1970, s. 24;
- (c) she can swallow her scruples and sue for maintenance.

²¹ This is particularly reflected in the fact that the Victorian Social Welfare Department deducts from family assistance payments the amount of any maintenance awarded under an affiliation order. This is regardless of whether the maintenance is actually paid.

difference from children of two-parent families, and in confirming and strengthening his sense of self. While the inadequacy of the Maintenance Act provisions in providing for the child's upkeep was recognised, it was felt that affiliation proceedings, however unpleasant, did serve this purpose. Hope was expressed that some of the adversary element could be removed from the proceedings, that fathers could be persuaded to contribute to maintenance voluntarily, and that something of a 'family court' atmosphere might be attained. It is possible that the 'declaration of paternity' provisions in the Status of Children Act might serve these functions, without possessing the defects of affiliation proceedings. On the other hand, a declaration of paternity must be obtained in the Supreme Court, and this possesses substantial cost disadvantages. This objection would be less substantial if legal aid became more readily available, or if social welfare authorities played an active part in obtaining declarations of paternity.

For the reasons set out above, it is suggested that the Maintenance Act 1965 should be substantially amended to remove the corroboration requirement and introduce provision for compulsory blood tests. Further investigations should be made into the financial and other consequences of repealing the provision for private support altogether.

(b) *Public Sources*

Since Sackville and Lanteri discussed the ex-nuptial child's support from public sources in 1970, financial assistance for ex-nuptial children and their mothers has grown dramatically.²² To a large extent this is due to the increased intrusion of the Commonwealth government into the field, both by means of direct benefits paid to unmarried mothers, and by the Commonwealth grants reimbursing the States for payments made to unmarried mothers who are ineligible for Commonwealth assistance.²³

(i) VICTORIAN SOCIAL WELFARE DEPARTMENT

For six months from the birth of the child a single mother is ineligible to receive Commonwealth assistance. The reason for this waiting period is not clear. It is probably derived from the fact that a similar six months delay is applicable to the wife who is deserted, presumably for the purpose of establishing that desertion has indeed taken place.²⁴ During this six months period, an unmarried mother may receive assistance from the State Social Welfare Department.

The financial assistance to which an unmarried mother and her child

²² Sackville R. and Lanteri A., 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *Australian Law Journal* 5, 51. See also Sackville R., 'Social Welfare for Fatherless Families in Australia: Some Legal Issues'. Part I: (1972) 46 *Australian Law Journal* 607; Part II: (1973) 47 *Australian Law Journal* 5.

²³ Both of these are discussed in detail *infra*.

²⁴ Sackville R., 'Social Welfare for Fatherless Families in Australia: Some Legal Issues: Part I' (1972) 46 *Australian Law Journal* 607, 611.

are entitled cannot be discovered by a perusal of the Victorian Social Welfare Act 1970, or any regulations made under that Act. The Act simply contains a broad provision in the following terms:²⁵

The Minister may from time to time determine the maximum rates of assistance to be paid in respect of children and young persons under this Division but may direct that the maximum rate shall not apply in any case where the Director-General considers that for preventing the disruption of a family a greater rate of assistance should be paid for some period or periods.

Not only does the Act contain no provisions relating to the specific amount of benefits, but details of the means test to be satisfied are also missing. This makes it difficult for an applicant to discover her entitlement to State assistance by herself, and may also make it difficult to determine why an application has been refused.²⁶ It reinforces the concept of the payment as a matter of grace, rather than of right. A more precise statement of the amounts of payment, and the means test applicable should be contained in the legislation.²⁷

The family assistance payment made by the State for a mother and one child is \$40.50 per week, plus an additional \$5.00 per week if rent or board is paid. An extra allowance of \$2.00 per week is made if there is a child under the age of six years or an invalid dependent child requiring full-time care. A further payment of \$5.50 per week is made for each child after the first. Thus the total amount which can be received by a single mother, with one child under six years, paying board or rent, is \$47.50.

The means test is extremely stringent. Assets exceeding \$500, plus \$100 for each dependent child, but omitting the value of a home, exclude the mother from eligibility for assistance. Thus a mother who owns a car may find herself disentitled. Every dollar of income earned by the mother reduces the total amount payable. As already seen, unmarried mothers are required to take proceedings against the father for maintenance. Alternatively the Social Welfare Department will be satisfied if the mother obtains an agreement for voluntary maintenance for not less than \$8.00 per week. The amount of any maintenance order is deducted from the family assistance payment, whether or not the maintenance order is satisfied. Recipients of family assistance are eligible to receive medical, pharmaceutical and optical benefits free of cost, though to a large extent these fringe benefits are now supplanted by Medibank. A school book allowance is also available.²⁸ Unlike the situation for invalid and old age pensioners, travel concessions on public transport are not granted.

²⁵ Social Welfare Act 1970, s. 23. See also ss. 15, 16.

²⁶ Members of the National Council for the Single Mother and Her Child commented upon this point in the context of the Commonwealth Supporting Mothers Benefit. They disliked the terminology of the 'benefit' as opposed to the 'pension' granted to widows, commenting that it implied that their 'right' to receive the benefit was illusory.

²⁷ Sackville R., 'Social Welfare for Fatherless Families in Australia: Some Legal Issues: Part II' (1973) 47 *Australian Law Journal* 5, 10-1.

²⁸ This information was supplied by the Social Welfare Department.

Under the States Grants (Deserted Wives) Act 1968, the Commonwealth reimburses the State half of its expenditure on family assistance payments, which also include payments to deserted wives and wives of prisoners with dependent children in their care.²⁹ In 1973-1974, \$7,653,841 was paid to the States under this Act and in 1974-1975, \$6,932,168.³⁰ The substantial decrease in amount was due to the introduction of the Commonwealth supporting mothers benefit,³¹ for until this was introduced the States remained responsible for the payment of family assistance to unmarried mothers, deserted *de facto* wives, and *de facto* wives of prisoners with dependent children in their care, even after the first six months.

As can be seen from the above description, the position of an unmarried mother during the first six months from the birth of her child is extremely grim. The maximum family assistance she can receive is \$47.50. If she works part-time any amount she receives is deducted from her family assistance payment. In fact, she may receive less than \$47.50 even if she does not work, for her payment is reduced by the amount of any maintenance order. The Henderson Commission of Enquiry into Poverty fixed the poverty line for a single non-working parent and one child at \$54.20 for the June quarter 1975.³² Thus a single mother with one child is substantially below the poverty line if she is dependent on family assistance. The position of a deserted *de facto* father may be even worse, for he has no entitlement whatsoever to family assistance.

(ii) AUSTRALIAN DEPARTMENT OF SOCIAL SERVICES

The Commonwealth Social Services Act 1947-1975 takes a different approach to that of the Victorian Social Welfare Act. The Commonwealth Act sets out in detail the amount of the entitlement, the conditions of eligibility, and the details of the means test. Thus it is possible for an applicant to receive independent legal advice on all these matters, as contrasted with her position under the State Act. That being said, it should also be stated that the Social Services Act is a monster of abstruse draftmanship. Not only is the Act amended frequently, (often three or four times a year) so that minor amendments must continually be read back into the original Act, but there is considerable cross-referencing between the various Divisions. As Professor Sackville points out, 'even the simple task of ascertaining the current level of the widow's pension, or the operation

²⁹ State Grants (Deserted Wives) Act 1968 (Cth), s. 4.

³⁰ Australia, *Department of Social Security Annual Report 1974-5*, 27. In 1973-4 Victoria received \$1,573,762 by way of reimbursement. See Victoria, *Social Welfare Department Annual Report 1973-4*, Table 18.

³¹ Social Services Act (No. 3) 1973 (Cth). The new benefit became effective on 3 July 1973.

³² *First Main Report April 1975*, Appendix G. Tables G1, G2. See also G3 for benefit recommendations.

of the means test, requires a tortuous analysis of independent sections that severely taxes even the most hardened legal mind'.³³

In 1973 an amendment to the Act introduced the supporting mother's benefit.³⁴ The benefit is set at the same level as a Class A widow's pension, but may be claimed by persons not eligible for the widow's pension: unmarried mothers, deserted *de facto* wives, and *de facto* wives whose husbands are in prison. The supporting mother's benefit is payable six months after the date of the event giving rise to eligibility, — in the case of an unmarried mother this would be the birth of the child, in the case of a deserted *de facto* wife, the desertion. Thus an unmarried mother receives family assistance from the State for the first six months, and thereafter receives a Commonwealth supporting mother's benefit. The amount received by a supporting mother as from 1 May 1976³⁵ is as follows:³⁶

Basic rate	\$41.25
Plus	
Mother's allowance	\$ 4.00 per week (\$6.00 if child is under six or an invalid)
For each child	\$ 7.50

Supporting mothers who are entirely or substantially dependent upon their pension and who pay rent or board are entitled to a supplementary allowance of \$5.00 per week. The payment of the supplementary allowance is subject to a stringent means test.

In addition, all Australian mothers are entitled to the payment of a lump sum maternity allowance of \$30.00 for a first child³⁷ and to child endowment at the rate of 50 cents per week for the first child, increasing for each subsequent child.³⁸ Neither the maternity allowance nor child endowment are subject to a means test.

Fringe benefits for the supporting mother include subsidised hearing aids, telephone rental concessions, and the ability to participate in the N.E.A.T. retraining scheme.

Payment of the supporting mother's benefit is subject to an extremely complex means test which is based upon both the 'income' and the 'property' of the supporting mother.³⁹ The details of the means test will not

³³ Sackville R., 'Social Welfare for Fatherless Families in Australia: Some Legal Issues' Part II (1973) 47 *Australian Law Journal* 5, 11.

³⁴ Social Services Act (No. 3) 1973 (Cth), s. 9, introducing Part IV AAA into the principal Act.

³⁵ Social Services Act (No. 2) 1975 (Cth).

³⁶ To compare this with previous levels see Australia, *Department of Social Security Annual Report 1974-75*, 5.

³⁷ Social Services Act 1947-75 (Cth), s. 87.

³⁸ Social Services Act 1947-75 (Cth), s. 95.

For first child 50c per week

For second child \$1.00 per week

For third child \$1.50 per week

For fourth child \$1.75 per week

³⁹ Social Services Act 1947-75 (Cth), ss. 18, 59, 64, 65, as applied to supporting mothers ss. 64, 83AAA(5), 83AAE.

be discussed here,⁴⁰ but it is reasonably liberal. A mother with assets below \$4,500 in value, (excluding assets such as a permanent house, vehicles for private use, and furniture)⁴¹ may earn up to \$26.00 per week before the benefit begins to reduce. The benefit is reduced on a graduated scale. However, in ascertaining the precise financial position of the supporting mother, it should be remembered that the supplementary allowance for rent is subject to a more stringent means test than the means test for the benefit as a whole. Thus a supporting mother who works part-time will lose her supplementary allowance for rent.⁴²

Thus a supporting mother with one child under the age of six could receive \$26.00 for part-time work (if she could find it) plus \$54.75 from the Commonwealth. This would take her above the poverty line⁴³ but would still leave her below the adult minimum wage level. The Australian Conciliation and Arbitration Commission fixed the adult minimum wage at \$93.10 effective from 1 April 1976.⁴⁴

The position of a single mother improves after the first six months from the birth of her child, when she is entitled to receive the supporting mother's benefit. She is above the poverty line, although her income is considerably lower than that of the average member of the community. The supporting mother's benefit has not yet reached the level recommended in the Report of the Henderson Commission of Inquiry into Poverty.⁴⁵ The position of the single father supporting ex-nuptial children is much worse. By definition he is not entitled to a supporting mother's benefit, although in a few cases single fathers have received payment from the Commonwealth in the form of special benefits.⁴⁶

In Victoria, 4,032 unmarried mothers received the supporting mother's benefit in the financial year ending 30 June 1975. In addition, 950 separated *de facto* wives, and 17 *de facto* wives of prisoners received the benefit. All these women would be the mothers of ex-nuptial children.⁴⁷

9. CONCLUSIONS

The financial position of single mothers and their children has improved over the last few years. Possibly as a result of this change larger numbers of unmarried mothers are keeping their babies rather than giving them up

⁴⁰ For an explanation of the principles of the means test, and a reasonably up-to-date example of its operation, see Sackville R., 'Social Welfare for Fatherless Families in Australia: Some Legal Issues: Part II' (1973) 47 *Australian Law Journal* 5, 13-4.

⁴¹ Social Services Act 1947-75 (No. 2) (Cth), s. 65.

⁴² Social Welfare Act 1947-75 (Cth), s. 65A. (Means as assessed not exceeding \$312 per annum).

⁴³ See p. 363, n. 32 *supra*, but the poverty line will have risen since these figures were tabulated.

⁴⁴ This information was supplied by the Australian Department of Labour and Immigration.

⁴⁵ *First Main Report April 1975*, Appendix G, Table G.3.

⁴⁶ Social Welfare Act 1947-75 (Cth), ss. 174-8.

⁴⁷ Australia, *Department of Social Security Annual Report 1974-75*, Table 22.

for adoption.⁴⁸ Some concern has been expressed at this trend. It has been suggested that the well-being of ex-nuptial children might be better served by their adoption into a two-parent family, rather than by their retention by their mother. As far as the author knows, no surveys have been undertaken which either confirm or deny this proposition.⁴⁹ It has also been suggested that some unmarried mothers may decide initially to retain their babies. As the children grow older, financial and emotional burdens increase. As a result, some of the children originally retained by their mothers may be given up for adoption or become wards of the State at a later age. As yet, it is too early to discover whether these allegations have much substance. The statistics available do not impinge directly on these points. However, in so far as the available statistics are useful, they do not appear to give any confirmation of these views. No increase has been observed in the number of older children surrendered by their mothers for adoption. The suggestion that this trend exists was rejected by the Directors of several adoption agencies, and by members of the National Council for the Single Mother and Her Child.⁵⁰

Even if increased financial assistance does create this result, the argument that single mothers should be forced by financial hardship into giving up their children 'for the good of the child' is a repulsive one. Both State and Commonwealth welfare authorities have a duty to ensure that ex-nuptial children can attain a decent standard of living and a viable position in Australian society.

⁴⁸ Although a number of directors of adoption agencies expressed the view that the changing social attitude to ex-nuptial children was a more important factor in influencing single mothers to keep their children. See also Kiely 'Social Attitudes to Single Mothers: A Pilot Study' (1972) 5 *Melbourne Journal of Politics*.

⁴⁹ Although Johns has explored the physical implications of this problem in her M.D. thesis *The Health of Babies Kept by their Single Mothers* (University of Melbourne, 1974). See also Crellin E., Pringle M. L. K. and West P., *Born Illegitimate: Social and Educational Implications* (1971). This survey covered 828 children born during one week in England, Scotland and Wales. The authors found that practically from conception onwards illegitimately born children were vulnerable to personal and social problems, 'though other socially disadvantaged children shared this vulnerability'. These problems included less antenatal care for mothers, higher mortality rate at birth, lower birth weight, poorer social environment, poorer educational attainment and poorer housing. The illegitimate group kept by single mothers compared unfavourably with those who had been adopted, who achieved in most cases a standard as good as, and in some cases a standard higher than, the legitimately born group of children. Johns, in her thesis cited *supra*, questioned the applicability of these findings to Australia where different social conditions prevail.

⁵⁰ Johns also rejects this view, for she found that very few mothers who decided to keep their babies later returned them for adoption. Johns N., *The Health of Babies kept by their Single Mothers* (Unpublished M.D. Thesis, University of Melbourne, 1974) 127.