Parents at law

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The object of this paper is to show how in the New Zealand context the distribution of parental rights and duties has evolved historically, to analyse the scope of the present law in New Zealand, and to indicate those concepts within the present legal framework which need to be developed by the courts and the legislature in order to cope with the changing fabric of the modern family.

1. INTRODUCTION

In those Western democracies which inherited the English Common Law the rights and duties[1] involved in the legal relationship of parent and child were traditionally tied to the concept of legitimacy. During the last ten to fifteen years many of these jurisdictions have been re-assessing the remaining vestiges of that model of parent-child relationship at law. This has involved legal recognition of the equal status of men and women as parents, and the equalisation of the legal position of nuptial and ex-nuptial children.

Generally the step has been taken easily in respect of married couples who have been given equal rights as parents in respect of the children of their marriage.[2] But the move to give proven fathers equal rights with the mothers of children born ex-nuptially has proved to be more difficult. Some jurisdictions have retained a distinction between legitimate and illegitimate children but have softened the consequences of illegitimacy in some specific areas such as inheritance.[3] Other jurisdictions have unequivocally equalised the position of

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1 I have used the terms "rights" and "duties" for most of this paper although in some circumstances a "right" is described as an "authority" and a "duty" as an "obligation". It is not intended that these terms are read in the Hohfeldian sense.

2 E.g. s.1(1) Guardianship Act 1973 (U.K.; s.6(1) Guardianship Act 1968 (N.Z.); s.61(1) Family Law Act 1975 (Australia).

3 E.g. Family Law Reform Act 1969 (U.K.) which provides that illegitimate children rank as dependants for purposes of family provision and that if parenthood can be proved they have the same rights of succession on the intestacy of either of their parents as legitimate children (s.14). Also the presumption that words such as "children" in any disposition refer to legitimate children only has been abolished (s.15).

nuptial and ex-nuptial children in respect of both their parents so that once parenthood is proved or recognised all rights and duties are established between each parent and the child whatever the relationship of the parents to one another.[4]

The New Zealand response to this move is the Guardianship Act 1968 and the Status of Children Act 1969. The joint operation of these two statutes interacting with other legislation concerning such areas as inheritance and maintenance, has had the effect of tying the legal duty of parenthood to the biological fact of parenthood while reserving the rights which used to flow from the relationship of legitimate children with their fathers to those parents who also have legal status as guardians. It is submitted that this division provides a model of equality while at the same time avoiding some of the practical difficulties involved in vesting all parental rights in all parents.

In New Zealand today the legal consequences of parenthood are distributed among three "classes" of parent: the biological parent, the guardian, and the custodian. And they are bestowed or acquired in several different ways. Some are rights or duties which are an automatic incident of the status which the adult holds in respect of the child. This status may arise as an incident of the circumstances of the child's birth or may be conferred on application to the court. Other privileges and obligations are only acquired by means of application to the court and are conferred at the discretion of the court. An adult by virtue of her status in relation to a child may have a right to make an application to court which another adult without such a relationship with the child would not have, or would only have with leave of the court.

A. The Biological Parent

Thus, biological parents[5] as an incident of that biological relationship have a right to inherit from their children if the children die intestate and there are no other claimants with higher priority.[6] Biological parents have an obligation to maintain their children which is enforceable by the court.[7]

4 E.g. South Australia Family Relationships Act 1975 and s.4 Guardianship of Infants Amendment Act 1975. Victoria (Status of Children Act 1974); Tasmania (Status of Children Act 1974); and New South Wales (Children (Equality of Status) Act 1976) have all legislated to equalise the position of nuptial and ex-nuptial children but the legal position in respect of parental rights of guardianship and custody has been less clear. The federal Family Law Act 1975 deals only with custody and guardianship between married persons. All legal aspects of illegitimacy are matters for state legislation. In *G* v. *P* [1977] V.R. 44 it was held that the Status of Children Act 1974 (Victoria) gave the father of an ex-nuptial child all the rights of a father of a nuptial child and therefore he was a guardian with rights in respect of the child's name. But see *W* v. *H* [1978] V.R. 1 and *Gorey* v. *Griffin* [1978] 1 N.S.W. L. R. 739.

5 The term biological parent does include a father by artificial insemination. Where the donor is a stranger to the mother the mother is unlikely to be able to discover his identity. As the law stands however, an identified donor is a biological parent. The Status of Children Act needs amending in this respect.

6 Section 77 Administration Act 1969.

7 Sections 35-39 Domestic Proceedings Act 1968; cls. 73-78 Family Proceedings Bill (No. 2) 1979 as reported from Statutes Revision Committee 7 August 1980.

They also have the status, without first obtaining leave, to make several claims in respect of their children by means of application to a court. For example, a natural parent may apply for custody of her child or make an application under the Family Protection Act 1955 for a share in the estate of a deceased child.[8] A rather more tenuous "right" possessed by the natural father as an incident of his paternity, is the regard which the court in its discretion may give to the objections of a putative father to consent for adoption. The words of the statute state:[9]

> the Court may in any such case require the consent of the father if in the opinion of the Court it is expedient to do so.

It is submitted that if the natural father does wish to exercise full parental rights in respect of his child, this provision should give him the opportunity to state his intention to the court and to be given a temporary respite in which to make applications for guardianship and custody himself.

B. The Guardian

Guardianship is defined as:[10]

> the custody of a child (except in the case of a testamentary guardian and subject to any custody order made by the Court) and the right of control over the upbringing of a child, and includes all rights, powers and duties in respect of the person and upbringing of a child that were at the commencement of this Act rested by any enactment or rule of law in the sole guardian of a child; and "guardian" has a corresponding meaning.

Today in New Zealand guardianship is an automatic incident of motherhood but not of fatherhood. A father is only a guardian of his child by operation of law if he was married to the mother at the time of the birth or conception, if he subsequently marries her, or he was living with the mother at the time of the birth.[11] In other circumstances a father may apply to the court to be appointed a guardian.[12]

Guardianship when isolated from custody or biological parentage involves rights or authority in respect of a child rather than duties or obligations. A guardian other than a testamentary guardian has a right to possession of a child. A guardian must give consent before an adoption may go ahead.[13] A guardian has the right of control over the upbringing of a child including the determination of the child's religion, education, health-care and medical treatment. None of these rights may be taken away from a guardian without a court order.

Each guardian has authority to make decisions in respect of a child. The law does not appear to be that both guardians must always give their authority to an

8 Provided that the parent was being maintained by the child immediately before her death or that the deceased had no spouse or child of a marriage: s.3 Family Protection Act 1955.
9 Section 7(3)(b) Adoption Act 1955.
10 Section 3 Guardianship Act 1968.
11 Section 6(1) and (2) Guardianship Act 1968.
12 Section 6(3) Guardianship Act 1968. Guardianship acquired by operation of s.6 may be confirmed by a declaration under 6A Guardianship Act.
13 Section 7(3) Adoption Act 1955.

action by or "on" the child.[14] But as each guardian has authority in respect of all matters of upbringing; joint guardians must liaise with one another. So although one guardian, say the father, has the authority to decide the child's school, the mother also has the authority to commit the child to other arrangements so that if there is disagreement, resolution of that disagreement is essential.[15] If the guardians cannot agree between themselves or with the help of counselling, they may apply to the court under section 13 Guardianship Act. The court will decide the question subject to section 23 — that the welfare of the child is the paramount consideration and that the wishes of the child shall be ascertained and taken into account to such extent as the court thinks fit. It is interesting that there is no right of appeal from a decision under section 13.[16]

C. The Custodian

Custody is defined as "the right to possession and care of a child."[17] As stated above, custody is normally an incident of guardianship and there are few legal consequences of the relationship of custodian and child per se. Here it is proposed to deal with only those incidents which are consequences of custodianship alone and which do not depend on guardianship or parenthood. These are the rights and obligations of foster parents and step-parents who have no other legal standing in respect of the child.

Custodians do have authority to discipline a child but this applies to any person in loco parentis to a child, including school teachers. In legal terms it means that any person in loco parentis has a good defence to a charge of assault on a child if the disciplinary action was not excessive or unreasonable. Where there are no guardians of a child or the guardians are unavailable custodians may make decisions in respect of medical treatment.[18]

The obligations of custodians are more numerous and may be gleaned in a negative way from section 27(2) Children and Young Persons Act 1974 which sets out the grounds on which police or social workers may lay complaints addressed to parents, guardians or persons having the care of a child or young person. They include the obligation of a custodian to provide a child with food, clothing, shelter, schooling, health care and to some extent love and affection. In most instances a custodian, without more, is not expected to fund these needs but step-parents will incur a maintenance obligation in some circumstances.[19]

14 E.g. under s.25(3) Guardianship Act 1968 consent to any medical surgical or dental procedure may be given by a guardian of the child. One consent should be sufficient in an emergency or for minor treatment. It is submitted that consents of both guardians must be obtained for serious treatment and surgery which can be deferred.

15 *Seabrook* v. *Seabrook* [1971] N.Z.L.R. 947.

16 Section 31 Guardianship Act 1968. Note that in *H* v. *J* [1978] 2 N.Z.L.R. 623 the guardian who was dissatisfied with a Magistrate's decision under s.13 applied for a judicial review of the Magistrate's decision on the ground that there has been a breach of natural justice in that the applicant had not been permitted to fully argue his case, and the review having been granted, the s.13 application was heard in the Supreme Court.

17 Section 3 Guardianship Act 1968.

18 Section 25(2)(b) Guardianship Act 1968.

19 Section 35(3) Domestic Proceedings Act 1968; cl. 77(2) Family Proceedings Bill (No. 2) as reported from Statutes Revision Committee 7 August 1980.

A parent who has custody of a child by a custody order under the Guardianship Act may retain guardianship but must also fulfil the obligations of a custodian. Non-custodial parent/guardians retain rights as guardians and while exercising access they would incur the obligations of a custodian.

It is clear that a person may be a guardian, a parent or a custodian without more. A testamentary guardian has all the rights of non-custodial guardianship but if the child continues to live with the surviving parent, none of the obligations of the parent or custodian. A putative father may incur the obligations of parenthood without the rights of guardianship or the obligations of a custodian. A foster parent or step-parent may be a custodian without guardianship or blood relationship. These however tend to be the exceptional family situations. Parents who were married to each other or living together at the time of the birth of their child and who continue to live in the same household together with their children will be natural parents, guardians and custodians of their children and will have all the rights and obligations incidental to each status. In the case of separation or divorce where only one parent remains custodian, the other parent will still hold shared rights and obligations of parenthood and guardianship.

These then are the legal parameters of the parent-child relationship in New Zealand today. Distributed among the three categories of parent, guardian and custodian are all those privileges and obligations once held exclusively by a father in respect of his legitimate children. The changes in the legal position of mothers and ex-nuptial children over the last one hundred and forty years has brought us to a position more appropriate for present day society. The question remains whether the reforms so far made have allocated the rights and duties most appropriately. The present position has been reached by a series of haphazard reforms unrelated to one another and without a clear conceptual framework in mind. It is submitted that the present law needs re-assessing and evaluating as a whole. It is however useful first to trace these changes historically so that a clearer picture of the origins of the present law can be obtained.

2. RECOGNITION

The Common Law had such a strong bias towards legitimacy and "father right" that recognition was conferred only on legitimate children, thus ensuring that a legal relationship arose only between a father and his child born within marriage. The illegitimate child was filius nullius, there being no legal consequences arising from his parentage. The Common Law carried this concept even further by refusing to acknowledge that a child although born out of wedlock, could be legitimated by the subsequent marriage of his parents.[20] Means of legal recognition of the parent-child relationship, which involved rights and obligations equivalent to legitimacy, were very slow to evolve. Piecemeal rights and obligations were conferred on mothers and putative fathers in areas such as registration, maintenance and inheritance but until the late 1960s when the whole field of parental rights was re-vamped by the Guardianship Act 1968 and the

20 Compare with civil law systems, e.g. France: Code Civil 1804 Chap. III Section 1.

Status of Children Act 1969, the only means of attaining status equivalent to legitimacy was by the subsequent marriage of the child's natural parents or by adoption.

The first inroad into the Common Law principles was made in New Zealand in 1860 by the Half Caste Disability Removal Act. The effect of this statute was to legitimate the ex-nuptial children of Maori-European liaisons if those parents had subsequently married. The statute was of very limited effect in that it only applied to marriages already made, plus those contracted within the twelve months after the passing of the Act.[21] When this Bill received its second reading and was debated in the House of Representatives, Mr Forsaith[22] referred to the fact that this Bill would put half-caste children in a better position than European children, but he stated that a move to the position of Scottish law (which allowed legitimation) was not generally contemplated. Some suspicions as to the less than humanitarian concerns of this statute may be inferred from the content of the second half of the Bill which was deleted in Committee but which it seems[23] made provision enabling Maori relatives to endow offspring of mixed unions with land under legal sanction.

There was no further law affecting recognition of illegitimate children until the first Adoption Act of 1881.[24] Under this statute illegitimate children could be adopted by 'strangers' and acquire all the rights of legitimate children vis-à-vis their adoptive parents. The statute also provided a circuitous means of legitimating an ex-nuptial child by allowing a natural mother alone, or a natural mother with her spouse to adopt her own ex-nuptial child. In this respect, the adoption law has not changed up until the present day.[25]

The Legitimation Act of 1894 finally enabled an ex-nuptial child to be legitimated after her parents' marriage but only where her parents had been free to marry at the time of her birth. It was another 28 years before adulterous couples could legitimate their child after marriage.[26] And not until 1939[27] were ex-nuptial children legitimated by the fact of their parents' later marriage without the necessity of registration. Neither were children of void marriages regarded as legitimate nor did they acquire any of the legal rights consequent on legitimacy until the Matrimonial Proceedings Act 1963 was passed.[28]

The effect of the Status of Children Act 1969 was to abolish most distinctions between legitimate and illegitimate children, and thus do away with the need for legitimation.[29] Such legal consequences as follow from parenthood are thus ensured

21 I.e. until 3 November 1861.
22 N.Z. Parliamentary debates, 1860:640.
23 I have not been able to track down a copy of this Bill and this assumption is taken from the reference made to that part of the Bill during the second reading debate.
24 The United Kingdom did not have legal adoption until Adoption Act 1926 (U.K.).
25 See Adoption Act 1955.
26 Legitimation Amendment Act 1921-22.
27 Legitimation Act 1939. For a history of legitimation in New Zealand see *Taylor* v. *Harley* [1943] N.Z.L.R.
28 Section 8.
29 Although a child is required to be re-registered after the marriage of her parents s.19A Births and Deaths Registration Act 1951.

so long as parenthood is proved. There are various ways in which paternity may be proved.[30] For the first time by means of a High Court declaration a putative father is provided with a means of proving and acknowledging paternity without the active support of the mother of his child.[31] Obviously there may be difficulties of proof if the mother is obstructive. No methods of proving maternity are enacted apart from a presumption relating to the child born to a married woman[32] but it must be assumed that all possible evidence is admissable if a doubt should arise. But proof of parenthood no longer confers all the rights and obligations which at Common Law arose from the relationship of a legitimate child and her parents. A new statutory concept of guardianship was introduced in 1968 and not all parents are guardians. In order to have all the rights of a legitimate child at Common Law, both one's natural parents would have to be guardians. The effect of adoption is still to give adoptive parents the status of natural parents and guardians.

3. NAME

The Common Law, unlike most civil law jurisdictions, has never had strict rules about use of names and any adult is free at Common Law to be known by any name. Use of a name gives it legal currency and the making of a deed poll is merely confirmation of that intent. The legal status of a child's name is unclear. Traditionally, legitimate children have taken their father's surname and illegitimate children their mother's surname.

Statutory requirements for secular registration of births[33] were first introduced in England in 1836 and were incorporated into New Zealand law in 1840 though the first Registration Ordinance was made as early as 1847. Such registration provides a record of the birth date, sex, name, and parentage of a child. By the Registration Ordinance 1847 nuptial children were registrable by either parent and the names of both mother and father appeared on the record. This has continued to be the case until the present day.[34] The 1847 Ordinance did not mention illegitimate children but the Registration Act 1858 provided that where the child was illegitimate the Registrar "may" enter the word "illegitimate" or "unknown". The Births and Deaths Act 1875 stated that the Registrar "shall" enter the word "illegitimate" or "unknown" in the case of an ex-nuptial child, and for the first time an entry of the father's name was specifically provided for, but only at the joint request of the mother and the father. This is essentially still the position today although the father who is living with the mother need not attend at the Registry Office in person and may give a consent in writing which can be delivered to the Registrar.[35] If the mother of an ex-nuptial child is dead

30 See s.s.5 and 8 Status of Children Act 1969.
31 Section 10 and 8(4) Status of Children Act 1969.
32 Section 5 Status of Children Act 1969.
33 I.e. other than parish records of baptisms.
34 Section 11 Births and Deaths Registration Act 1951.
35 Section 18 Births and Deaths Registration Act 1951 as amended by the Status of Children Act 1969.

or cannot be found the father alone may register the child.[36] The father's name may also be added to the register at a later date on production of appropriate evidence.[37] Except where she is dead or cannot be found, the mother of an ex-nuptial child has a veto over the father's name being entered in the register and the only recourse for a father in such circumstances is to apply to the High Court for a declaration of paternity or for appointment as a guardian under section 6 Guardian Act 1968.[38]

The presence of the father's name on the birth certificate has provided a means for a father to acknowledge his paternity but until 1969 the legal consequences of that acknowledgement were minimal. Presumably such an entry in the register would have been some evidence of paternity but it was not until the Status of Children Act 1969 that it became prima facie evidence of paternity. In any event prior to 1969 the consequences of proof of paternity were restricted to liability for maintenance[39] and limited inheritance possibilities by means of an application under the Family Protection Act 1955.[40]

A full birth certificate in New Zealand does not specify the surname of the child as such: the father's full name and the mother's full name appear on the form but only the first or christian names of the child. When a parent registers a child he or she fills in a form RG27 issued by the Registrar of Births which includes a space at the top for the child's surname. If a short copy of a birth certificate is requested it is the surname which appears on the top of the RG27 which is entered as the child's surname. The Registrar allows an unmarried mother who bears a different surname from the father of the child to choose either her own or the father's surname for the child if the father's particulars are given. But with parents who are married to each other, even though they retain different surnames, Registrars will most often refuse to record the child's surname as that of the mother. This is a practice which no doubt accords with the wishes of the vast majority of people but appears to have little foundation in law. There is no statutory provision regarding surnames and it is submitted that the common law is unclear and uncertain in the light of the Guardianship Act 1968 and the Status of Children Act 1969. Is the authority to determine a child's name now an incident of guardianship or parenthood?

In *H* v. *J*[41] Vautier J. ruled that it is the right of a child to use her father's surname, and that neither parent has the right to change a child's surname without the consent of the other parent or the order of a court. The case concerned a child who was born to parents who were living together but unmarried. The father's name was on the Births Register and the parents did not separate until the child was just four years old. There was evidence of an agreement between the parents that the child would continue to use the father's surname but the mother

36 Ibid. s.18 (1)(a) proviso.
37 Ibid. ss.18(2), 18(3) and 19.
38 Ibid. s.18(3).
39 Section 38 Domestic Proceedings Act 1968.
40 Section 3 Family Protection Act 1955.
41 [1978] 2 N.Z.L.R. 623.

had registered the child at school with her surname hyphenated to that of the father. The mother argued that until the child was registered at school, the question of which parent's surname she would use had not arisen, and that once she was at school the child found it difficult to use a surname different from that of her mother. There were frequent and regular access arrangements with the father. On an application under section 13 Guardianship Act 1968 Vautier J. held that the child's surname was that of the father, and that she should continue to use the father's surname.

While the final decision in this case may be seen as appropriate on its particular facts, the way in which Vautier J. viewed the law relating to names is open to question.

He stated that it is the right of a child to use a father's surname. Does that mean that it is not a right of the child to use its mother's surname? If the mother's evidence is believed the child in fact had a preference for using her mother's surname.[42]

Vautier J. argued that at Common Law a legitimate child had the right to use its father's name and that as the distinction between legitimacy and illegitimacy had been abolished by the Status of Children Act 1969, the ex-nuptial child now also had the right to use its father's name. It must be pointed out that this 'right' can presumably only arise where the father's name is on the Birth Register, and is not available to the ex-nuptial child whose father is not on the register. Therefore, Vautier J. appears to say that a child's surname is determined not by guardianship, or by fatherhood, but by the fact of whether or not the father's name appears on the birth certificate. Whether or not the father's name appears on the birth certificate depends on a number of factors. These are that the parents are married or where unmarried, that the father and the mother both consent to the father's name going on the birth certificate or that a declaration as to paternity has been made in the High Court that the father has been declared a guardian of the child.[43]

It is submitted that at Common Law the right of a legitimate child to the use of the father's name was associated with the father's legal guardianship of the child and not his biological parentage.[44] The illegitimate child had a biological father but not a legal male guardian and consequently no right to use the father's name.

The father of a legitimate child was the child's legal guardian to the exclusion of the mother. Therefore, it was the father's surname which the child used and not the mother's. Since the Guardianship Act 1968 gave equal guardianship rights to mothers and fathers of nuptial children, it is submitted that the child has the right to use the surname of either guardian. Vautier J. gained support from the decision of the Supreme Court of Victoria, *G* v. *P*[45] but in that state there is

42 Ibid. 625.
43 Sections 18 and 19 Births and Deaths Registration Act 1951.
44 See Buckley J. in *Re T* [1963] Ch. 238, 241.
45 [1977] V.R. 44.

no equivalent to the New Zealand Guardianship Act 1968 and the court expressly held that on the basis of the Victorian Status of Children Act 1974 the father of an ex-nuptial child became its guardian.

The emphasis in Vautier J.'s judgment on the right of the child to use a surname is somewhat misleading. Does the child have a right to refuse to use a father's surname as for example where the father is a notorious criminal? It is submitted that the discussion is more practically approached from the point of view of the parents as it will usually be the parents who will be the decision-makers in respect of a child's name.

Does a parent then have a 'right' to determine a child's surname? In *H* v. *J*, although Vautier J. approaches the question from the position of a child's right, he in fact omitted any discussion of the child's wishes and was dealing with a dispute between the parent/guardians under section 133 Guardianship Act 1968.

In the case of a nuptial child it has been traditional for a mother to have taken the father's surname on marriage, and for the child therefore to take the 'family' surname. But what is the situation where a woman has retained her maiden name on marriage?

It is submitted that as there is no statutory direction in New Zealand under the Births and Deaths Registration Act, each guardian has the right to determine the child's surname and that this is a decision for the guardians to make between themselves with the possibility of ultimate resort to the court under section 13 Guardianship Act 1968 in case of disagreement. In cases where the parents are not married but are both guardians, either by operation of law since the time of the child's birth, or by appointment of the father as a guardian by the court, the position should not be different if the presumed intent behind the Guardianship Act is to be given effect. Where guardians were not able to agree as to the child's surname it is submitted that whether or not the mother and father were living in the same household would be a factor in the decision by the court.

In those instances where the father's name is on the birth certificate but the father is not a guardian of the child, it seems unreasonable from the point of view of both the mother and the child that the child should necessarily be saddled with the surname of the father. In such a case the father has no rights or authority in any other aspect of the child's upbringing although he does have an obligation to maintain the child. Would the father want the child to bear his surname in such a case? If all parties were agreed that the surname of the child should be that of the mother would it not be rather ridiculous to insist on the so-called right of the child to use the father's surname? Where the father was not interested enough in the child to apply for guardianship would it not be wrong to insist that he had a right for the child to use his surname, that overrode the mother's authority as guardian to name the child as she wished? It is submitted that Vautier J. in *H* v. *J* did not sufficiently consider factual situations other than the type with which he was then dealing where the father was both parent and guardian, when he equated presence of the father's name on the birth certificate with the necessity for the child to use that surname.

H. v. *J.* is an unusual case in that although the dispute as to the child's name arose after the parties separated, the judgment is mainly concerned with establishing what the child's surname had been since birth and while the parties were living together. It would seem that had the parties lived together for another two years before splitting up the child would have likely been registered at school with her father's surname and the dispute would not have arisen in the same form. One imagines that cases are likely to be rare which dispute the name of a child near the time of the birth. This raises another question in the light of Vautier J.'s judgment. If a child had been known by its mother's surname since birth, even though the father's name was on the birth certificate, would he hold that the surname was not the true legal name if an issue relating to the child's name were brought to court at some later date?

Most cases involving questions as to children's surnames arise where the parents, whether married or unmarried, have separated after the child has become accustomed to using the father's surname, and the mother takes the name of her new husband, leaving the child or children from the earlier relationship with a surname that is not the family or household surname.

There are two basic judicial approaches to this question. The first approach insists that the children keep the surname by which they were originally known. The second is a more pragmatic approach which regards the surname itself as of less significance, and makes the ruling which seems most likely to be workable in the given situation.

In New Zealand two Magistrates Court decisions have upheld the "right" of a natural father to have the children of his first marriage retain the father's surname even though they were in the custody of the mother who had remarried and taken a different surname.[46] The argument has been that the name is a link with the natural father which ought to be retained in order to keep the father "interested" in his children and encourage the children to recognise ties with the father, that the mother may change her name yet again at some future time, and that custody of the children may go to the father at some stage. These arguments were also supported by Vautier J. in *H* v. *J.*

The English Court of Appeal has however taken a different approach. Ormrod L.J. said:[47]

> and the very last thing that any rule of this court is intended to do is to embarrass children. It should not be beyond our capacity as adults to cope with the problem of dealing with children who naturally do not want to be picked out and distinguished by their friends and known by a surname other than their mother's, if they are thinking about it at all. It is very embarrassing for school authorities and indeed to the courts if efforts have to be made to stop a little girl signing her name 'W' when it really is 'R'. We are in danger of losing our sense of proportion. All one can say in this particular case is that one can understand the situation, which is not at all unusual, and I just hope that no one is going to make a point about this name business, in other words, to treat it as a symbol of something which it is not. There is

46 *Re WAR and KAR* (1966) 12 MCD 18 and *J.T.* v. *CCH* (1978) 14 MCD 275 and see *D* v. *B* [1977] 3 All E.R. 751.

47 *R(BM)* v. *R(DN)* [1978] 2 All E.R. 33, 39.

> nothing in this case that suggests that the mother or Sergeant W. want to make a takeover bid for this family from the father and turn these children into their own children, nothing at all. Therefore, I hope that it can be treated as counsel in his exchanges with the learned judge below observed, 'This is a peripheral matter'. I would endorse that strongly.

A child centred approach to the issue would seem more appropriate than a resolution of the question on the basis of guardianship or parental rights. This would be the best approach in the case of school age children where the children themselves may be concerned to express a preference, but it will not resolve the issue in respect of younger children. The decision in a case of dispute would seem to be one for the court and the solution may differ according to circumstances. The issue of name does however seem more appropriately regarded as an incident of guardianship and custodianship, and not merely of parenthood.

4. INHERITANCE

The English law of succession clearly distinguished between the inheritance rights of legitimate and illegitimate children.

By 1840 all forms of fixed portion inheritances had been abolished and the principle of freedom of testation held sway. Legitimate children had an advantage in that the word "child" in any will or other instrument was interpreted to mean a legitimate child, and if a testator wished to will property to his ex-nuptial children he had to take great care to ensure that his will would be interpreted as he intended.

The law of succession on intestacy maintained two separate systems: one for real property and the other for personal property. Both systems excluded any consideration of the illegitimate child. Succession to realty on intestacy preserved the system of primogeniture, admitting only legitimate children and preferring the male heir.[48] Succession to personalty on intestacy was governed by the Statute of Distributions 1670.[49] There was an entitlement to succession between legitimate children and their parents but illegitimate children were totally excluded.[50]

In New Zealand the distinction between realty and personalty on intestate succession was partially abolished by the Real Estate Descent Act 1874[51] and completely done away with by the Administration Act 1879[52] so thereafter realty was distributed according to the same rules of personalty.

The first modification of the law in the direction of recognising a parental obligation to the ex-nuptial child came in an unusual provision in the Destitute Persons Act of 1877. Section 10 provided that a magistrate could order support

48 Inheritance Act 1833 (U.K.).
49 22 and 23 Car 2 c. 10.
50 Where there was a widow the children shared equally in two thirds residue. If there was no widow the children shared equally. A father took half the estate where there was a wife but no children. A father took all the estate where there was no wife and no children. A mother only inherited if the father had predeceased her.
51 In force 1 October 1875.
52 In force 1 September 1880.

for an illegitimate child from the estate of its mother or father provided that this would not be at the expense of the deceased's spouse and legitimate children.[53] No doubt the intent was to prevent such children becoming a charge on the state but it must be remembered that no similar order could be made in respect of a legitimate child at that time even if she had been excluded from her father's will.[54]

By the Administration Act 1879 some rights of inheritance were established between a mother and her ex-nuptial child. The mother of a male ex-nuptial child shared one half of his estate with his widow if there were no surviving legitimate children[55] but the mother of a female illegitimate child did not take a share in her daughter's estate unless she died without a spouse or any children whether legitimate of illegitimate.[56] Illegitimate children could only inherit from their mother if she had no husband and no legitimate children.[57]

These provisions of the 1879 statute were incorporated unchanged into the Administration Act 1908 as section 51. It was not until the Administration Amendment Act 1944 that the illegitimate children of a woman ranged equally with her legitimate children for the purposes of distribution on intestacy.[58]

By the same amendment in 1944 mothers were put on an equal footing with fathers so that where a legitimate child died intestate without a spouse or children of her own, her parents would succeed to her estate in equal shares.[59]

The first inroad into the principle of freedom of testation was made by the Testators Family Maintenance Act 1900 which allowed legitimate children to claim a share out of a parent's estate where they had been excluded from the will.[60] The original statute did not include illegitimate children but in *Worthington* v. *Ongley and Kelly*,[62] the court upheld legacies given to illegitimate children and an order for payment of the legacies to the widow and legitimate children was refused on the grounds that there was no proof that the illegitimate children had support from any other quarter. The court was prepared to uphold the testator's moral obligation to his illegitimate children. In 1936 the provisions of the Family Protection Act 1908 were extended to the wills of testators in respect of their ex-nuptial children, if parenthood had been admitted or proved in the testator's lifetime, and in 1939 the Family Protection provisions were extended to claims in respect of intestate estates for both legitimate and illegitimate children.[62]

Meanwhile the position of Maori ex-nuptial children was totally different. The New Zealand law acknowledged that Maori custom made no distinction between

53 Section 11.
54 The legitimate child would take a share on an intestacy.
55 Section 35 Administration Act 1879.
56 Ibid. s.36.
57 Ibid. s.37.
58 Section 8 Administration Amendment Act 1944.
59 Ibid. s.6.
60 These principles were affirmed by the Testators Family Maintenance Act 1906, consolidated as part of the Family Protection Act 1908.
61 (1910) 29 N.Z.L.R. 1167; 13 G.L.R. 127.
62 Section 22 Statutes Amendment Act 1939.

legitimate and illegitimate children as far as inheritance was concerned. By the Intestate Native Succession Act 1876[63] those entitled to succeed on the intestacy of a Maori person were to be determined in accordance with Maori custom, thus recognising the lack of distinction between legitimate and illegitimate children.

And by section 5 Native Land Amendment Act 1912 it was provided that the word "child" in a will made by a Maori included a child capable of inheriting native freehold land in accordance with native custom. This continued to be the law until the necessity for any distinctive provisions for Maori people was abolished by the Status of Children Act 1969.[64]

The Status of Children Act 1969 in doing away with the legal distinction between nuptial and ex-nuptial children has several consequences for the law of inheritance. First the rule that words of relationship signify only legitimate relationship in the absence of a contrary expression of intention is abolished.[65] Therefore, the obligation now rests on the testator who wishes to exclude his ex-nuptial children to do so explicity, rather than the testator who wishes to include them. The Family Protection legislation still affords any excluded children nuptial or ex-nuptial the opportunity of challenging the will. The position on intestacy at first appears very simply that ex-nuptial and nuptial children will be treated equally. In practice however, this rule is seen to raise many problems in respect of proof of the father-child relationship. A child born to a married woman is still presumed to be the child of the mother's husband[66] and relationship through the husband is accepted for inheritance purposes.[67] In cases of the ex-nuptial child the 1969 statute provided that 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 the construction of any will and other testamentary disposition be recognised only if paternity had been admitted (expressly or by implication) or established against the father in his lifetime, and if that purpose was for the benefit of the father paternity had been so admitted or established while the child was living.[68] Thus, an ex-nuptial child or her relatives could inherit from the child's father as long as paternity had been established while the father was still alive. The father of an ex-nuptial child could only inherit from the child if paternity was established while the father and the child were alive. The father's relatives could inherit from the child if paternity was established during the father's lifetime. In 1978 the principal Act was amended[69] so as to include paternity established while the child was in utero and to allow as well for the establishment of paternity for inheritance purposes

63 Later s.139 Nature Land Act 1909

64 See ss.174 and 176 Nature Land Act 1931; ss. 115 and 116 Maori Affairs Act 1953.

65 Section 3 (2) Status of Children Act 1969.

66 Ibid. s.5.

67 Ibid. s.7(1)(a).

68 Ibid. s.7(1)(b).

69 Status of Children Amendment Act 1978 s.3.

after the death of the father or the child by means of a declaration of paternity made under section 10 Status of Children Act 1969.[70]

The model of the legal relationship between parent and child in which the obligations of parenthood are consequent on biological parentage and the privileges are consequent on legal guardianship is consistently carried through in the New Zealand law except in the area of inheritance on intestacy. In this area both the parent and the child have a privilege of inheritance from the other and an obligation to provide for the other on intestacy by virtue merely of their biological relationships. It would be much more consistent with the model described if the mutual rights and obligations of inheritance on intestacy were tied to guardianship rather than biological parentage. Those few cases in which a right to inherit would seem appropriate outside of the guardianship relationship could still be dealt with under the Family Protection Act 1955 where blood relationship gives rise to a right to apply to the court to exercise its discretion in respect of provision for the claimant out of the deceased person's estate.

5. MAINTENANCE

The obligation to maintain has since early in New Zealand history been fixed on the parents regardless of the legitimacy or illegitimacy of the child. One can assume that the interest of the state in avoiding the economic responsibility for children outweighed the niceties of legitimate recognition. The Destitute Persons Ordinance 1846 set the pattern for all the subsequent Destitute Persons Statutes.[71]

Mothers and fathers could be ordered to contribute to the support of their legitimate children.[72] The mother of an illegitimate child could be held responsible for its support[73] and the father also, if his paternity was proved.[70] Although procedures for proving paternity gradually took more sections of the statutes the essential elements remained the same even in the Domestic Proceedings Act 1968. If the mother gave evidence it had to be corroborated but the evidence of the mother was not necessary for the making of the order.[75]

The state was less forthcoming in its own support for ex-nuptial children. The predecessor of the present family benefit was provided for under the Family Allowances Act 1926 but paid only to families where the father's income was

70 Section 7(1)(c) as inserted s.3 Status of Children Amendment Act 1978. The position of executors, administrators and trustees who distribute estates without cognisance of claimants entitled through ex-nuptial connections was dealt with in s.6 and s.7(2) of the 1969 Act. These provisions have been expanded and specific steps which such persons must take before distribution are set out in the 1978 Amendment by repealing s.6 and inserting s.5A, s.6, s.6A, s.6C, s.6D and expanding s.7(2) and adding s.7(3) and (4).

71 1877 No. 44; 1883 No. 26; 1884 No. 21; 1886 No. 7; 1894 No. 22; 1904 No. 32; 1905 No. 18; 1908 No. 45 and No. 219; 1910 No. 38; 1915 No. 58; 1921 No. 20.

72 Sections 1-3 Destitute Persons Ordinance 1846.

73 Idem.

74 Ibid. ss.5 and 6.

75 Section 6 1846 Ordinance; s.10 Destitute Persons Act 1900; s.49 Domestic Proceedings Act 1968; cl. 53 Family Proceedings Bill (No. 2) 1979, contrast el. 39 Family Proceedings Bill 1978.

below $8.00 a week. The allowance was only paid for each child in excess of two and alien, asiatic and illegitimate children were excluded. It was not until the Social Security Act of 1938 that a benefit was paid in respect of alien, asiatic and illegitimate children and then only in respect of the third and later children in the family. In 1940 the second and later children received the benefit and from 1941 it has been paid for each child, although the income qualification was not abolished until 1946.

The obligation to maintain in New Zealand has always been fixed on the parents and children have never owed a similar responsibility to their parents. The obligation has remained a consequence of biological parenthood once proved with a minor exception in the case of step-parents where the step-children have been members of the step-parent's family.[76] It is unrelated to guardianship status.

6. PHYSICAL POSSESSION AND RIGHT TO CONTROL UPBRINGING

A. Nuptial Children

At Common Law a father had the right to the physical possession of his legitimate children and also the right to control their upbringing. A father could enforce his right to possession by means of a writ of habeas corpus and a father would only be deprived of possession of his legitimate children if he was shown to be unfit to be a custodian. From 1839 until 1968 the mother gradually gained rights in respect of her nuptial child until eventually she was put on a completely equal footing with the father by the Guardianship Act 1968. Talford's Act passed in the United Kingdom in 1839 was the first statutory encroachment on the Common Law. It allowed a mother to petition the Master of the Rolls or the Lord Chancellor for an order for access to her child and, if the child was under 7 years old, for possession of the child until it was 7 years old. Talford's Act became the law in New Zealand in 1840. The first extension of the mother's rights in New Zealand law came in the Married Women's Property Act of 1870 which allowed a magistrate or Justice of the Peace who was making an order in respect of the woman's property on breakdown of her marriage, also to make an order giving her custody of male children up to the age of 10 years and female children up to the age of 18 years or sooner marriage.[77] The Law Amendment Act 1882 had a much broader base and allowed a mother by her next friend to file a petition in the Supreme Court, regardless of her property position, asking for access and custody or control of her male and female children up to 16 years of age.[78] It was also provided that an agreement for custody should not be invalid by reason only of its providing that the father should give up custody.[79]

The mother's rights were further extended by the Infants Guardianship and Contracts Act 1887 whereby a mother could apply to the Supreme Court for a

76 Section 35(3) Domestic Proceedings Act 1968; s.52 Matrimonial Proceedings Act 1963; cl. 77(2) Family Proceedings Bill (No. 2) 1979 as reported from the Statutes Revision Committee, 7 August 1980.
77 Section 3 Married Women's Property Act 1870.
78 Section 12 Law Amendment Act 1882.
79 Ibid. s.13.

custody or access order in respect of any of her minor children. The court was given the power to "make such order as it may think fit . . . having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father."[80] This section was re-enacted unaltered in the Infants Act 1908. The 1887 and 1908 Acts also contained a provision whereby the guilty party in a judicial separation or divorce could be declared by the court to be unfit to have custody of the children of the marriage.[81]

The "automatic" right to possession and custody of the legitimate child remained with the father, and the mother was given merely the right to apply for a court order in her favour. The court did however, hold that where a father asked for a writ of habeas corpus to take a child out of the custody of its mother, it was entitled to give effect to the provisions of the Infants Act 1908 and consider the merits of the mother as custodian even though the mother had not made an application under section 6.[82]

The wording of the equivalent provisions in the Guardianship of Infants Act 1926 is considerably different, but it is very difficult to see any practical difference in the decisions of the courts after the 1926 Act had come into force. The 1926 Act provided that "the Court shall regard the welfare of the infant as the first and paramount consideration".[83] The mother was deemed to have the same powers as the father to apply to the Supreme Court in respect of any matter affecting the infant.[84] Unlike the Act of 1887 no mention was made of marital misconduct.

In fact the Courts still viewed marital misconduct as a factor which meant that the welfare of the child would more often than not be best served by giving custody to the "innocent" parent. So in 1923 in the case of *Salaman* v. *Salaman*[85] the custody of a 5 year old girl who had lived with her mother in Wellington for the previous 4 years while her father resided in Auckland, was given to her father because the mother had committed adultery since the separation of the parents. The child was to reside in a house separate from that of the father, with a nanny to look after her. The court viewed the situation of the mother as a live-in housekeeper as somewhat more financially precarious than the soundly financed father.

Despite the change in the statute, in *Cubitt* v. *Cubitt*[86] custody was taken away from a mother who had had a sexual relationship after divorce. There were other factors involved in the case but the main reason for giving custody to the father was the mother's "immoral" conduct.[87]

80 Section 6 Infants Guardianship and Contracts Act 1887.
81 Ibid. s.8.
82 *Re J.H. and L.J. Thomson (Infants)* (1911) 30 N.Z.L.R. 168.
83 Section 2 Guardianship of Infants Act 1926.
84 Ibid. s.3.
85 [1923] N.Z.L.R. 454 C.A.
86 [1930] N.Z.L.R. 227.
87 The mother had placed the child with her brother but the father planned to have the child looked after by other relatives.

Nevertheless, the attitude of the courts to extra-marital sexual relationships did gradually change. In *Howell* v. *Howell*[88] an adulterous wife was given custody by the court but the child was put under the supervision of the Child Welfare Department. Ostler J. said:[89]

> Modern authorities show that the petitioner has no absolute right to the custody of his child on the ground that his former wife is living in adultery. It is a question in every case as to the best interests of the child.

But in *Otter* v. *Otter*[90] custody of a 4 year old girl was taken away from the mother who was living in adultery and given to the father, purely on the basis that when the child was of an age to have the situation explained to her, it would be preferable that she should be living with the innocent parent.

In *Connett* v. *Connett*[91] it was said that there is a legal presumption in favour of an innocent parent but effect was not to be given to that if it would be adverse to the infant's welfare. The Guardianship Act 1968 expressly provides that "the Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child."[92] Spouses are no longer said to "live in adultery" or even to be innocent or guilty, but in 1977 Richardson J. ruled that "all things being equal it was better for a boy of 12 (against his own expressed wishes) to live with his mother and other siblings than with his father who was living in a de facto relationship."[39]

The lesson to be learned from this series of cases spanning three differently worded pieces of legislation in 1887, 1926 and 1968 is that for so long as the court is vested with a discretion to be exercised with the welfare or best interests of the child in mind, minor changes in wording ofthe statute will not affect the decisions of judges.

It is salutory to note that the 1926 Act provided that the court:[94]

> shall not take into consideration whether from any other point of view the claim of the father. or any right at common law possessed by the father, in respect of such custody, upbringing, administration, or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

Presumably, in 1926 these words were intended finally to lay to rest any superior right of the father. But it was not until the Guardianship Act 1968 that mothers and fathers of legitimate children each acquired the right of guardianship and custody at the birth of their child. The 1968 Act therefore omitted any specific reference to mothers and fathers in setting out those considerations which the court must take into account in determining questions under the Act and stated merely that "the Court shall regard the welfare of the child as the first and paramount consideration."[95] Various groups in the community have felt that the

88 [1942] N.Z.L.R. 311.
89 Ibid. 312.
90 [1951] N.Z.L.R. 739.
91 [1952] N.Z.L.R. 304.
92 Section 23(1) Guardianship Act 1968.
93 *H* v. *H* (1977) Unreported, Auckland Registry, M614/77; [1977] N.Z. Recent Law 316.
94 Section 2 Guardianship of Infants Act 1926.
95 Section 23(1) Guardianship Act 1968.

pendulum has swung too far in the other direction and that mothers are now receiving a preference over fathers in custody disputes which is unwarranted. A solution has been sought to this problem in a proposed amendment to the Guardianship Act 1968 which inserts a subsection (IA) in section 23 which reads:[96]

> For the purposes of this section, and regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.

Such a provision may have some political value but one is sceptical that it can have any practical value when seen in its historical context.

The courts have since 1887 always stated that they have been proceeding with the welfare of the child in mind. It is fashions and theories of child-care which have changed and thus altered the practical effect of paying attention to a welfare principle.

A classic example of this change in thinking is a case like *In re Mills*[97] where a father regained custody of a 7 year old child after she had been living with her aunt and uncle for $4\frac{3}{4}$ years after the death of her mother. The father had remarried and now had the means of caring for the child. The court held that it was the natural right of the father to have custody of his own child and that there was a prima facie presumption that it is for the benefit of a child to be in the custody of natural parents. The court referred to the judgment of Warrington L.J. in *Re Thain*[98], a case concerning a similar situation. Warrington L.J. stated:[99]

> The welfare of the child is no doubt the first and paramount consideration, but it is only one amongst several other considerations, the most important of which, it seems to me, is that the child should have an opportunity of winning the affection of its parents, and be brought for that purpose into intimate relation with the parent. The judge bore these matters in mind, and was therefore right in coming to the conclusion that the father was entitled to, and that it was for the welfare of the child that he should take over the duties and enjoy the actual privileges of a father. Eve J. said: 'It was said that the little girl would be greatly distressed at parting from [her aunt and uncle]. I can quite understand it may be so, but, at her age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.' The learned judge spoke from experience, and what he said appeals to the common sense of human nature.

These cases seem horrifying today when it is no longer regarded as wise to uplift a child from a happy stable home and place her with a total stranger as primary caretaker.[100] Ironically, at the same time these cases are authority for the paramountcy of the welfare principle.

A current concern in custody disputes revolves around the role of psychologists and psychiatrists in evaluating what is best for the child in terms of section 23

96 Clause 8(1) Guardianship Amendment (No. 2) Bill 1979.
97 [1928] N.Z.L.R. 158.
98 [1926] Ch. 676.
99 Ibid. 690-691.
100 For a discussion of natural parents v. foster parents in modern times see *Re D* [1971] N.Z.L.R. 737.

Guardianship Act 1968, how this evidence should be brought into court and what weight the court ought to give to such evidence.[101]

B. Ex-nuptial Children

At Common Law the ex-nuptial child was filius nullius and therefore, technically, no-one was entitled at law to custody. The mother's right to custody was eventually recognised in 1883 by Jessel M.R. in *R.* v. *Nash*[102] and later confirmed by the House of Lords in *Barnardo* v. *McHugh*.[103] It would seem however that the right of the mother of an illegitimate child was not quite in the same category as the right of a father in respect of his legitimate child. As for example *In re J.*[104] where a child was left with fosterparents even though the natural mother wished to have the child back in contrast to cases like *In re Mills*[105] discussed earlier.

It is not clear in New Zealand whether section 6 of the Infants Guardianship and Contracts Act 1887 (later re-enacted as section 6 Infants Act 1908) applied to ex-nuptial children and thus gave both mothers and putative fathers the right to apply for custody of their ex-nuptial children. In *Re M and Others*[106] Wild C.J. held that whether or not section 6 Infants Act 1908 covered illegitimate children, the Supreme Court had power in its inherent jurisdiction to make an order for guardianship and custody in respect of illegitimate children. In that case the father was appointed guardian and awarded custody. Wild C.J. said:[107]

> It appears to me that the principle that the Court looks first to the wishes of the mother of an illegitimate child was derived primarily from cases where the father, even if known, was not claiming custody for himself. I do not think it applies with the same force to a case such as the present where children have been brought up for years by both parents just as if their union had been sanctified by marriage.

The Guardianship Act 1968 clearly gives fathers and mothers the right to apply for custody whether or not they are guardians.[108] Mothers will always be guardians[109] unless they have been removed[110] and fathers who do not acquire the status by reason of marriage or living with the mother may apply to the Court for appointment as guardians.[111] Applications for custody in respect of ex-nuptial children will be treated on exactly the same basis as an application in respect of nuptial children.

101 See C. Jackson "Specialist Evidence in Child Custody Disputes in New Zealand" (1981) 11 V.U.W.L.R. 43.
102 (1883) 10 Q.B.D. 454 C.A.
103 [1891] A.C. 388.
104 (1912) 31 N.Z.L.R. 1191.
105 [1928] N.Z.L.R. 158 and see *In re Baré* [1934] G.L.R. 542.
106 [1966] N.Z.L.R. 1053.
107 Ibid. 1056.
108 Section 11 Guardianship Act 1968.
109 Ibid. s.6.
110 Ibid. s.10.
111 Ibid. s.6(3). Guardianship acquired by operation of s.6 may be confirmed by a declaration under s.6A.

C. Custody and Guardianship

The Guardianship Act 1968 for the first time in New Zealand law separates the concept of custody into the two components of physical possession and the right to control upbringing. The right to control is defined as "guardianship" and the physical possession as custody. So it is possible when parents live apart for both to retain parental rights of control over aspects of upbringing such as education and religion while one parent retains physical possession.

Prior to the 1968 Act, the status of the custodial parent compared with the non-custodial parent was not clear. Custody had been defined as the "bundle of powers" which a parent held in respect of a child and would thus appear to have included those powers subsumed under the heading of "guardianship" in the 1968 Act. If one parent was given custody of a child it was not clear whether the other parent retained any rights at all. At Common Law the father and not the mother was the guardian of the child. If the mother was awarded custody of a child did this leave any residual rights, powers or authority with the father as guardian? If the father was awarded custody, that must have meant that the mother had no authority in respect of the child whatsoever as there were no residual "rights" of any kind left with her.

In the United Kingdom mothers of legitimate children were given equal rights of guardianship with fathers by the Guardianship of Minors Act 1973, but unlike New Zealand there is no statutory definition of what is included in the legal concepts of guardianship and custody. Custody in English law seems to involve more "rights" than custody in the New Zealand sense which, since 1968, includes only physical possession of the child. The divorce court in England is able to make orders for care and control to one parent and custody to the other, so, as Cretney says, custody must involve more than just physical possession or such "split" orders would be meaningless.[112] Similar problems have arisen in Australia.[113]

It is submitted that the split between the right to control and the physical possession of the child in the New Zealand legislation is a very useful and practical device which pays many dividends when attempting to define the legal relationship of separated parents with their children.

7. PARENTS, THE LAW AND THE MODERN FAMILY

The Guardianship Act 1968 and the Status of Children Act 1969 can be seen as responses to the injustices of inequality between married parents and between nuptial and ex-nuptial children. The combined effect of these two statutes is however more radical than the legislators probably appreciated. In separating out the legal incidents of the status of natural parent, guardian and custodian, the law has provided a framework within which parental privileges and obligations can be determined independently of the marriage relationship. Such a framework is essential in present day society where separated spouses, de facto marriage relationships, extra-marital relationships and second marriages are common place.

112 S. M. Cretney *Principles of Family Law* (3 ed. Sweet and Maxwell London, 1979) 439.
113 *In the Marriage of Newbery* (1977) 2 Fam L.R. 11,652.

The legislation appears to have catered to this situation more by accident than design. The whole political debate surrounding the Family Proceedings Bill and the Family Courts Bill is an indication that the public persona of family life is still firmly rooted in a concept of lifelong marital security and fidelity which is inconsistent with the reality of daily life. These assumptions about family life are also held, I suspect, by the law profession and the judiciary in the face of their own life experience and that of their clients. This results in the law profession and the courts being slow to utilise the law so that it caters to these new social realities. In *H* v. *J* Vautier J. says:[114]

> I think the child should retain the father's surname as the name to which she is legally entitled and which she should be allowed to retain until she marries and changes it in the way to which the society in which she lives is accustomed, or until she is old enough to forsake it, if that is her desire, of her own free will and with a proper understanding of all that is involved.

He is discussing a 5 year old who is the offspring of a de facto relationship now ended and yet his unquestioned expectation for this female child is that she will marry and will change her name to that of her husband when she does.

This also means that the right questions are not being asked about the law relating to parent and child and that the most appropriate advice is often not being given to clients.

Three questions need particular attention:

1) How is the father's legal status as a parent to be safeguarded?
2) Is the law clear concerning the parental privileges and obligations of separated parents?
3) How can the law be best utilised to cater for the needs of reconstituted families?

A. The Father

The law as it stands at present favours mothers over fathers; a complete reversal of the Common Law. Is this appropriate? Any woman who gives birth to a child is immediately acknowledged at law as parent and guardian of that child. A man married to a woman who gives birth is presumed to be the biological father[115] and is also the guardian of the child if the presumption of his paternity is not challenged.[116] A father who is not married to the mother of his child will have no trouble establishing his parenthood prima facie if the mother wishes his paternity to be acknowledged. He may have his name entered on the child's birth certificate with the mother's consent, or he can execute a deed together with the mother.[117] If he was living with the mother at the time the child was born, and his paternity is acknowledged, he will also become a guardian of the child.[118] If he was not living with the mother at the time the child was born but his paternity

114 [1978] 2 N.Z.L.R. 623, 637.
115 Section 5 Status of Children Act 1969.
116 Section 6 Guardianship Act 1968.
117 Section 8(1) and (2) Status of Children Act 1969.
118 Section 6 Guardianship Act 1968.

is acknowledged by the mother, and the mother consents to his becoming a guardian, there should be no reason why the court should not exercise its discretion to appoint him guardian under section 6(3) Guardianship Act 1968.

The situation will be more difficult for the father who was not married to the mother or living with her at the time of the birth and where the mother, although she may acknowledge paternity, does not wish to share guardianship with the father. It is not clear what the attitude of the court would be in such a situation. There are no reported cases on the point. The court has a discretion to appoint the father as guardian under section 6(3) Guardianship Act 1968. The only guidelines for the exercises of that discretion are the general guidelines set out in section 23 of the Act, that the welfare of the child shall be the first and paramount consideration. What weight ought to be given to the adamant assertion of a mother that the father should not be given equal rights in respect of his child?

The question of which parent is to be the custodial parent must be a primary consideration here. If the father wishes to have custody and the court considers him the preferable custodial parent, presumably, guardianship would be awarded to the father (and retained by the mother unless the circumstances were utterly exceptional). If however, the mother is the preferable custodial parent or the father does not wish to have custody of the child, how is the court to deal with the situation? Expert evidence from a psychologist appointed by the court or called by counsel for the child, concerning the motivations of the father and mother would be crucial to this decision. This is also a situation where on-going counselling for the parties in respect of their own relationship and their relationship to the child might be appropriately ordered by the court. It is submitted that unless the circumtances were truly exceptional a court would be likely to exercise its discretion under section 6(3) in favour of a father who genuinely wanted to be a guardian. The discretion is however an appropriate one. Otherwise a situation may arise where a mother does not want custody, the father is appointed guardian but is also not willing to take custody and the child is fostered rather than adopted into a permanent family. This would be unlikely to be in the child's best interests.

The situation of the unmarried father whom the mother denies is the parent of her child is even more difficult. The only legal means for such a man to attempt to prove his paternity is to apply to the High Court for a declaration of paternity.[119] Once his paternity was proved, if that were possible with the support of the mother, the same hurdles as to guardianship would have to be faced as the man who can prove paternity but is not a guardian by operation of law.

119 Section 10 Status of Children Act 1959. A putative father may only be given leave to apply for a paternity order in the District Court if the mother is dead or has abandoned the child, under s.47(d) Domestic Proceedings Act 1968; cl. 48(d) Family Proceedings Bill (No. 2) 1979. The whole orientation of this procedure is against the father rather than the mother. The wording of cl. 48(2) which states that a paternity order may be made against a male, is even more excluding of the father than the equivalent provision of s.45 Domestic Proceedings Act which describes a paternity order as one declaring a man to be the father of the child.

This situation may seem harsh for putative fathers but the fact that there is no reported cases concerning such disputes must be some indication that the problem is likely to arise very rarely.

The question arises of whether a man should be given more legal support to assert his paternity. It is submitted that it is appropriate that a man should not be able to put his name on a child's birth certificate in the face of opposition from the mother. The mother should be in the best position to know who is the father of her child, or whether there is doubt about paternity. There is always the possibility that occasionally a woman may have motives for denying paternity to a man she knows is the father of her child. In such situations the man who asserts paternity ought to have access to the Family Court for such a determination. Under the present Family Proceedings Bill he has no right of hearing in the Family Court but only in the High Court.[120] Neither is there any means by which such a putative father can request counselling/conciliation with the mother through the Family Court, as under the Family Proceedings Bill only married persons may request counselling and make use of the provision compelling the other party to attend.[121] It is submitted that although it is appropriate to deny a putative father automatic rights in the face of opposition from the mother, the present impediments which confront such a man in attempting to resolve the issue are totally unnecessary.

The second question which arises is whether it is appropriate to deny automatic guardianship to unmarried men whose paternity is proved, or acknowledged. Here again it is submitted that the distinction between parenthood and guardianship in the New Zealand legislation is very useful. Guardianship arises automatically with paternity in those cases where the parents are married or living together at the time the child is born. These provisions would cover the majority of cases where both parents have a desire to share the upbringing of the child. In other situations if the mother is willing, there should be very little difficulty in vesting guardianship in the father. It is submitted that the difficulty put in the way of those fathers who are unmarried and have been living separate from the mother but who do wish to share the privileges and responsibilities of parenthood is outweighed by the far greater difficulties which would arise if guardianship was an automatic consequence of paternity for unmarried fathers. If that were the case many more solo mothers would be put through unnecessary strife in clarifying their legal relationship with their babies. If the mother wished to place the baby for adoption the father's consent would have to be sought thus causing delays in some cases, and acute embarrassment in others. The solo mother who kept her baby would be obliged, to go through a court proceeding requesting that the father be deprived of his guardianship or face the prospect of the father asserting his guardianship rights at some time in the future. These are some of the problems which have been raised in the United Kingdom in respect of the possibility of doing away with the concept of illegitimacy.[122]

120 Section 10 Status of Children Act 1969.
121 Clause 9 Family Proceedings Bill (No. 2) 1979 as reported from Statutes Revision Commission 7 August 1980.
122 The Law Commission Working Paper No. 74, *Family Law: Illegitimacy* 1979.

The solution is not to back away from abolishing the concept of illegitimacy, but to distinguish between parenthood and parental obligation, and guardianship and parental privilege as the New Zealand legislation does.

B. Separated Parents

The increase in the rate of marriage breakdown[123] and the increased tendency of unmarried mothers not to give their babies up for adoption[214] has resulted in an increasing number of solo parent and separated parent families.[125]

Does the present law cater adequately for these families? In the case of the solo parent who is also the sole guardian the legal answer to most problems which can arise will usually be fairly easily solved as the right to control is vested in the parent with guardianship. Parents who are not guardians may apply for custody and access[126] but such applications are presumably quite rare.[127] Problems are more likely to arise where both parents are guardians and both show a keen interest in being involved as parents of their children. Some separated parents are able to sort out very workable arrangements but even in these cases there may still be tensions on some occasions. For other parents their continuing interaction as parents is very difficult and painful. The counselling provisions of the Family Proceedings Bill do not provide for requests for counselling referrals for divorced or never married parents[128] and this is a glaring omission.

There have not been sufficient cases for the exact parameters of the legal relationship of non-custodial guardians with their children to have been clearly defined. The theory of the relationship as described earlier[129] is not always followed by the judges.[130]

It would probably be very helpful in this connection if there were the possibility of an appeal from decisions made under section 13 Guardianship Act which allows guardians who are unable to agree on any matter concerning the exercise of their guardianship to apply to the court for its direction.[131] Presumably it was thought that guardians should not be given the opportunity to prolong

123 As witnessed by the increase in divorce rates per 10,000 population from 10.78 in 1969 to 19.53 in 1979. It is appreciated that an increase in the divorce rate is not necessarily tied to an increase in marriage breakdown but it is submitted that this has been so in the last 10 years in New Zealand. There have been no changes in the availability of divorce during this period in terms of changes in the grounds for divorce or the availability of legal aid.. Levels of social acceptability of divorce may have changed slightly but not markedly .

124 35% placed for adoption in 1968; 9% in 1979.

125 The rise in the number of domestic purposes benefits for solo parents from 12,600 in 1974 to 37,400 in 1979 is some evidence of this. There are many more separated parents neither of whom receives the domestic purposes benefit.

126 Sections 11 and 15 Guardianship Act 1968 respectively.

127 No records are available.

128 Clause 9 Family Proceedings Bill (No. 2) 1979.

129 Supra.

130 See e.g. *H* v. *J* [1978] 2 N.Z.L.R. 623.

131 The lack of a right of appeal has been carried over into cl. 13(5) Guardianship Amendment (No. 2) Bill 1979.

squabbles over their children. This may be a laudable sentiment but it is not carried through into squabbles specfically about access or custody. That problem could be solved by requiring leave to appeal. It is submitted that disagreements between separated parents over the exercise of guardianship rights are important, and clarification of the law in this area would be expedited if there were the possibility of a ruling in an appropriate case from the Court of Appeal.

The law in other jurisdictions is not helpful as custody and guardianship are differently defined. It is submitted however that the New Zealand legislation does contain a useful framework in which separated parents can operate.

Joint custody arrangements are still rare in New Zealand. It is important to appreciate that much of the discussion on joint custody in other jurisdictions in fact envisages a legal situation similar to that which pertains in New Zealand where two parents are guardians but only one has custody as defined in its more limited sense by section 3 Guardianship Act 1968. Where parents have good channels of communications with each other and live physically near to each other, there is no reason why the children should not spend time with each parent on a regular basis. Whether this is termed joint custody or liberal access is fairly immaterial in the New Zealand context from a practical point of view, although there may be some psychological value in being a joint custodian. If joint parenting is to be a reality between separated parents all institutions in our society need to be supportive towards it.

Lawyers in practice could do much to educate their clients about their legal roles as guardians especially in relation to the other parent who also has guardianship whether that parent has custody or access rights. Government departments such as Education and Social Welfare which have dealings with parents could also instruct their staff more appropriately in the legal rights of parents who are separated.[132] There seems to be a tendency in many sections of the community to disregard the rights of the non-custodial guardian. I suspect that this is due to unwillingness on the part of society as a whole to recognise the reality of split families and to evolve social procedures for dealing with them. A well-funded Family Court with trained support staff could go a long way towards helping in this direction.

C. Reconstituted Families

Further problems arise when the previously unmarried mother marries a man other than the father of her child, or the divorced parent enters a second marriage. In this situation all the unresolved legal issues relating to the non-custodial guardian persist, with the additional difficulties associated with the status of the new step-parent. This situation is not catered for adequately in the present law. The only action which is generally considered by a step-parent is to apply to adopt the children of his or her spouse. But the effect of an adoption order is totally to exclude the original parent and absolve him or her from all legal obligations and

132 E.g. questions have arisen in the Psychological Services section of the Department of Education concerning the rights of the non-custodial parent in respect of referrals of children to Psychological Services.

privileges. Understandably, few parents are willing to sign away their legal relationships with their children so completely.[133] It has been suggested elsewhere by the writer[134] that there is no legal reason why step-parents could not be appointed guardians to their step-children under section 8 Guardianship Act 1968. A step-parent could be appointed guardian instead of the natural parent or in addition to the natural parent. There would seem to be no problem in appointing a step-parent as guardian in substitution for a natural parent in a situation where at present for example an adoption order is made. It is not suggested that a natural parent who is showing any interest in the children should be deprived of guardianship.[135] Practical problems are likely to arise however, in attempting to give a step-parent guardianship status in addition to the natural parents. There is a danger that such an application could become just another lever to be used in continuing hostilities between the natural parents.

A less threatening procedure which is available under the present legislation but seldom used in this way would be for a step-parent to apply for a joint custody order with the natural parent.[136] In this model the natural parents would remain joint guardians and the step-parent's de facto custody would be formally recognised. If the natural parent/guardians had a joint custody arrangement there is no reason why each second spouse could not also have custody with the natural parent. The children would have two natural parent/guardians and four "custodians".

This is not to suggest that all families would want to formalise family relationships in such a way. It is to suggest that in some situations such formal recognition of roles would be helpful to the children in reconstituted families and also to the parents.

One of the reasons for facing the necessity of formalising the legal position of the step-parent is that second families also come under stress and sometimes break down completely. In such a situation the other natural parent has a role as well as the two parties to the second marriage. Also the step-parent may have become the key parent figure for one or all of the children.

The law as such can never offer a complete solution to any family problems but it can provide a framework which gives family members some security within which to operate. This is not the position of the step-parent at the moment, or the child who has become emotionally dependent on a step-parent.

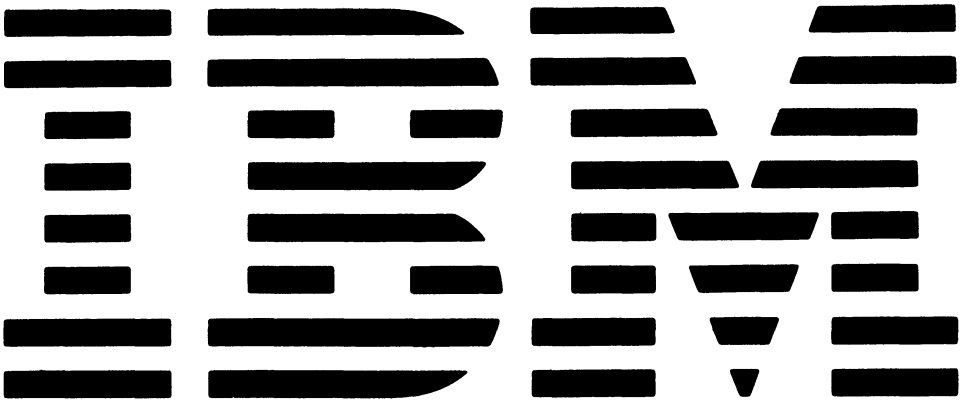
This raises another issue under the Family Proceedings Bill — that step-parents have no standing as parents to request counselling referrals or mediation conferences in respect of their step-children whether or not they have formal custody.[137]

133 See e.g. *G* v. *Y* (1980) Unreported, Auckland Registry, M226/80, Holland J.
134 "The Politics of Adoption" (1979) 8 N.Z.U.L.R. 235.
135 Section 10(2) Guardianship Act 1968 states that no parent shall be deprived of the guardianship of his child pursuant to subsection (1) of this section unless the court is satisfied that the parent is for some grave reason unfit to be a guardian of the child or is unwilling to exercise the responsibilities of a guardian.
136 Section 11 Guardianship Act 1968.
137 Clauses 9 and 12 Family Proceedings Bill (No. 2) 1979.

The legal and practical problems of reconstituted families is another area in which lawyers, government departments and other social agencies need to play an educational role.

8. CONCLUSION

The Guardianship Act 1968 and the Status of Children Act 1969 provide a very useful framework for the legal relationship between parent and child in that, at least on a theoretical level, they provide equally well for still married parents, solo parents, separated parents and reconstituted families. The problems arise at a practical level in encouraging lawyers, government departments, social agencies and the courts to utilise the flexibility contained in these provisions to the best advantage. At the same time it is recognised that there are no purely legal answers to family problems and that counselling and conciliation services must be seen as providing a useful resource not only at the point of marriage breakdown but at any stage in the parenting life whether before marriage, during marriage, after divorce or during a subsequent marriage. As a society we must realise that there is more than one model for "the family" and that parenting roles must be sustained across the boundaries of reformed adult relationships.



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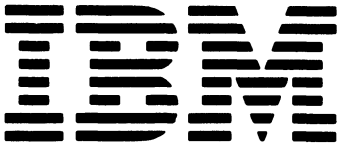

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