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FINAL REPORT

THE LEGAL STATUS OF THE CHILD BORN OUTSIDE OF MARRIAGE IN NOVA SCOTIA

Law Reform Commission of Nova Scotia
March 1995

The Law Reform Commission of Nova Scotia was established by the Government of Nova Scotia under the *Law Reform Commission Act*, in February 1991.

The Commissioners are:

William Charles, Q.C., President
Ronald Culley, Q.C.
*Justice John Davison
Jennifer Foster
*Dawna Ring
Dawn Russell
Dale Sylliboy

*Commissioner Davison and Commissioner Ring's appointments ended their terms with the Commission in February 1995, however, both were involved in the decisions reflected in this Report.

Dr. Moira McConnell is Executive Director to the Commission.

Anne Jackman, LL.B. and Dr. Marilyn Preus are Legal Research Officers to the Commission. The Commission was also assisted in its research through various stages of this project by legal consultants K. Carrigan and V. Paul.

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The Law Reform Commission receives funding from the Government of Nova Scotia and the Law Foundation of Nova Scotia. The Commission gratefully acknowledges this financial support in carrying out its research projects.

Canadian Cataloguing in Publication Data:

Law Reform Commission of Nova Scotia Final Report, *The Legal Status of the Child Born Outside of Marriage in Nova Scotia*, March 1995.

THE LEGAL STATUS OF THE CHILD BORN OUTSIDE MARRIAGE IN NOVA SCOTIA

SUMMARY

In 1992, the Law Reform Commission of Nova Scotia decided to examine provincial laws to determine what changes are needed in order to eliminate discrimination against children who are born outside marriage. In Nova Scotia the law still distinguishes between children based on whether or not the child's biological parents marry and it is the Commission's view that there are no valid reasons for perpetuating this legal distinction. Public opinion regarding the status of "legitimacy" supports this view, as do the changes that are occurring in family structures including the increasing social and legal recognition of "common law" relationships. In addition, there are many people who choose to be single parents or to make use of assisted conception technologies involving sperm and/or ovum donation. To the extent that there is a social stigma inherent in the term and concept of "illegitimacy", the law should be altered to remove legal obstacles to the equal treatment of all children. The need to take into account changing social definitions of the family as well as a variety of perspectives regarding the nature of family relationships are seen by the Law Reform Commission as important reasons for reform.

The Commission also believes that reform is necessary for several legal reasons. First, Canada and the provinces, including Nova Scotia, have agreed to ensure that their laws are not contrary to the United Nations *Convention on the Rights of the Child*, which includes the right to be protected from discrimination on the basis of birth status. Aside from human rights commitments, there have been Nova Scotia court decisions ruling that legislation which distinguishes between children on the basis of the marital status of their parents is contrary to the equality provisions of the Canadian *Charter of Rights and Freedoms*. The uncertainties arising from treating children differently depending on birth status also causes problems for those giving legal advice.

The Commission has made its recommendations to the government primarily in the form of a new law, the draft *Status of the Child Act*, which is found at the end of this Report. Since some of the ways in which the law discriminates against children born outside marriage relates to the interpretation of laws, as well as to the legislation itself, it is believed that a new *Act* would be a more sensible and efficient way to clarify the law for individuals and legal practitioners in this area. The changes proposed in this Report will not, by themselves, remove the stigma which may still be attached to births which occur outside of marriage, but they will ensure that discriminatory treatment is not supported or maintained by our legal system. This is a challenging area for reform since any changes to law inevitably requires both a reallocation of resources and changes in procedures which have been in place for many years. It is the view of the Commission that the perpetuation of inequality for reasons of short-term cost-effectiveness is not acceptable as a basis for a viable justice system and, on balance, changes must occur if law is to serve the needs of the whole community.
In order to remove the distinction between children based on the marital status of a child's parents and to fulfill Nova Scotia's obligations under the United Nations *Convention on the Rights of the Child* the Law Reform Commission of Nova Scotia recommends a number of changes including:

- The majority of the Commission recommends that the legal relationship of parent and child should continue to be based primarily on a biological connection with exceptions for adoption and reproductive technology. There should also be increased legal recognition that people other than the biological parents may also have a caretaking or parenting relationship with a child and

changes responding to this should be made to laws governing notice and consultation. There is a dissenting opinion expressing the view that biology is is not the primary connection between parent and child rather the parent/child relationship is a social relationship.

- The majority of the Commission recommends that the government of Nova Scotia adopt the draft *Status of the Child Act* in this Report and the consequential amendments. A dissenting opinion would pass a law containing only the provisions in the draft *Status of the Child Act* which abolish discrimination based on birth status with the exceptions in cases of adoption and new reproductive technology and also the list of relevant consequential statutory amendments.

- The majority of the Commission recommends that, while it is necessary that the draft *Status of the Child Act* contain some provisions clarifying legal parent/child relationships in cases where a child results from use of reproductive technology as an exception to the rule that the biological parents of the child are the legal parents, further study and research on law and policy should be carried out to respond more comprehensively to the use of reproductive technology in Nova Scotia.

- The majority of the Commission recommends that, there should be legal presumptions of paternity in the *Act* which include the existing presumption regarding marriage and other social situations where a person could be presumed to be the biological parent of a child for purposes of the law, unless it can be established otherwise.

- The majority of the Commission recommends that a Parentage Register be created where legal documents relating to determinations of parent/child relationships can be jointly registered by parents. In addition, the Commission suggests a Register be created where people who believe they may be a parent may file a unilateral declaration regarding their interest in being notified in legal proceedings where they would be entitled to participate. This Register will provide a means of ascertaining who may be an interested person for purposes of giving notice of proceedings but it would not create any greater entitlements or responsibilities than that which exists in the laws governing responsibilities and rights of parents and children. There is a dissenting opinion expressing the view that the woman should make the determination as to who should be regarded as the male parent. This is because she has a nurturing relationship with the child based on gestation and birth. There is a concern that this recommendation would allow men, who through sexual relations have only a biological connection with the child, to be in the position of being able to become a social father to the child by simply registering an interest.

- A majority of the Commission suggests that a biological father, who could be presumed to be a parent under the *Status of the Child Act* or who has registered his interest, should be entitled to notice of a proposed adoption equivalent to that which already exists where the man is married to the mother of the child, but has had no ongoing social relationship with the child. The court may waive Notice and consent requirements for any person when it determines it is in the best interest of the child and is consistent with the views of the mother. There is a dissenting opinion expressing the view that in the case of adoption,

the woman should make the final determination as to the best interest of the child. The dissenting opinion recommends that only a mother and a person who is entitled under the existing law because of a social relationship with the child should receive Notice. The discrimination between children in the existing law based on birth status should be eliminated by removing the entitlement of a father to Notice solely because of marriage.

- The Commission suggests that there should be a review of the *Trustee Act*, *Probate Act* and *Public Trustee Act* to review the search, Notice, limitation periods and liability provisions in light of the draft *Status of the Child Act.*

- The consequential amendments to the *Vital Statistics Act, Solemnization of Marriage Act*, *Change of Name Act*, *Family Maintenance Act*, *Intestate Succession Act*, *Family Benefits Act*, *Fatal Injuries Act*, *Public Service Superannuation Act*, *Settlement Act*, *Victims' Rights and Services Act*, and the *Children and Family Services Act* set out in the draft *Status of the Child Act* should be adopted to remove the distinction between children based on the marital status of their parents.

EN DEHORS DES LIENS DU MARIAGE EN NOUVELLE-ÉCOSSE

[1]SOMMAIRE

En 1992, la Commission de réforme du droit de la Nouvelle-Écosse procédait à une étude des lois provinciales dans le but de déterminer quels amendements doivent y être apportés afin d'éliminer la discrimination contre les enfants nés(es) en dehors des liens du mariage. Aujourd'hui encore, le fait que les parents biologiques d'un(e) enfant soient mariés ou non, donne lieu à un traitement différent en vertu du droit de la Nouvelle-Écosse. La Commission est d'avis qu'il n'existe aucune raison valide pour perpétuer cette différence de traitement. L'opinion du public en ce qui concerne le concept "d'illégitimité" de même que les modifications apportées à la structure familiale, telles la reconnaissance légale et sociale des unions de fait, appuient cette position. En outre, de nombreuses personnes choisissent d'élever leur enfant seules ou même d'avoir recours à des méthodes de reproduction artificielle impliquant des dons de sperme et\ou d'ovules. Dans la mesure où le mot et le concept "d'illégitimité" impliquent une condamnation définitive et automatique par la société, le système légal devrait être modifié afin d'en abolir tous les obstacles au traitement uniforme de tous les enfants. La Commission de réforme du droit est d'avis que le besoin de prendre en considération les changements sociaux apportés à la structure familiale de même que les différentes perspectives concernant la nature des relations familiales, constituent d'importantes raisons militant en faveur d'une réforme.

La Commission est aussi d'avis qu'une réforme est nécessaire pour maintes raisons légales. En premier lieu, le Canada et ses provinces, incluant la Nouvelle-Écosse, se sont engagés à veiller à ce que leurs lois n'aillent pas à l'encontre de la *Convention sur les droits de l'enfant* des Nations Unies, laquelle inclut le droit pour les enfants d'être protégés contre la discrimination basée sur le statut à la naissance. Mis à part les engagements concernant les droits fondamentaux, certaines décisions des tribunaux de la Nouvelle-Écosse concluent que toute loi faisant une distinction entre les enfants basée sur l'état civil des parents contrevient aux articles de la *Charte canadienne des droits et libertés* garantissant l'égalité entre les personnes. De plus, l'incertitude découlant du traitement différent des enfants selon leur statut à la naissance entraîne de nombreux problèmes pour les conseillers juridiques.

Les recommandations de la Commission au gouvernement ont été faites principalement par le biais d'une nouvelle loi, le projet de *Loi sur le statut légal de l'enfant* (*Status of the Child Act*) reproduit à la fin de ce Rapport. Comme la discrimination contre les enfants nés(es) en dehors des liens du mariage résulte de l'interprétation donnée aux lois de même que du contenu des lois elles-mêmes, il appert que l'adoption d'une nouvelle loi constitue la façon la plus logique et efficace de clarifier ce secteur du droit pour les praticiens et le public. Les changements proposés dans ce Rapport ne pourront, à eux seuls, empêcher la condamnation sociale entourant les naissances en dehors des liens du mariage, mais assureront que le traitement discriminatoire des enfants ne soit pas encouragé ou perpétué dans notre système légal. Il s'agit d'un secteur du droit dont la réforme présente de nombreux défis puisque tout changement dans un système légal implique inévitablement une nouvelle affectation des ressources de même que des modifications à des procédures en place depuis bon nombre d'années. La Commission est d'avis que le maintien de la situation d'inégalité pour des considérations de rentabilité à court terme est inacceptable comme fondement à un système de justice viable, et, tout compte fait, les changements sont essentiels dans un système de droit prétendant satisfaire les besoins de la communauté entière.

1 Traduit de l'anglais par Me Nathalie Bernard, LL.B (Université Laval), LL.B (Dalhousie University), LL.M (Dalhousie University)

Dans le but d'abolir les distinctions entre enfants basées sur l'état civil des parents de l'enfant et de remplir les engagements de la Nouvelle-Écosse en vertu de la *Convention sur les droits de l'enfant* des Nations Unies, la Commission de réforme du droit de la Nouvelle-Écosse recommande de nombreux changements dont ceux énumérés ci-dessous:

.La majorité des Commissaires recommande que la relation légale entre un parent et son enfant continue d'être principalement basée sur le lien biologique sauf dans les cas d'adoption et d'utilisation de méthodes de reproduction artificielle. De plus, la loi devrait reconnaître de façon accrue que des personnes autres que les parents biologiques peuvent aussi avoir une relation parentale ou de tutelle avec un enfant. Dans ces cas, les changements appropriés devraient être apportés aux lois régissant les avis et consultations. Il existe une dissidence à l'effet que le lien biologique n'est pas le lien principal entre un parent et un enfant, mais plutôt que la relation parent\enfant se traduit par une relation sociale.

.La majorité des Commissaires recommande que le gouvernement de la Nouvelle-Écosse adopte le projet de *Loi sur le statut légal de l'enfant (Status of the Child Act*) reproduit à la fin de ce Rapport ainsi que les amendements en résultant. L'opinion dissidente prône plutôt l'adoption d'une loi intégrant les dispositions du projet de *Loi sur le statut légal de l'enfant* (*Status of the Child Act*) lequel vise à abolir la discrimination basée sur le statut légal de l'enfant à la naissance y compris les exceptions en cas d'adoption et de méthodes de reproduction artificielle, de même que la liste des amendements statutaires en résultant.

.La majorité des Commissaires recommande que quoiqu'il soit nécessaire que le projet de *Loi sur le statut légal de l'enfant* (*Status of the Child Act*) contienne des dispositions clarifiant la relation légale parent\enfant dans les cas où l'enfant résulte de l'utilisation de méthodes de reproduction artificielle dérogeant ainsi à la règle que les parents biologiques de l'enfant sont les parents aux yeux de la loi, des recherches et études additionnelles sur des considérations légales et de principe devraient être menées afin de répondre de façon plus complète à l'utilisation des méthodes de reproduction artificielle en Nouvelle-Écosse.

.Cette *Loi* devrait contenir des présomptions légales de paternité, notamment celle déjà existante basée sur le mariage ainsi que sur d'autres situations sociales, en vertu desquelles une personne peut être présumée comme étant le père biologique d'un(e) enfant à des fins légales, à moins de preuve contraire.

.La majorité des Commissaires recommande qu'un Registre des lignées (Parentage Register) soit crée afin de permettre que les documents juridiques traitant de l'existence de relations parent\enfant puissent y être enregistrés conjointement par les parents. En outre, la Commission propose qu'un Registre soit crée afin de permettre aux personnes croyant être un parent, d'enregistrer de façon unilatérale une déclaration exprimant leur désir d'être informées de toute procédure juridique à laquelle elles auraient le droit de participer. Ce Registre constituerait une façon de déterminer qui sont les personnes intéressées devant recevoir avis de procédures juridiques, sans toutefois leur donner des droits ou leur imposer des obligations en sus de ceux existant déjà en vertu des lois régissant les obligations et droits des parents et enfants. Une dissidence existe à l'effet qu'une femme devrait pouvoir décider qui doit être considéré comme le parent masculin. Cette position repose sur le fait que la mère entretient avec son enfant une relation protectrice basée sur la gestation et la naissance. Cette recommandation de la majorité des Commissaires soulève une inquiétude en ce que les hommes qui par le biais de relations sexuelles ne possèdent qu'un lien biologique avec l'enfant, puissent devenir le père de l'enfant aux yeux de la société, simplement en enregistrant une déclaration.

.La majorité des Commissaires propose qu'un père biologique, pouvant être présumé père en vertu du projet de *Loi sur le statut légal de l'enfant* (*Status of the Child Act*) ou qui a enregistré une déclaration, devrait avoir le droit de recevoir un Avis que des procédures d'adoption ont été commencées, au même titre que le père qui est marié avec la mère de l'enfant mais qui n'a entretenu aucun lien avec l'enfant. Le tribunal peut renoncer aux exigences concernant l'envoi de l'Avis et le consentement d'une personne s'il détermine qu'il en va du meilleur intérêt de l'enfant et que la mère est en accord avec cette décision. Une minorité des Commissaires croit que, dans les cas d'adoption, la mère devrait pouvoir décider unilatéralement ce que constitue le meilleur intérêt de son enfant. L'opinion minoritaire est à l'effet que seules la mère et la personne concernée en vertu de la loi en vigueur en raison de l'existence de liens sociaux avec l'enfant, devraient recevoir un Avis que des procédures d'adoption ont été commencées. La discrimination contre les enfants basée sur leur statut légal à la naissance devrait être éliminée du droit en vigueur en retirant le droit de recevoir un Avis que des procédures d'adoption ont été commencées à l'homme présumé père seulement parce qu'il est marié à la mère.

.La Commission propose que la *Loi sur les fiduciaires (Trustee Act)*, la *Loi successorale (Probate Act)* et la *Loi sur le curateur public (Public Trustee Act)* soient étudiées afin d'y reviser les dispositions traitant des recherches, des Avis, de la prescription et de la responsabilité à la lumière du projet de *Loi sur le statut légal de l'enfant* (*Status of the Child Act*).

.Les amendements aux lois énumérées ci-après et découlant du projet de *Loi sur le statut légal de l'enfant* (*Status of the Child Act*) devraient être adoptés afin d'éliminer la différence de traitement entre les enfants basée sur l'état civil de leurs parents: la *Loi sur les registres de l'état civil (Vital Statistics Act)*, la *Loi sur la célébration des mariages (Solemnization of Marriage Act)*, la *Loi sur les changements de nom (Change of Name Act)*, la *Loi sur les obligations alimentaires (Family Maintenance Act)*, la *Loi sur les successions ab intestat (Intestate Succession Act)*, la *Loi sur les prestations familiales (Family Benefits Act)*, la *Loi sur les préjudices mortels (Fatal Injuries Act)*, la *Loi sur le régime de pension des employés(es) de l'Etat (Public Service Superannuation Act)*, la *Loi sur les règlements hors cour (Settlement Act)*, la *Loi sur les droits et l'aide aux victimes (Victims' Rights and Services Act)*, et la *Loi sur la protection des enfants et de la famille (Children and Family Services Act)*.

TA'N TELPUKUIT MIJUA'JI'J WESKIJINUIT TA'N MU TOQPUKA'TASIJIK WNKI'KU ULA NOPA SKO'SIA.[1]

1992 ek na, Law Rifo'rm Kmisn wjit Nopa Sko'sia kisite'tip menaqa ankatmn teplutaqnml kulaman kisaptutew ta'n tel nuta'q kiwaskwi'kmn wjit ta'n tli ksika'ten ta'n teli pilua'tasulti'tij mijua'ji'jk ta'n weji skwijinultijik wunki'kua mu toqpukwa'tasiliki. Me Nopa Sko'siaewey teplutaqnn tepiseywaji mijua'jijk ta'n wunki'kua toqpukwa'tasiliji kisna mu kimsin telaptik mu eyknuk ta'n koqoey wjit mijua'ji'jk wji-piluo'tasultinew msit wen teluet wula tetpaqtek, aqq wen nike mu nisamat ta'n tijiw toqnasij mita apaja'sik ta'n telpukwikip "jiksu'k".[2] App eyk wen ajite'tk newti-kisikian mijua'ji'jk kisna kwilk apoqnmasuti malpale'witewey wjit ta'n tli pqutkitmatew. Katu eyk na mu welte'taqn wen "pa'ta'lewij",[3] ketlsik teplutaqnn nutaql kiwaskwi'kasin kulaman msi mijua'ji'jk newte tlo'tasultitaq. Law Rifo'rm Kmisn telaptik nutaq pekaji ankaptmn ta'n teli pilua'sikl jiksu'kewe'l aqq nekmewe'l ta'n teli-mili-nmitasikl.

Kmism elt telaptik miamuj kiwaska'sikl wjit teplutaqniktuk. Tmtk, Kanata aqq ktikl provinsl, maw Nopa sko'sia, kisutmi'tij teplutaqmual mu pilu'ten jel *United Nations Conventions on the Rights of the Child*, toqo wiaqtek mu wen piluite'tasin wjit ta'n tel piltu'-wskwijinuin. Ewekasimk human rights ika'ltimkewey, Nopa Sko'siaewe'l kortl kisutmi'tij teplutaqn ta'n tetpisamaji mijua'ji'jk wji-skwijinultijik ta'n wnki'kua jiptuk mu toqpukua'tasi'k ketlsik se'k elapukuek je'mu *Canadian Charter of Rights and Freedoms* ta'ntijiw mijua'ji'jk piltuo'tasulti'tij wjit ta'n teli piltui-wskwijinuij kisa'toq metua'sik ketleuia'ltimk wjit ta'nik nuji-iknmuetu'tij legal advice.

Komisn ki's kisitoqsip recommendationek kapmntal, wjit piley telplutaqn teluisik *Status of the Child Act*, kespiwi'kasik wula wi'katikniktuk. Tlia lo'q eykl teplutaqnn pilue'waji pa'taq'laq aqq maw teplutaqnn nekmewe'l ta'n telinsitmk tela'tekek telnmitasik piley *Act* me naji koqtes wjit ta'n teli-sapi-kina'muj mimajuinu'k aqq nuji-we'kwamua'tijik wjit jiksu'kl. Kiwaskikwi'kaqn wula reportituk ma nkutukayiw jikla'tuk ta'n ne'kayiw teli-tetasulti'tij pa'ta'laq katu ketleweya'tew ma klamite'tasinuk tan teli-piluo'tasulti'tij kisna ma klo'tasinuk wula legal systeminal. Metu'ekitew wjit rifo'rm mita ta'n tijiw kiwaska'tu'n teplutaqnn miamuj kitik ilamko'tu'nl suliewe'l aqq mimajuinu'k aqq ta'n telukuti'tij ki's saq. Kmisn telaptik siawi-klo'tmumk piluo'tasimkl wjit ta'n tel tepawtik sulieweyiktuk ma kisi tetpaqi kma'tuk justice system aqq tetpi, kiwaskiwi'kaqn miamuj ika'ql wjit teplutaqn kisi apoqnmuan msit wenl.

Klaman kis jikla'tuten tan teli piluweyuj mijwa'ji'jk wjit wkni'kua teli tepqatmilij aqq klaman Nopa Sko'sia kaqi kisa'tutal tetusqnml tan ewikasikl *United Nationsewey Convention on the Rights of the Child*, na Law Ri'form Kmisn Nopa Sko'siaewey kisutkl wla kiwaskiwi'kaqn':

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Suel msit Kmisnaq kisutmi'tij ne'kew wekasin tan wetapeksij mijwa'jij wjit telakuti'tij wnki'ku'l pasik elmiak wekasik wjit adoption aqq kina'matnewey wjit teli we'jitamk. Nkutey pa nuta'k teplutakeniktuk wji nmitasin ikikik mimajwinuk aqq katu tanik wejitajik kisikiatak kisna kisikwenatak mijajijl aqq pilwel na telapwekl nuta'kl ltasin teplutakniktuk wjit kekinuwa'tatimk aqq ilumtultimk. Eykik telwa'tijik mu na pasik we'jitamk telwenuk akutijik mijwa'jij aqq wnkikl, katu

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[1]**Translation provided by Professors Murdena Marshall and Joe B. Marshall, University College of Cape Breton, Sydney, Nova Scotia.**

[2]This is the Mi'kmaw word for Family.

[3]Pa'ta'l- a Mi'kmaw word the equivalent of "illegitimate child".

maw teli wlamati'tij.

- Suel msit Kmisnak kisutmitij kapmnt Nopa Sko'siaewey wsua'tunew tan ewsiwikasik *Status of the Child Act* ula wi'katiknituk aqq maw kiwaski wi'kaqn'. Pilwapukwa'tijik tlwa'titis sapa'tunej teplutakn tan wiak wikasikl *Status of the Child Act*ewel tan ejikla'tu'tij piltuo'taqn wjit wen teli wskijinuij katu mu elt *adoption* aqq kina'matnewey ujit teli we'jitamk, aqq maw wiji kiwaski wi'kasikl teplutaknl.

- Suel msit Kmisnaq kisutmitij, tlia' pa nuta'q wla ewsiwikasik *Status of the Child Act* wiaqten teplutaqnewe'l tan welwikasik tetpisi keknuasikl wjit ta'n teli tetoqama'tij mijua'ji'j aqq kjiniw tpa wnki'ku aqq ta'n mijua'ji'j wejiwskwininuit ta'n eweykasik kina'matnewey piley, ketlsik kjitmiw lpa wnki'ku teplutaqniktuk elt nenujik, me nutaq kina'mutnewey aqq mlkiankatasin teplutaqnu aqq ta'n wiaqi-wikasikl tepias tlian kulaman mej aji nsiten ta'n koqoey wula weji-wskuijuimk eweykasimk kina'matnewey piley wula Nopa Sko'sia.

- Tepias ten teplutaqn ta'n ikantekl wjit ta'n wen kjitmiw lpa wnki'ku *Act*iktuk tepias elt ten teplutaqn ta'n ikantekl ta'n telpukwik toqpukua'ltimk aqq ta'n piluey ta'n kisi ketleweya'toq kjitmiw la wnki'kul teplutaqniktuk, misoqo piuey kisi ketleweya'tasik.

- Suel msit Kmisnaq welte'tk ten *Parentage Register* wi'katikn teplutaqnl ta'n pasik ewekasi'tij mijua'ji'j aqq kjitmiw lpa wnki'ku kisi-msaqni-wikasin kisa'tutij kitk wnki'ku. Apjela kmisn elutk ten *Register* wjit miajuinuk ta'n etlite'tmitij nekowk kjitmiw lpa wnkikul kisi lukwatal wi'katkn teplutaqne'l kulaman kisi tko'tew ta'n teli mili ilsuaqnl. Wula *Register* ketewya'tew wjit ta'n wen mej ketu kjijitoq kinua'taqn teplutaqniktuk katu ma atki'ktnuk alsusuti kisna anka'taqn aqq ta'n nike eykl teplutaqniktuk ta'n anko'taqne'l aqq ta'n koqoey wejkuaqmimkl wjit kjitmiw lpa wnki'ku aqq mijua'ji'jk. Nike tel nmitasik to'q e'pit nuta'q nekm kisiutmn ta'n tlnenuaten wujjl. Wejitla'sik wula nita e'pit nekm pema'ltl aqq wjiskwijinualapn mijua'ji'jl. Eyk nike ankita'suaqn na ula elutaqn elt ji'nmuk asiste'tasultinew tlia lo'q kjitmiw lpa wnkikuit na nekmewey pasik wula mijua'ji'j wtaqnewa'sit, kis tlnmitasin kisi wjital nike pasik msaqniwi'kik ta'n teli pewatk.

- Suel msit Kmisnaq elutmi'tij to'q kjitmiw lpa wujil, kis tlnenuaten eweykasimk *Status of the Child*, kisna kisi msaqni-wi'kik ta'n teli pewatk, tepias kina'tuksin ta'n tijiw mijua'ji'j ketu wi'katiknaluj kutey nike ki's ta'n etek ji'nm aqq e'pit toqpukua'tasi'tij toqo e'pit wnijan katu menaq ankweeaql wula mijua'ji'jl. Etli-ilsutaqn kisi ika'tew wpmetuk kinua'taqn aqq asite'lsuti'l wjit ta'n pasik wenl ta'n tijiw mijua'ji'j ketu wi'kutikna'luj, tepias e'pit nekm kisutmn wjit mijua'ji'j weliaqm. Piluey ketlamsitasimk elutk pasik e'pit aqq ta'n wen kisi ankwe'watl mijua'ji'jl nekm pasik tepias msnmenew kinua'taqn. Nuta'q jikla'tasin piluo'tasultijik mijua'ji'jk teplutaqniktuk wjit ta'n teli wskwijinuit, apija'tuj ji'nm telapeksij mijua'ji'jl kina'taqniktuk mita toqpukua'ltimkek.

- Kmisnaq elutmi'tij ili-ankatasin *Trustee Act, Probate Act* aqq *Public Trustee Act* app iliankatasin punwijkaqn, kinua'taqn, etek pasik keknue'kl na'kwekl aqq tetuo'qne'l tetpsi-keknuasikl ta'n ewis-wikasik *Status of the Child Act.*

- Msit mimamuj kiwaski wikasital aqq wije'tultital etekl *Vital Statistics Act, Solemnization of Marriage Act, Change of Name Act, Family Maintenance, Intestate succession Act, Family Benefits Act, Fatal Inquiries Act, Public Service Superannuation Act, Settlement Act, Victims Rights and Service Act* aqq *Children and Family Services Act* kisi lukatasikl ewsiwikasikl *Status of the Child Act* tepias wsua'tasik kulaman jikla'tasitew ta'n mijua'ji'l tel tetpiso'talsultijik wjit ta'n wunki'kua teli tkweya'ti'tij.

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I INTRODUCTION

1. The Status of the Child Project

In 1992, the Law Reform Commission of Nova Scotia decided to examine the reforms to provincial law necessary to eliminate discrimination against children who are born outside of marriage. The Commission believes that reform is necessary for several reasons. First, Canada and Nova Scotia have a commitment to ensuring that their laws are not contrary to the United Nations *Convention on the Rights of the Child*.[4] This *Convention* is an international human rights agreement that obliges Canada to protect the rights of children, including the right to be protected from discrimination on the basis of birth status. Second, there have been several Nova Scotia court decisions[5] ruling that legislation which distinguished between children on the basis of the marital status of their parents is contrary to the equality provisions of the *Canadian Charter of Rights and Freedoms*.[6] Third, the uncertainty of the law in its treatment of children, depending on birth status, causes problems for those giving legal advice[7] and for members of the public.

Changes have been made to laws in other provinces and in other countries to remove the distinction between children based on their birth status.[8] Changes to provincial laws were proposed in 1982 by a national advisory body, the Uniform Law Conference of Canada, in its model *Uniform Child Status Act*.[9] The Nova Scotia Department of Justice had begun to consider whether to adopt some form of the Uniform Law Conference's model *Act* several years ago and supported the view of the Commission that it is an important area for law reform. In addition, the legal and social challenges posed by reproductive technology are an important matter for current and future consideration. After considering legal changes elsewhere and the social and legal situation in Nova Scotia, the Commission concluded that the cultural and social change that has occurred in family structure means that the concept of "legitimacy" as it applies to children, which still exists in the laws of

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[4] The *Convention on the Rights of the Child*, U.N. Doc. A/44/736 (1989), was adopted by the United Nations on November 20, 1989 and came into force on September 2, 1990. At the time Canada signed, it issued a statement of understanding that the *Convention* would be interpreted in light of the practices and needs of the Aboriginal peoples living in Canada. The *Convention* was ratified (formally adopted, together with an agreement to implement) by Canada on December 11, 1991.

[5] *Tighe* v. *McGillivray Estate* (1994) 127 N.S.R. (2d) 313 (N.S.C.A.); *Surette* v. *Harris Estate* (1989) 91 N.S.R. (2d) 418 (T.D.).

[6] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].

[7] M.J. Haugg, "Nova Scotia Statutes and the *Charter*: A Legitimate Concern" (1991) 17(3) *Nova Scotia Law News* 119.

[8] *E.g.*, Ontario passed a law dealing with the issue in 1977, the *Children's Law Reform Act* R.S.O. 1990, c.12, and in 1987, Prince Edward Island adopted the Uniform Law Conference's model *Act* and enacted the *Child Status Act,* S.P.E.I. 1987, c.8.

[9] *Uniform Child Status Act*, 1982, as am. 1991. The *Act* was drafted by the Uniform Law Conference of Canada, a group composed largely of legal counsel from provincial governments. Its purpose is to encourage harmonization of laws in each province by developing model laws that each province is encouraged to adopt.

Nova Scotia, is no longer appropriate or useful.

The Commission carried out legal research and consulted with an advisory group who had various interests and concerns. The members of the advisory group are listed at the end of this Report in Appendix B. Their time and contribution to this project is gratefully acknowledged. In order to obtain public comment and feedback, the Commission published and freely distributed a *Discussion Paper*, *The Legal Status of the Child Born Outside Marriage in Nova Scotia* in August 1993 which outlined some proposals for reform that the Commission was considering. Those proposals are found at the end of the this Report in Appendix C. The Commission carried out additional research and reviewed the written and oral comments received in response to the *Discussion Paper.* A list of people who responded in writing to the *Discussion Paper* is found at the end of this Report in Appendix B.

The reforms recommended in this Report will require changes both to the language and, in some cases, to the substance of existing laws. The Commission believes that a new *Act* is the best way to clarify the law for individuals and legal practitioners in this area. The Commission's recommendations to the government in the form of a draft *Status of the Child Act* adopts the model *Act* proposed by the Uniform Law Conference of Canada on most points. The Commission's draft *Act* is found at the end of this Report. In order to provide comprehensive recommendations, the Commission has included in the draft *Act* a list of consequential amendments to other legislation. In addition to the draft *Act*, the Commission has included a number of suggestions on other related areas of social policy and legal change that the government might consider. The changes recommended in this Report will not, by themselves, remove the stigma that still may be attached to children born outside of marriage but they will ensure that discriminatory treatment is not supported or maintained by the legal system.

2. Language

The Commission attempts in its *Discussion Papers* and *Final Reports* to write about law so that people without legal training can understand the issues and comment on the Commission's recommendations. However, it is necessary to use some terms that may not be familiar to all readers.

In this Report:

assisted conception means cases where a foetus and later a child is created as the result of donated sperm, ova or embryos. This is also sometimes referred to more generally as "reproductive technology".

birth status means a child's birth "within marriage" or "outside of marriage", and the differing legal and social treatment of the child that may result.

guardianship means the rights and responsibilities for the control and custody of a child under the age of 19, including the right to make decisions regarding the care and upbringing of the child. The law generally recognizes these rights and responsibilities as belonging to the parents or legal guardian of a child.

intestate succession means the right of blood relatives or persons related by adoption to inherit the property or belongings of a person who has died without a will.

maintenance means financial support of a child whether by court order or by agreement.

outside of marriage means that the child's mother was not married when the child was conceived or born and that she did not marry the child's father later. (Historically, this status has been described as "illegitimate").

paternity means the fact or legal finding that a person is the biological or genetic father of a child.

parentage means the fact or legal finding that a person is a biological or genetic father or mother of a child.

within marriage means that the child's mother was married when the child was conceived or born or where she later married the father of the child. (Historically, this status has been described as "legitimate" or "legitimated").

Both the legal and social disadvantages experienced by children born outside of marriage are reflected in, and maintained by, laws that refer to these children as "illegitimate". To avoid adding to this stigmatization, the terms "legitimate" and "illegitimate" will be used in this Report as little as possible. To distinguish between children on the basis of the marital status of the child's parents, the terms child born either "within" or "outside of" marriage will be used. In most cases, the legal and factual issues involve determining who the father of a child is, that is, the "paternity" of a child. However, the term "parentage" is also used in this Report to reflect the fact that, with reproductive technology, there will be cases where the "biological" father or mother are different from the "legal" father or mother.

3. The Social and Legal Context in Nova Scotia

Changing the law with respect to the status of the child born outside of marriage will help further two objectives. First, it is part of an overall effort to achieve social equality and to remove prejudices; and second, it will ensure that the law and the legal system reflects the values and perceptions of the current community rather than the values of the people and society who originally created the laws.

The law of Nova Scotia still uses the terms "legitimate" and "illegitimate" to distinguish between children according to whether or not the child's biological parents marry. The need for a change in the language is obvious even when the substance of the law is not to the detriment of the child. Because law affects people not only through legislation, but through court decisions and administrative practices, reforms to both the substance of the law and to practices are required.

(a) The historical and social context

The distinction between children based on birth status has a long history in the common law, which refused to recognize the legal existence of the child born outside of marriage:

> At common law, a child born outside marriage was regarded as *filius nullius*, "a son of nobody". He was deemed "illegitimate", a status which rendered him a child without rights or obligations in relation to his parents. He could not expect to inherit or receive support from his father or mother and neither parent had a right to custody or guardianship of the illegitimate child.[10]

In feudal England, children born outside of marriage were disadvantaged by their inability to inherit land. Initially, this was less a result of the moral persuasion of the Church than of the demand for

[10] J. Wilson & M. Tomlinson, *Wilson*: *Children and the Law,* 2d ed. (Toronto: Butterworths, 1986) at 202.

certainty of ownership, and therefore, of the identity of heirs, in the feudal landholding system.[11] The child was not considered socially inferior as a consequence of birth outside of marriage but neither the father nor the mother of such a child was legally responsible for exercising the rights and duties of a parent.

With the growing influence of the Church in medieval English society, the social position of the child born outside of marriage deteriorated. Parishes were frequently left with the responsibility of maintaining these children since there was no one who could be held legally responsible. In order to alleviate its responsibility, the Church adopted the doctrine of "legitimation by subsequent marriage". However, the common law expressly rejected this in the early thirteenth century.

For the next two centuries, the legal position of the child born outside of marriage in England remained uncertain. Beginning in 1576, with the first *Poor Law Act*, financial responsibility for the maintenance of the child born outside of marriage was imposed on the child's mother or father.[12] Frequently, it was the child's mother who bore the burden of support because she was the caregiver.[13]

The historical development of the law in Nova Scotia can be traced to the original English *Poor Law Act*. In *Gillis* v. *Soulis*,[14] Freeman, J.A. reviewed the common law and statutory position of the child born outside of marriage in a case under the *Family Maintenance Act*:

> The *Children of Unmarried Parents Act*, which imposed a statutory duty of support on fathers of children born out of wedlock, was enacted in Nova Scotia in 1951 (S.N.S. 1951, c.3), replacing the *Illegitimate Children's Act*, S.N.S. 1900, c.14, which replaced the *Maintenance of Bastard Children Act*, R.S.N.S. 1884, c.37. That earlier *Act* appeared by that name in the Revised Statues of Nova Scotia in 1851. The first legislation on the subject in Nova Scotia was *An Act to provide for the Support of Bastard Children and the Punishment of the Mother and Reputed Father*, S.N.S. 1758, c.19, which replaced the English Statute 18 Eliz., c.3....The Nova Scotia *Children of Unmarried Parents Act* was repealed by s.53(1) of the *Family Maintenance Act* (S.N.S. 1980, c.6) which came into force October 1, 1980.

In Nova Scotia, historically, many women would leave their community if they were pregnant and unmarried and temporarily move to Halifax for the birth. The municipal units at that time had financial responsibility for matters relating to child protection. In order to provide secrecy for a woman having a child outside of marriage (and perhaps also to alleviate costs to Halifax) the provincial government absorbed the costs for the child and the unmarried woman rather than having the information listed with the local settlement or municipality where the situation would become public knowledge.

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[11] Pollock & Maitland, *The History of English Law*, (2d ed. 1959) and Krause, *Illegitimacy: Law and Social Policy* (1971), discussed in the Ontario Law Reform Commission, *Report on Family Law, Part III: Children*, (1973) at 1-3; the Alberta Law Reform Institute, *Report No. 20, Status of Children*, (1976) at 3-5.

[12] The duty of support remained on both parents until the *Bastardy Act* of 1809, 49 Geo. 5, c.54, assigned primary responsibility to the father.

[13] During the latter half of the nineteenth century the courts of equity began to demonstrate a preference for the mother of the child in custody proceedings: Alberta Law Reform Institute, see note 8 at 4.

[14] (1990), 101 N.S.R. (2d) 91 (C.A.) at 92. See also, *Nowe* v. *Nowe and Halifax* (1986), 71 N.S.R. (2d) 272 (C.A.) at 274, where Justice Hart comments on the early legislative provisions in Nova Scotia with respect to the support of children born outside of marriage.

The common law position of the child born outside of marriage contrasts with that of the child born within marriage. Children born or conceived within marriage have always been considered "legitimate" and accorded full recognition as members of the family group to which they belong, together with all the legal rights.[15]

A recent Report of the Vanier Institute[16] provides some statistics on the nature of the family in Canada. Of the one-half million families in Canada, there is no one typical type. The "nuclear" family of the 1950s composed of two parents and their one or more biological or adopted children is now only one of many types of family. There are "extended" families composed of parents, children, aunts, uncles, grandparents and other blood relations; and "blended" families composed of divorced parents who have remarried and form a new family that includes children from one or both first marriages, and from the remarriage. About three quarters of a million couples are in common law relationships and over 41% of such couples have children at home. Thirteen percent of families are "lone-parent" families composed of a parent, most often a mother, with a child or children.

The situation in Nova Scotia is similar to that in the rest of Canada. The number of births outside of marriage in Nova Scotia has increased significantly in the last 25 to 30 years. According to a report by the Nova Scotia Women's Directorate,[17] births to "unmarried mothers" constituted 22% of all births in the province in 1986 as compared to 7% in 1961, and only 4% over the forty-year period from 1921 to 1961. While the overall birth rate for unmarried women has increased only slightly since 1966, the actual number of births to unmarried mothers has risen. By 1988 most of the increase in births to unmarried mothers could be attributed to unmarried women aged 20 to 49 rather than to teenagers. From 1970 to 1982, the divorce rate also increased steadily. The statistics indicate that the birth of children outside of marriage is a common situation in Nova Scotia and in Canada.[18]

It is clear that the law and legal system in Nova Scotia on this issue are out of step with the current values of society and that change is needed, both to ensure that the human rights of children are protected and to resolve problems caused by a legal system that no longer serves the needs of the

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[15] W.H. Holland & B.E. Stalbecker-Pountney, eds., *Cohabitation: The Law in Canada* (Toronto: Carswell, 1990) at 6-10.

[16] *Canadian Families,* Vanier Institute, 1994. Most of the statistics cited in the Vanier Report are taken from Statistics Canada.

[17] *Women in Nova Scotia: A Statistical Handbook,* September 1990 at 19; Statistics Canada, *Births* 1988, B6.0; see also, Statistics Canada; *Births and Deaths, Vital Statistics, vol. 1*, Catalogue 84-204.

[18] See S. Clark, M.P. Dechman, F. French & B. MacCallum, *Mothers & Children: One Decade Later, A follow up study to Vulnerable Mothers, Vulnerable Children* (Halifax: Nova Scotia Department of Community Services, 1991). The number of single-parent families has increased substantially; between 1976-1986, female single-parent families increased more than 50%, citing Statistics Canada: *Canada's Lone-Parent Families*, Ministry of Supply and Services, 1984. Catalogue no. 99-933. Statistics Canada figures for 1991 indicated that one in three first children is born to a "single" woman in Canada. In Quebec, the figure is one in two, while in Ontario it is one in five. "Canada Grows, Canadians Grow Apart" *Truro Daily News* (December 1992). The number of common law couples in 1991 (one in nine couples) was more than double the number in 1981. See also "Marriage Rate at Lowest Level since 1930's" *Halifax Chronicle Herald* (4 March 1993).

population. Reforms of provincial laws also must acknowledge the existence of the various cultures and value systems present in Canada. Under the laws inherited from Britain, the traditional basis for establishing a "parenting" relationship was marriage between the mother and father of a child. By contrast, the extended family or communal responsibilities play a much greater role in the upbringing of children in other cultures where the fact of biological connection does not necessarily determine who the social parent or caregiver for the child will be.[19]

It is the Commission's view that there are no valid social reasons for perpetuating the legal distinction between children born within and outside of marriage.[20] Public opinion supports this view,[21] and reflects changes in family structures. As noted recently by the Nova Scotia Court of Appeal commenting on the provincial law that did not allow a child born out of marriage to inherit from a biological father:

> ... I can see no persuasive case to be made for saying any pressing social objective exists to justify this unfair distinction.[22]

(b) The legal context

Historically children have derived their rights according to their biological relationship to their parents and the relationship of their parents to one another:

> When a child is born into a married relationship there is a rebuttable presumption that the child is the child of the couple in that relationship.[23]

The laws governing parent and child relationships in Nova Scotia are based on this presumption. Where the child was born within marriage, it was presumed that the child was the biological child of the woman's husband.[24] The presumption also applied to children conceived but not born before

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[19] D. N. Paul, *We Were Not the Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilization*. (Halifax: Nimbus, 1993) at 18. Religious institutions have also influenced community values in connection with marriage and sexual relationships outside marriage. A more communal approach to caregiving or parenting has also been a part of the culture of Black Nova Scotians.

[20] Some arguments in favour of retaining the distinction were canvassed in the Alberta Law Reform Institute, *Report No. 45*, *Status of Children: Revised Report, 1985* at 20-22 and the Law Commission No. 118, England, *Family Law: Illegitimacy*, 1982 at 17-21. The arguments against reform included: the institution of marriage and the stability of the family would be diminished; the distinction serves to uphold moral standards; and sexual promiscuity would be promoted. Although there were few written comments in response to the *Discussion Paper*, they generally supported the removal of the distinction either totally or with a few reservations in specific situations.

[21] *E.g.*, in August 1993, the Nova Scotia Health Department notified hospitals that marital information was no longer required on the forms recording live births.

[22] *Tighe* v. *McGillivray Estate*, see note 2 at 317.

[23] M. Henaghan & P. Tapp, "Legally Defining the Family" in M. Henaghan & B. Atkin, eds., *Family Law Policy in New Zealand* (Auckland: Oxford University, 1992) at 16.

[24] This presumption apparently dates back to the time of Blackstone's *Commentaries*, see Ontario Law Reform Commission Report, note 8.

the end of the marriage where the marriage ended by court order or death.[25] The presumption was later extended to children conceived before a marriage but born within it.[26] The presumption of parentage could be defeated by evidence proving that the husband could not have been the father of the child.[27]

In addition to the common law presumptions on the biological relationship of a child born within marriage, statutory measures were introduced to deal with situations where the status of the child might be in question despite the fact of marriage. For example, the Nova Scotia *Children of Unmarried Parents Act* passed in 1951 dealt with the children of "void" and "voidable" marriages,[28] and those whose biological parents marry each other after the child's birth.[29] At common law, a child born before marriage could never be "legitimate" even if the biological parents subsequently married. The *Act* and its replacement *Act*, the *Family Maintenance Act* which was passed in 1980, deemed that on the marriage of the parents, the child had, from the date of birth, "all the civil rights and privileges" and the "status and capacity" of "a child born in lawful wedlock".[30]

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[25] *Dodd* v. *Wilcox*, [1936] 1 W.W.R. 98, [1935] 4 D.L.R. 797.

[26] *Re Duckworth and Skinkle* (1924), 55 O.L.R. 272. This and other rules may have grown out of an attempt by the courts to avoid situations in which the rule *filius nullius* would be in direct conflict with a humanitarian view of the best interest of the child: Ontario Law Reform Commission Report, note 8. The other rules include statutory legitimation, the affiliation order and, indirectly, the process of adoption.

[27] At one time the requisite burden of proof was "beyond a reasonable doubt": *Preston-Jones* v. *Preston-Jones*, [1951] 1 All E.R. 124; *Himmelman* v. *Himmelman* (1959), 19 D.L.R. (2d) 291. The evidence needed to rebut the presumption was that the husband had no "sexual access" to his wife at any time when she could have become pregnant. The results of blood tests could also be admitted in evidence to disprove the presumed paternity. The burden of proof in civil matters, including paternity proceedings, is now recognized to be on the "balance of probabilities", although the sufficiency of the proof required to meet the burden is high. In *Wikstrom* v. *Children's Aid Society of Winnipeg et al.* (1955), 16 W.W.R. 577 (Man. C.A.), the court held that the presumption of legitimacy can "only be rebutted by evidence that is unquestionably decisive to the contrary".

[28] S.N.S. 1951, c.3 repealed and replaced in 1980 by the *Family Maintenance Act* R.S.N.S. 1989, c.160, ss.47 and 48, respectively. For marriages before October 1, 1980, the provisions of the *Family Maintenance Act* would apply to "legitimate" the offspring of "void" or "voidable" marriage. A marriage is "void" where there is a lack of legal authority in the person solemnizing the marriage. The child of a void marriage is deemed legitimate if the mother and father of a child were married according to the laws of the place of the marriage, and if either or both of them believed the marriage to be valid. Similarly, where a decree of nullity had been granted in relation to a "voidable" marriage, a child who would have been the legitimate child of the marriage had it been dissolved instead of annulled, would continue to be legitimate.

[29] This statutory form of "legitimization" is now found in the *Family Maintenance Act*, s.49.

[30] *The Family Maintenance Act*, ss. 50 and 51. Despite the general retroactive effect of the deeming provisions, the *Act* expressly stipulates that the rights of the legitimated child are subordinate to any "right, title or interest in or to property" where they have vested in another person before the *Act* took effect or before the marriage. This provision would exclude a "legitimated" child from the class of beneficiaries in a will if the interests had "vested" on the testator's death.

As noted above, the notions of a legal parent in Nova Scotia have been determined largely by Judeo-Christian values and property-based relationships between members of family units. Historically, parenthood has been based on a biological connection whereby the biological parents of the child are also the social and legal parents of the child. The most common social insignia for presuming this biological relationship was marriage. Thus the law relating to parental responsibilities focused on whether or not there was a marriage:

> When a child is born into a non-married relationship there is no such presumption. A father in such a relationship may provide evidence of his fatherhood by placing his name on the birth certificate, or acknowledging in writing signed by the mother that he is the father.[31]

If the distinction between children based on marital status is removed, then the question arises as to how to establish that a person is a parent, assuming that it would not be feasible or desirable to require genetic testing in every case where there is some legal need for clarifying the point. The answer in other jurisdictions has been to develop a list of behaviours, such as living with the mother at the time of conception or signing a registry as father, which are considered equivalent to marriage in presuming a biological relationship between the child and the adult.

In Nova Scotia, when there is no acknowledgement of paternity, it may be established under a number of statutes. For example, the *Family Maintenance Act* allows the Court to make an order to make a "possible father" of the child responsible for the child's financial maintenance.[32] The paternity order does not affect the child's birth status. There are, however, other areas such as care and custody of a child under the *Family Maintenance Act* which involve exclusive findings of paternity.[33] There are also statutes that provide for findings of paternity or parentage either explicitly or implicitly in connection with matters falling within their scope.[34] However, conferring

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[31] Henaghan & Tapp, see note 20.

[32] The court may find that a man is not the father of a child in the course of determining who the possible fathers are under s.27(1) of the *Act*. More than one person may be found to be the "possible father" of the child, for the purposes of a maintenance order. Any findings that a man is not the father or is a possible father in proceedings under the statute operate only for the purposes of the particular proceedings, affect only the parties to the proceedings, and may be contested by different parties at a later time.

[33] *Family Maintenance Act*, s.18(4) which states that "the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise provided by the *Guardianship Act* or ordered by a court of competent jurisdiction." "Father" is not defined in the *Act* and, like most Nova Scotia statutes in which the paternity of a child may be in issue, the *Act* specifies no criteria for determining who the father of the child is. In the absence of any such criteria, the determination will rest on the (exclusionary) results of genetic tests and on the *viva voce* evidence of witnesses, including the alleged father.

[34] See, *e.g.*, *Vital Statistics Act* R.S.N.S. 1989, c.494, s.4(7), registration of a man as the father of child born outside of marriage at the joint request of man and mother of child; *Change of Name Act* R.S.N.S. 1989, c.66, s.8(1), (2), where a person acknowledges himself to be the father of a child born outside of marriage and the child is registered with the man's surname, the man's consent is required to change the name of the child; s.8(3), where a person is shown on the birth registration of a child born outside of marriage, as the father of the child, he may apply to change the name of the child with the consent of the mother; s.8(4), where a person furnishes the court with an order determining he is the father of a child born outside of marriage, he may, with the consent of the child's mother, apply to change the name of the child.

statutory benefits on a child born outside of marriage falls short of full recognition of parentage for all purposes of the law. Generally speaking, these statutes require some evidence of acknowledgment of paternity either in writing, verbally or by the person's conduct toward the child and, in some cases, an assumption of responsibility toward the child.[35] In other cases, the behaviour exhibited toward the child is viewed as sufficient in itself, to establish the fact of "parentage" under the *Act*.[36] For example, the *Fatal Injuries Act* provides that a person has, in respect of the death of a deceased, the same rights under the *Act* as a child of the deceased, if the deceased demonstrated a "settled intention to treat" that person as a child of the deceased's family. Much like the determination of "possible" paternity under the *Family Maintenance Act*, determinations of paternity for the purposes of other statutes operate only for the purposes of the particular proceedings[37] and affects only the parties to the proceedings. Since these determinations of parentage depend on differing findings and processes, they may create uncertainties.

The rights of children may also be affected by the rules of interpretation in relation to the construction of statutes and documents. Until a recent Supreme Court of Canada decision changed it,[38] the established rule of interpretation was that any reference to a child was understood to mean a "legitimate" child unless the contrary intention was clear from the language of the statute.[39] A

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[35] *Children and Family Services Act*, ss.3(1)(r)(vii) and 67(1)(f)(vi), where a man will be considered a "parent" for purposes of receiving notice in child protection and adoption proceedings if he has acknowledged paternity and has an application before a court respecting custody or access or against whom there is an application pending for child support, or where he is providing support or exercising access to the child; *Family Maintenance Act*, s.13(1), a person who acknowledges that he is the father of a child born outside of marriage and who enters into an agreement registered with the Minister to provide for child maintenance may not be the subject of maintenance proceedings under the *Act*.

[36] *Fatal Injuries Act* R.S.N.S. 1989, c.163; *Children and Family Services Act*, s.67(1)(f)(iv) and the *Children and Family Services Regulations*, N.S. Reg.183/91, Schedule A, s.65. Under the stated provisions of the *Children and Family Services Act* and *Regulations*, a man who, during the twelve months before adoption proceedings are commenced has cohabited with the mother of the child where she has care of the child; contributes to the financial support of the child; and behaves toward the child as if the child was his son or daughter, will be considered a parent for the purposes of receiving notice of adoption proceedings.

[37] One possible exception is a determination under the *Vital Statistics Act*, s.8 which permits a person "whose birth has not been registered in accordance with Section 4, 5, 6 or 7 [to]... apply ... for a finding that the person was born in the Province on a certain date... and as to his parentage." This provision is available only to the person for whom birth registration is sought. The judicial finding and the resultant registration would, however, afford some evidence of parentage in any proceeding in which parentage is in issue.

[38] *Gingell* v. *R.* [1976] 2 S.C.R. 86, and *Plummer* v. *Air Canada* (1979) 25 N.R. 118 (S.C.C.).

[39] *Montreal West* v. *Hough*, [1931] S.C.R. 113 at 120; *R.* v. *O'Donnell* (1923) 23 O.W.N. 512 (H.C.); *Re Herlichka*, [1959] 1 O.R. 724 (H.C.). Some inroads into this rule were made by the courts. *E.g.*, in *White* v. *Barrett*, [1973] 3 W.W.R. 293 (Alta C.A.), the court interpreted the word "parent" in a statute to include the father of an illegitimate child. In so doing, the court favoured the "ordinary meaning" rule of construction over that of *filius nullius*. However, the statutory framework may not always permit application of the ordinary meaning rule. See *McGuire* v. *Fermini* (1984) 62 N.S.R. (2d) 104 (T.D.); aff'd (1984) 64 N.S.R. (2d) 60 (C.A.).

similar rule applied in relation to the interpretation of wills and other documents.[40] Words such as "child" or "issue" were understood to refer *prima facie* to children born within marriage.[41] A common law rule of public policy prohibited testamentary gifts to future born "illegitimate" children.[42] The changes in case law interpretation and absence of change in statutes means that there is uncertainty and confusion about the law on this subject.

The law in Nova Scotia has altered over time to varying degrees to deal with social changes so that in some instances the child of unmarried parents is treated no differently from the child of married parents. However, most changes remove the distinction between children in terms of the child's relationship to the mother and few affect the relationship between the child and his or her father. These changes that have been made are an attempt to act in the best interests of the child but they still maintain the stigmatization of birth outside of marriage. The fact that a legal distinction exists at all is discriminatory. This means that further changes in the law governing notice and consent, custody and guardianship, inheritance and some statutory benefits are needed to ensure consistency and certainty and to bring the law in line with the human and constitutional rights that exist in Nova Scotia.

(i) The United Nations Convention on the Rights of the Child

The United Nations *Convention on the Rights of the Child* is an international agreement recognizing the right of every child to be protected, amongst other things, from discrimination on the basis of birth status. According to the *Convention*, every child has the right:

- "to know and be cared for by his or her parents" recognizing that both parents have common responsibilities and primary responsibility for the upbringing and development of the child;

- "to preserve his or her identity, including nationality, name and family relations as recognized by law ...";

- where separated from one or both parents "to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests..."

All of these rights are to be implemented by taking into account the "best interests of the child".[43]

Canada, on formally adopting the *Convention on the Rights of the Child,* became obliged under international law to ensure that the terms of the *Convention* are implemented both federally and provincially. The government of Nova Scotia has agreed to assist the

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[40] The rule of construction for wills has two exceptions. First, where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest (or grant). Second, where there is, on the face of the document, and on a "just and proper construction and interpretation of the words used in it", an expression of the intention of the testator to use the term to apply to and include "illegitimate" children. *Family Law Reform Act of 1869*, *Hill* v. *Crook* (1873) L.R. 6 H.L. 265 at 282-84. See also *Lobb* v. *Lobb* (19100 21 O.L.R. 262 (H.C.), aff'd 22 O.L.R. 15 (C.A.), applying the first exception, and *Re Nicholls* [1973] 2 O.R. 33 (H.C.), applying the second exception.

[41] *Hill* v. *Crook*, *ibid.*

[42] England has reversed the rule by s.15(7) of the *Family Law Reform Act*, 1969, c.46.

[43] See note 1, arts. 3.1, 7.1, 8.1, and 9.3.

government of Canada in meeting its international commitment. In the view of the Commission, Canada's participation in the United Nations *Convention* represents a significant impetus for law reform in Nova Scotia in relation to the rights of the child born outside of marriage.[44]

(ii) The Canadian Charter of Rights and Freedoms

In addition to Canada's international obligations under the *Convention on the Rights of the Child*, the Canadian *Charter* in the *Constitution Act, 1982* provides an equally compelling basis for abolishing the status of illegitimacy. The provinces have an obligation under the *Charter* to ensure that provincial laws do not interfere with the right of the individual to equal protection and equal benefit of the law without discrimination. A number of courts have interpreted this as a guarantee of the equal treatment of all children, whether born within or outside of marriage. Indeed, statutory provisions that discriminate against children born outside of marriage have been declared unconstitutional when challenged under s.15 of the *Charter*.[45] For example, the existing law of Nova Scotia permits a child of unmarried parents to inherit only from the mother under the *Intestate Succession Act*. Justice Chipman, writing for the Nova Scotia Court of Appeal, concluded that the law, which disallowed a child born out of marriage to inherit from a biological father was discriminatory:

> The illegitimate child is precluded from the benefits of the legislation by reason of a distinction - birth out of wedlock. Such a distinction is based on personal characteristics associated with the group to which the child belongs. It is an unfair distinction. Speaking with respect to s.36 of the children of the *Unmarried Parents Act* of Saskatchewan which denied certain rights to illegitimate children and unmarried mothers, Barclay, J. in *Panko* v. *Vandesype* (1993) 101 D.L.R. (4th) 726 categorized the legislation as maintaining a distinction which was illogical, unfair and thus discriminatory within s.15 of the *Charter.* The same can be said here.[46]

The distinction in legal status between children may also be in conflict with the *Human Rights Act* of Nova Scotia which prohibits discrimination on the basis of "family status" and "marital status".[47]

(iii) Changes in laws elsewhere

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[44] This commitment motivated the Alberta Law Reform Institute to update and republish its recommendations on reform of the law on the *Status of Children* in Alberta. The Institute had published a Report in 1976, see note 8, recommending the abolition of the statutes on illegitimacy and legitimacy in favour of equal treatment. This was updated and republished in 1985, see note 17, at the request of the government. Despite the request, the law has still not been completely reformed on this point: See Alberta Law Reform Institute, Report No. 60, *Status of Children: Revised Report 1991* at 1-2.

[45] See, *e.g.*, *Tighe* v. *McGillivray Estate*, note 2; *P.A.D.* v. *L.G.* 89 N.S.R. (2d) 7 (Fam. Ct.), per Williams, J.F.C.; *Surette* v. *Harris Estate*, note 2; *M.(L.M.S.)* v. *Alberta (Attorney-General)* (1990), 74 D.L.R. (4th) 403 (Alta. Q.B.); and *Panko* v. *Vandesype* (1993) 101 D.L.R. (4th) 726.

[46] *Tighe* v. *McGillivray Estate*, note 2 at 317, referring to *Panko*, *ibid.* in which the court reviewed cases on this issue and concluded that this distinction constituted discrimination because it "is based solely on illegitimacy which is an immutable personal characteristic". Note that in N.S.R. the *Panko* case is referred to as *C.E.P.* v. *G.V.*.

[47] R.S.N.S. 1989, c.214, as am., ss.5(r), (s).

In addition to changes to ensure consistency with constitutional and human rights agreements, the laws in Nova Scotia should reflect the current values of Nova Scotians and changes elsewhere in Canada and the world. In Canada, all of the provinces and territories have legislation that significantly improves the status of children born outside of marriage. Indeed, all provinces and territories, except Nova Scotia and Alberta, have legislatively abolished the status of "legitimacy" and have declared legal equality between children, regardless of the marital status of the child's parents.

The first Canadian jurisdiction to provide for full legal equality between children born within and outside of marriage was Ontario with the enactment of the *Children's Law Reform Act* of 1977.[48] Since that time, the Uniform Law Conference of Canada adopted a model law, the *Uniform Child Status Act* in 1982 (as amended in 1991 to take into account assisted conception), which is similar to the Ontario legislation. Following these reforms, "child status" legislation was introduced in New Brunswick in 1980, Quebec in 1981, British Columbia in 1985, the Yukon in 1986, Prince Edward Island in 1987, the Northwest Territories in 1987, Manitoba in 1987, Newfoundland in 1988, Saskatchewan in 1990 and Alberta in 1991.[49] With the exception of Alberta and British Columbia, the child status legislation in the common law provinces and territories is similar in form. They all follow the broad outline of the Ontario and the Uniform Law Conference's model legislation which abolishes the common law designation of "illegitimate" and declare a child to be the child of his or her "natural parents" regardless of birth outside of marriage.

Legal reforms directed at equalizing the birth status of children have also taken place in many other countries. In countries with a common law system, one of the earliest comprehensive reforms was the New Zealand *Status of Children Act* introduced in 1969.[50] Almost all of the Australian states have similar legislation.[51] In Ireland, the Law Reform Commission recommended[52] that legislation be enacted to remove the concept of illegitimacy from the law and to equalize the rights of children born outside of marriage with those of children born within marriage. These recommendations were implemented with the passage of the *Status of Children Act,* 1987.[53] Statutory reforms have also been implemented

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[48] R.S.0. 1980, c.68.

[49] Although these are not comprehensive, see *Status of Children: Revised Report, 1991*, note 41 at 3.

[50] *Status of Children Act*, 1969. This *Act* removed the term "illegitimacy" from the legal vocabulary in New Zealand. See also, Henaghan & Atkin, eds., *Family Policy in New Zealand*, note 20.

[51] Victoria: *Status of Children Act 1974*; Tasmania: *Status of Children Act 1974*; South Australia: *Family Relationship Act 1975*; Queensland: *Status of Children Act 1978*; New South Wales: *Children (Equality of Status Act) 1976*. In Western Australia, piecemeal amendments of existing laws has largely achieved the same effect.

[52] *Report on Illegitimacy*, (L.R.C. 4 - 1982) at para. 200.

[53] See, W. Duncan, "Ireland: The Status of Children and the Protection of Marriage" (1988-89) 27 *Journal of Family Law* 163.

in many states of the United States.[54] A number of them have adopted legislation patterned on the *Uniform Parentage Act*[55] which eliminates the concept of legitimacy and provides that, "the parent and child relationship extends equally to every child and to every parent regardless of the marital status of the parents."[56]

In Britain, following years of study, the recommendations of the Law Commission respecting the removal of legal disadvantages affecting children born outside of marriage were adopted by Parliament in the form of The *Family Law Reform Act* of 1987.[57]

Civil law jurisdictions have also introduced reforms assimilating the status of children born outside of marriage and within.[58] Scotland implemented the *Law Reform (Parent and Child) (Scotland) Act* in 1986 in response to suggestions put forward by the Scottish Law Commission.[59] It declares the legal equality of children, regardless of the marital status of their parents and closely parallels the English law enacted in The *Family Law Reform Act* of 1987. The Scandinavian countries[60] and Switzerland[61] have also purported to place the child born outside of marriage in the same position as those born within. Indeed, Norway achieved substantial legal equality for children born outside of marriage as early as 1915. The law was

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[54] See H.D. Krause, *Child Support in America* (Charlottesville: Michie, 1981) at 119, 161-62, 206-12.

[55] As of 1991, 19 jurisdictions in the United States had passed legislation similar or identical to the *Uniform Parentage Act* (1973) and another four have enacted an earlier and more limited uniform statute, the *Uniform Paternity Act* (1960). A number of other states provide for full equality between children, without following the uniform statutes. Included are Arizona (1921), Oregon (1957), Alaska (1962) and North Dakota (1969).

[56] Apart from legislative developments, the United States Supreme Court, in a series of decisions starting in 1968, held that the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, entitles the child of unmarried parents to legal equality with the child of married parents. See *Levy* v. *Louisiana* 391 U.S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance* 391 U.S. 73 (1968); *Weber* v. *Aetna Casualty & Surety Company* 92 U.S. 1400 (1972); *Gomez* v. *Perez* 93 U.S. 872 (1973); and *Trimble* v. *Gordon* 430 U.S. 762 (1977); but compare *Labine* v. *Vincent* 401 U.S. 532 (1971) and *Mathews* v. *Lucas* 427 U.S. 495 (1976) cited in Krause note 51.

[57] U.K., c.42.

[58] M.A. Glendon, M.W. Gordon & C. Osakwe, *Comparative Legal Traditions in a Nutshell* (St. Paul: West, 1982) at 108.

[59] Scottish Law Commission No. 82, *Family Law Report on Illegitimacy*, 1984.

[60] *E.g.*, Sweden enacted significant reforms in 1969.

[61] Law of June 25, 1976, modifying arts. 252-263 and 270-327 of the *Swiss Civil Code.*

reformed in the former West Germany in 1969, in France in 1972,[62] and in Italy in 1975.[63] Complete equality was not achieved in these countries, however. Initially, there was differing treatment of children in relation to succession.[64] However, France has removed the remaining distinctions between children.[65] In Poland, the status of legitimacy was abolished "in favour of a uniform relationship between the progenitor and his offspring, that is one of 'parent and child'."[66]

The process of reform in these countries has been stimulated by recognition of the rights of children born outside of marriage under the European *Convention on the Legal Status of Children Born Out of Wedlock*.[67] It provides, in its preamble, that efforts have been or are being made in a large number of member states of the Council of Europe to improve the legal status of children born outside of marriage by reducing the differences between them and children born within marriage that are to their legal or social disadvantage. The *Convention* goes on to say that the signatory states believe that the situation of children born outside of marriage should be improved and that the formulation of common rules concerning their legal status would assist this goal. The *Convention* recommends provisions to achieve this in areas such as maintenance and succession and it also provides for distinctions to be properly made with respect to guardianship and access.

Also of significance to the legal treatment of children born outside of marriage is the *European Convention on Human Rights*[68] (to which the United Kingdom, amongst other countries, is signatory). In an influential decision based on this *Convention*, the European Court of Human Rights held that the provisions of Belgian law prohibiting an "illegitimate" child from inheriting from the child's close maternal relatives on their intestacy, contravened articles 8 and 14 of the *Convention*. The Court further held that the differing inheritance rights between "legitimate" and "illegitimate" children lacked objective and reasonable justification.[69]

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[62] Law of January 3, 1972. The new art.334 of the *Code Civil* provides that the child born outside of marriage has, in general, the same rights and duties as the child born within marriage, in relation to the father, as well as to the mother.

[63] See V. Librando, "The Reform of Family Law in Italy" in A.G. Chloros (ed.) *The Reform of Family Law in Europe* (Netherlands: Kluwer, 1978) at 161-66.

[64] See M.L. Englehard-Grosjean, "The French Law of Filiation" (1977) *37 La. L. Rev.* 701.

[65] See J. Rubellin-Devichi, "France: More Equality, More Solidarity in Family Relationships" (1988-89) 27 *Journal of Family Law* 143.

[66] D. Lasok, "Legitimation and Affiliation Proceedings" (1961) 10 *I.C.L.Q.* 123 at 129.

[67] Opened for signature on October 15, 1975. The European *Convention* was ratified by the United Kingdom on February 24, 1981.

[68] *Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4 November 1950; TS 71 (1953); Cmd 8969).

[69] *Marckx* v. *Kingdom of Belgium*, [1979-80] 2 E.H.R.R. 330. See also, *Johnston*, [1986] 9 E.H.R.R. 203.

4. Summary

The discussion in this Part of the Report has established that there is an obligation to ensure that children are not discriminated against on the basis of birth status. The historical background to this discrimination is captured in the words "illegitimate" and "legitimate" and is embedded in the differing treatment of people based on that classification. It has been shown that any changes have been mainly to rights in relation to the mother. However, common law, statutory law, and practice still retain this unfair distinction. This is contrary to international and national human rights and equality law. Since the technology for ovum and embryo transfer has only recently been developed, the law has assumed that the woman who gives birth is the biological mother. As will be noted in the discussion in Part II, however, changes in technology involving ovum or embryo transfer no longer permit this assumption and the question of the rights and relationship of the woman giving birth to the child are matters of current debate. The social context of changing family structures[70] and cultures in which social parenting is important, challenge the validity of a system based on biological connections.

The next Part deals comprehensively with various changes that will be required to remove this discriminatory distinction.

[70] *E.g.*, recent case law recognized lesbian co-mothers as parents in the United States case of *Thomas S.* v. *Robin Y.*, 559 N.Y.S. 2d 377 (Fam. Ct.), 1993). There is also discussion of the role and rights of grandparents and a resident caregiver as the core family unit. See also *Canadian Families*, note 13.

II RECOMMENDATIONS FOR REFORM

1. There is a need to reform the law and legal system in Nova Scotia to abolish discrimination based on the marital status of the child's parents as required by the United Nations *Convention on the Rights of the Child* and the *Canadian Charter of Rights and Freedoms*.

There is a need for reform to comply with the provisions of the United Nations *Convention* and the Canadian *Charter*, and to ensure that the laws and legal system in Nova Scotia are consistent with laws elsewhere in Canada and internationally. The nature of the family and the basis for caregiving relationships are in the process of change in Canada and Nova Scotia as the traditional definition of the family is challenged by multiculturalism, changes in reproductive technology, and the increasing frequency of divorce, second families, and single-parent families. The fact that, in many cases, the laws in Nova Scotia still discriminate against a child because of the marital status of his or her parents, has been identified by the courts in Nova Scotia as unfair and in violation of the constitutional right of a person to equality. This discrimination is inherent in the term "illegitimate". The laws based on this distinction perpetuate discrimination by their substance, and by their language even when the law itself may not operate to the detriment of the child. The Commission believes that change is needed to modernize the laws and legal system in Nova Scotia to ensure the equal treatment of children. The majority of the Commission believes that the recommendations in this Report are the best way to reform the law. A dissenting opinion agrees with the recommendation that the law should be reformed to remove this discrimination but does not agree with the majority decision to discuss the implications of this recommendation in this Report.[71]

The Commission recommends that:

The law and legal system in Nova Scotia be reformed to abolish discrimination based on the marital status of the child's parents as required by the United Nations *Convention on the Rights of the Child* and the Canadian *Charter of Rights* and Freedoms.

2. The biological connection should remain the foundation of the parent and child's legal relationship with specific exceptions.

In concluding that the law should be reformed to respond to the legal and social situation in Nova Scotia, the Commission had to consider how the reform should occur. This involved two questions. The first, more substantive question, is whether the underlying structure of the legal parent and child relationship based on a biological connection should be changed.

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[71] Commissioner Ring agrees with this principle but believes: "The Report should end here. The Report, its recommendations and the draft *Act* go beyond equality rights of the child based upon the marital status of the child's parents. The bulk of this Report and draft *Act* deal with the rights of the biological father, most of which I disagree with. The draft *Act* should consist of sections 5, 6 and 7 and related consequential statutory recommendations."

The second question is how the reforms should be made. Should the law be changed by simply removing the words in existing laws that distinguish between children born inside and outside of marriage, or should there be a new law that comprehensively deals with the changes? The Commission's views on the first question are discussed in this Recommendation. The Commissioners conclusions on the second question as to whether there should be a new law are discussed in Recommendation 4.

The first question as to whether the foundation of the law on parent and child legal relationships should be altered is not an easy issue. The Commission carried out research into various practices that exist in the Mi'kmaq community in Nova Scotia and in other Aboriginal communities in Canada and elsewhere in the world. The Commission also received commentary on the extended family and caregiving relationships from members of the Black community and from other communities in Nova Scotia where social parenting and caregiving relationships are not necessarily based on a direct biological connection between the child and the person in the role of parent. In addition, changes in reproductive technology, the emerging recognition of same sex partners as viable family units, and the increasing reformation of families after divorce has meant that often the person who has a primary parental role in a child's life may not be the biological parent of the child. The majority of the Commission felt that while these relationships and this social reality must be considered, and in some cases recognized by law, the biological connection between the parent and child should remain the primary basis of legal rights and responsibilities. Many aspects of this issue are not easily reconcilable. For example, although social caregiving is recognized, there are equally important concerns about maintaining genetic and ethnic connections so that children can know their cultural heritage. The importance of these connections is recognized in the United Nations *Convention on the Rights of the Child* and in the concern about adoption of Aboriginal children by people who are not Aboriginal. The issue of customary adoption and caregiving practices is discussed in more detail in Recommendation 3.

If the law continues to recognize the biological mother and father as parents irrespective of marriage, the child will have a legally recognized opportunity to know and benefit from both biological parents. As stated in the Commission's *Discussion Paper,* the *Legal Status of the Child Born Outside Marriage in Nova Scotia*[72]: "[I]f the interest in genetic relationships and the importance of ensuring that people take responsibility for the care and maintenance of children is considered, it would not be useful to discount a biological connection." In addition to making recommendations to broaden the range of individuals who have an opportunity to participate in the child's life, this approach preserves existing rights. The majority of the Commission remains of the view that its initial proposal in the *Discussion Paper* should be adopted. There is a dissenting opinion that the biological connection should not be the basis for the legal relationship between parent and child.[73]

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[72] 1993 at 16.

[73] Commissioner Ring dissents from this view: "I disagree that biology should be the primary basis for determining the relationship between a parent and a child. A father and parent is more than just sperm. A parent is a caregiver, nurturer and someone who has a social relationship with that child and preferably with that child's mother. The parenting relationship is what is paramount."

The majority of the Commission recommends that:

The biological connection remain the foundation of the parent and child's legal relationship with specific exceptions.

3. There should be two express exceptions in the law to deal with adoption and assisted conception. In addition, social parenting and customary caregiving relationships should be taken into account in legal decisions affecting children.

Having concluded that the biological connection should remain the basis for the legal relationship between parent and child, the Commission considered whether there should be any exceptions to this rule. The exception that currently exists in the law of Nova Scotia relates to adoption. The Commission concluded that this exception should be maintained. The Commission looked at the question of whether the adoption provision should be expanded to include customary adoption. The Commission concluded that the overall law and practice governing adoption should be the subject of a more comprehensive review. However, in this Report, the Commission has restricted its recommendations to issues relating to status to take into account customary caregiving practices. It was felt that piecemeal changes would not be helpful and might create further confusion and inconsistency in the law. In addition, the Commission is aware that the Nova Scotia adoption laws are currently under review by a committee which should consider this issue more fully. The subject of assisted conception, which is in the process of development, is equally complex and should also be more specifically and comprehensively reviewed. However, it is necessary in this Report to deal with some aspects of assisted conception.

(a) Adoption

(i) Legal adoption

According to the *Children and Family Services Act*, where a child has been legally adopted[74] he or she will be considered the child of the adoptive parents for all purposes "as if the adopted person had been born in lawful wedlock to the adopting parents".[75] This means that under existing law, an adoption order will have the effect of legally establishing a parent-child relationship between genetically or biologically unrelated people - the adoptive parent(s) and the child. Where the child is legally adopted, the legal relationship between the child and his or her biological parents is ended unless one of the adoptive parents is a

[74] Adoption may be public (facilitated by a government operated agency) or private.

[75] S.80(1)(a). Although adoption is often used in cases where neither one of the proposed adoptive parents are genetically connected to the child, in some cases (e.g., step-parent adoption) one of the parents is the biological parent.

biological parent (i.e. step-parent adoption).[76]

(ii) Customary adoption/caregiving practices

Apart from the legal adoption procedures under the *Children and Family Services Act*, the Commission considered whether the socially-based parenting relationships as practised by the Aboriginal and other ethnic communities should be recognized as an exception to the parent and child relationship being based on a biological connection. This reform would take into account the parenting/caregiving traditions that exist in many communities in Nova Scotia, particularly where the extended family still has a significant role in the social structure of the community.

Customary adoption in Aboriginal communities in Canada has been defined as follows:

> A custom adoption occurs when a child's birth name is not changed and although the adoptive parent has care and custody, the natural mother and father have access and some rights. It is akin to a trust arrangement, as the natural parent may retrieve the child if agreed upon by all parties.[77]

Customary adoption in Mi'kmaq culture has been described from an historical perspective as follows:

> The children were raised in an atmosphere of benevolent devotion. They were loved and cherished by their parents and given loving care and attention by members of the Tribe. As a result of this ingrained attitude, MicMac children were never abandoned. They were considered extended family by adult members of the Tribe and were treated like one's own. If a child became homeless for any reason, he or she would be adopted by other members of the community and their life would soon return to normal.
>
> Adoptions were simple. If a child could not be cared for by its natural parent or parents for one reason or another, or if a child had been orphaned, a childless couple, or a couple with children, would simply take the child into their family. The child would then be treated by the community as though it was the couple's own natural-born.[78]

While the existence of customary adoption and community participation in child-caring practices of the Aboriginal people is generally acknowledged, it has only recently been given statutory recognition.[79] The first place in Canada to give broad legal recognition to

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[76] S.72(4) of the *Children and Family Services Act* allows that in step-parent adoptions only the parent who is not biologically related to the and child applies for adoption. The biological father who was not married to the biological mother, would lose his status as parent of the child to the step-father.

[77] S. Bull, "The Special Case of the Native Child " (1989) 47 *The Advocate* (Van) 523 at 526.

[78] Paul, *We Were Not the Savages,* note 16 at 14.

[79] There has, however, been statutory recognition of the interests of Aboriginal children in knowing their cultural, racial and linguistic heritage through recent amendments to the *Children and Family Services Act.* The *Act* requires the court to consider these factors as part of the "best interests" of the child when deciding whether to dispense with consent to adoption of a parent entitled to notice, and when issuing the adoption order itself. In protection proceedings, in which the placement of the child will ultimately be an issue, Micmac Family and Children's Services of Nova Scotia may be substituted for the agency

customary adoption was the Northwest Territories under the *Child Welfare Ordinance*.[80] The Federal *Indian Act*[81] first recognized customary adoption for the purpose of distribution of property on intestacy; however, it was not until 1985 that statutory recognition of customary adoption was extended to all matters falling within the scope of the *Act*.[82]

Despite the fact that full statutory recognition of customary adoption did not exist until recently, the courts have for many years recognized and upheld these traditions as part of the common law. In one decision, the court stated:

> I am of the view that native custom, speaking very generally (for there are slight differences between those of one people and another), recognizes a form of adoption: the rearing of children was and is not the exclusive responsibility of the parents, though they have primary rights and duties. Grandparents, uncles and aunts share this responsibility to a great extent. In native society, originally matrilineal, it is usual nowadays for grandmothers and aunts to take in and rear children when their parents, for one reason or another, cannot themselves do so. Many instances of this custom were given (and see also James Sewid, *Guests Never Leave Hungry,* 1969, University of Washington Press). I think it is general, and much in use today. It brings about something very close to our notion of adoption: a notion which is common to all legal systems, West Coast native custom as well as our Roman derived law.[83]

The comments of the British Columbia Royal Commission on Family and Children's Law in a 1975 Report supporting the legal recognition of Aboriginal customary adoption, are also of

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initiating the proceedings, s.36(3), and the court is directed to consider "whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family...", s.42(3).

[80] *An Ordinance to Amend the Child Welfare Ordinance*, assented to February 8, 1974, c.1, ss.3 and 4, amending ss.83 and 86(1), respectively, of the *Child Welfare Ordinance*, reenacted as the *Child Welfare Act* R.S.N.W.T., 1988, c.C-6. The amendments allow a judge to waive the strict formal requirements of the adoption provision in the ordinance where the court determines there is a valid customary adoption. The mandatory formal requirements are reduced to a report from the Department of Social Development.

[81] R.S.C. 1985, c.I-5, as am., by R.S.C. 1985, c.32 (1st supp.).

[82] Repealing ss.48(16), which defined "child" as including, for the purposes of inheritance on intestacy, a child adopted in accordance with Indian custom. S.2(1)(c) of the *Act* was amended to expand the definition of "child", applicable for all purposes under the legislation. The amended definition added "a child born out of wedlock" and "a child adopted in accordance with Indian custom" to the previous definition which included a legally adopted child. Since 1985, a reference to a "child" in the *Indian Act* includes children adopted in accordance with Indian custom. Policy Guidelines for Indian and Northern Affairs, Canada indicate that affidavits are required from the birth parents, adoptive parents, Band Council and Elders before a customary adoption can be registered. At least one of the affidavits must attest as to whether: the Band has a recognized customary adoption procedure; the custom was followed in the particular case; the person to be adopted is under 18 years of age; and the child retains the ability to inherit from the natural parents (Indian Registry, L73916 - Participant Manual, 1992).

[83] *In the Matter of Birth Registration No. 67-09-0022272*, April 6, 1973, Supreme Court of British Columbia, unreported, per Tyrwhitt-Drake, J. at 2-3, quoted in the British Columbia Royal Commission, *Tenth Report of the Royal Commission on Family and Children's Law: Native Families and the Law*, 1975 at 37-38.

interest:

> Because some of the native Indian custom adoptions allow for continued contact with natural parents and for inheritance from natural parents, some persons have argued that it would be better to recognize a custom adoption as a type of guardianship rather than as an adoption. However, the majority of native persons indicated that they considered custom adoption as adoption, not guardianship.
>
> Furthermore, we note that the current concept of adoption in white society is a relatively new concept. In fact, adoption is as old as man. It has been practised in many different cultures in many different ways. The North American white concept of adoption as a function of child welfare -- involving the placing of children with strangers and the complete severing of natural ties, including the possibility of inheritance, is a relatively recent development in adoption and seems to reflect the realities of a highly mobile, nuclear-family-oriented, urban, industrial society.
>
> To impose this style of adoption on our native Indian population and to call their custom adoptions something less–i.e., guardianship–-would be, in our opinion, inappropriate.
>
> We believe it is time to show respect for and confidence in the already established customs of native Indians to provide for their own children.[84]

Other law reform bodies and authors who have considered the issues also recommend legal recognition of customary adoption. For example, in New Zealand, the *Adoption Act* 1955, s.19, specifically states that "adoption in accordance with Maori custom is not recognized as lawful". This and other provisions of the *Act* have been criticized from the Maori perspective. In *Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law*, the authors comment on the relationship between the *Adoption Act* 1955 and the Maori view of adoption:

> There is a fundamental difference in the way in which Maori and the law define the concept of adoption. The Adoption Act establishes adoption as the legal transference of the status of parent in relation to a child from one set of parents to another, distinguishing it by implication from fostering, where a child is placed temporarily in the custody and care of adults other than its birth parents without any such transference. Maori in contrast use a single term to refer to all situations where adults other than birth parents and grandparents are the primary care-givers of a child for any significant period.[85]

Under the *Adoption Act* the ties between the child and his or her natural parents are extinguished which the Maori do not approve of. The Maori view is that the parental role is not exclusive. The biological parents play a supplementary role as caregivers.[86]

In Australia, the Law Reform Commission has suggested that the Aboriginal peoples do not consider traditional child-caring practices as "adoption" but rather as a form of substitute

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[84] *Ibid*. at 27. The Commission, prior to the *Indian Act* provision on customary adoption in 1985, recommended statutory provisions which set up a registration system for recognition of the adoption. The Commission concluded that the concept of adoption was, and the concept of guardianship was not, an appropriate description of the practice. This contrasts with the conclusion of an Australian Commission that adoption was not an appropriate concept because the Aboriginal community did not see it that way but as a concept closer to guardianship.

[85] J. Metge & D. Durie-Hall, in *Family Law Policy in New Zealand,* c.2, note 20 at 71.

[86] *Ibid*. at 72.

child care or "fostering" arrangements.[87] The Commission concluded that the concept of adoption set out in the law should not apply:

> It is preferable to ensure the retention of children within Aboriginal families and communities, thus protecting appropriate arrangements for custody.[88]

The New South Wales Law Reform Commission in a recent *Discussion Paper*[89] reviewing all adoption law practices commented:

> Adoption, as it is currently defined, is an unknown institution in Aboriginal customary law. The separation of children from natural families and the absolute transfer of parental rights are incompatible with the basic tenets of Aboriginal society.

The issue of whether or not it is appropriate to impose an inaccurate concept on this practice is not confined to customary adoption. The effect that the legal system has in shaping a society is a matter which is raised in any society in which there is more than one set of values and cultures. Initial research indicates that, as with Aboriginal people elsewhere, the Mi'kmaq have a traditional practice of customary adoption and caregiving.[90]

Given the recognition of the practice under the *Indian Act*, provincial recognition of customary adoption is needed in order to achieve consistency between the federal and provincial laws affecting Aboriginal peoples. Of particular concern are the areas of child protection and adoption proceedings, both of which fall within provincial legislative jurisdiction in relation to Aboriginal children.[91] For example, "parents" by customary adoption are not specifically recognized in the *Act* which may mean that if the child has been taken into care or placed for adoption, the caregiving parents may not always receive notice. A similar concern exists for some members of the Black Nova Scotia community. By contrast, under federal legislation, a notice concerning an Aboriginal child covered by the *Indian Act,* would have to be given to the adoptive parents of a child. The principles of fairness and justice toward Aboriginal people suggests that since this practice is recognized by the different Bands and by the *Indian Act*, it should also be recognized by legislation. Customary adoption has been practised and recognized by Aboriginal people for many centuries although the *Indian Act* has only recently formally recognized this practice for all purposes under the *Act*. Aboriginal people believe their practices to be free of many of the

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[87] Report No.31: *The Recognition of Aboriginal Customary Law*, vol. 1, 1986 at para 383.

[88] *Ibid.* at para 386.

[89] *Review of the Adoption of Children Act, 1965*, (N.S.W.) Discussion Paper 34, 1994 at 192-93.

[90] A researcher on this project, V. Paul, interviewed people from a number of communities to develop a broad picture of whether customary adoption was practised by the Mi'kmaq people and how it was understood or recognized in the Community. The Mi'kmaq community in Nova Scotia comprises at least 13 communities located throughout the province, although the geographic delineation of groups does not follow provincial boundaries. There are also Mi'kmaq people who do not live on the settlements governed by federal law. As of March 1993, there were believed to be 9,698 registered Mi'kmaq of which 2,965 lived out of the settlement: *Mi'kmaq Present and Past: Resource Guide* (Nova Scotia Department of Education, 1993) at 5.

[91] *Children and Family Services Act*, S.N.S. 1990, c5.

hostilities evident in Anglo-Canadian society and believe these practices should be respected and recognized.

As noted, the laws governing adoption are not the focus of the Commission's project on the *Status of the Child*. However, the issue arises in the context of determining parenting relationships and in seeking to ensure that reform of the laws of Nova Scotia take into account the views of historically under-represented groups. The Commission considered that customary adoption is inherently different from adoption under the law today and were concerned about the effect of determining the legal relationship in this way. It was the view of the Commission that piecemeal changes should not be made in this area of law in isolation from other changes. Consequently, the majority of the Commission concluded that while the draft *Status of the Child Act* should not deal with customary adoption, the law on adoption and other provincial laws affecting children should be comprehensively reviewed to take into account the practice of social parenting. In addition to customary adoption, there are also

many grandparents who wish to have a legally recognized parent-like role in relation to their grandchildren.[92]

The Commission recommends that the legislation governing adoption in the province should be reconsidered to recognize the practice of customary caregiving. Although the term "adoption" is frequently used to describe the practice, the legal concept of adoption is based on Anglo-Canadian[93] law and it is not necessarily a concept that accords with the Aboriginal understanding of relationships and responsibilities between adults and children.

(b) Assisted conception

Assisted conception is the term used in this Report and in the draft *Status of the Child Act* to describe reproductive technologies used to increase the chance of conception.[94] The moral and ethical concerns arising out of the use of this technology persuaded the government of Canada in 1989 to establish a Royal Commission to study its implications and to provide recommendations on its availability.[95] The subject has generated considerable discussion as to the relationship and rights of the various participants of the technology. This has coincided with overall changes in family structure. For example, there are many same-sex

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[92] This issue is discussed in K. Czapanskiy, "Grandparents, Parents and Grandchildren: Making a Case for Inter-dependency in Law" (March 1994) presented at Columbia University, Law School, to be published in the *U. Conn. L. Rev.*.

[93] The concept was developed in England by a Judeo-Christian society with particular ideas and values regarding the nature of relationships between people.

[94] These procedures, which range from donor insemination (with variations as to the donor and as to whether the recipient is the intended social mother) to *in vitro* fertilization and to embryo transfer are available in health care facilities in many areas of Canada.

[95] The Royal Commission on New Reproductive Technologies was established in October 1989 and released its Final Report late in 1993. In the course of its existence, the Commission produced numerous shorter papers on specific issues such as "surrogate" motherhood and donor insemination, *e.g.* R. Achilles, *Donor Insemination: An Overview Paper*, 1992.

couples who choose to be parents.[96]

As noted earlier, the Uniform Law Conference of Canada's model law, the *Uniform Child Status Act* adopted in 1982 was amended in 1991 specifically to take into account reproductive technology. It provides that a sperm donor is not recognized as the father of the child although the birth mother will always be recognized as the child's legal mother, at least until adoption of the child. In its *Discussion Paper* in 1993, the Law Reform Commission of Nova Scotia expressed the view that the law governing reproductive technology should be dealt with comprehensively and not as part of this Report. That is still the view of the Commission. However, the Commission recognizes that the issue must be addressed in the draft *Status of the Child Act* so as to avoid the situation where sperm or ovum donors are regarded as the legal parents contrary to the intention of the parties involved. In its *Discussion Paper,* the Commission suggested that donors of sperm and ova should not be recognized as the legal "parents" of a child born as a result of assisted conception. This view is shared by numerous other law reform bodies,[97] and has been implemented in legislation in those jurisdictions that have provided for the status of children of assisted conception.[98]

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[96] *E.g.*, the recent American case of *Thomas S.* v. *Robin Y.*, note 67, reflects the new demands placed on the law. The case involved a lesbian couple who had children using known sperm donors (one of them being Thomas S.). He and the co-mothers agreed that if the co-mothers sought to do so, the child could meet him. Eventually he met the child and over a number of years, had contact with her. The court case involved a claim by Thomas S. for an order of paternity and two weeks visitation with the child alone. The trial judge recognized the social reality of the child's co-mother parents as the "family unit" and the lack of relevance of the genetic tie as an overriding force. This case may signal a shift to more legal recognition of parenting as a social role *vis-a-vis* the child. Alternatively, the case could be viewed as falling within the family law principle that each case is decided on the basis of the best interest of the child.

[97] See, *e.g.*, the Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters, 1985* vols. I and II; Alberta Law Reform Institute, note 8; British Columbia, Royal Commission on Family and Childrens' Law, *Ninth Report of the Royal Commission on Family and Children's Law: Artificial Insemination* (1975); Law Reform Commission of Canada, *Medically Assisted Procreation* (Working Paper 65, 1992). But the Law Reform Commission of Saskatchewan, *Tentative Proposals for a Human Artificial Insemination Act* (1981), suggested that the donor be accorded parental rights where the donor was not anonymous and knew or had reason to know that the mother was unmarried; was separated from her husband; or that her husband did not consent to the procedure. The resulting support obligation would terminate when another person, such as the husband of a woman who marries subsequent to the birth, legally assumes the support obligations toward the child.

[98] Quebec was the first jurisdiction in Canada to enact legislation dealing with artificial insemination. In the common law provinces, the *Children's Law Act* S.N. 1988, c.61, s.12 and the *Children's Act*, R.S.Y.T. 1986, c.22, s.13 deal with artificial insemination through provisions similar to those put forward by the Uniform Law Conference of Canada in the *Uniform Child Status Act* (1982) as amended in 1991. In Britain *The Family Law Reform Act* 1987, c.42 provides for children born of donor insemination. In the United States, the *Uniform Status of Children of Assisted Conception Act* was introduced in 1988. To date, it has been adopted by two states, North Dakota in 1989, and Virginia in 1991. In addition, at least twenty-five other states have passed artificial conception legislation. Most Australian states

The draft *Status of the Child Act* deals with assisted conception on several points. Under s.7, issues relating to sperm donation are addressed and, for the most part, follow the Uniform Law Conference of Canada's model *Act*. The legal relationship of parent and child will be determined by the context of the donation. For example, where the sperm donor does not intend to be the social parent of the child (for example, anonymous donation), he will not be regarded as the legal father. In other cases, where the sperm donor would have been the social father, he will be considered the legal father of the child. This is to ensure that the law fulfils the expectations of those making use of the technologies. The other issue relates to donated ova or embryos. In this case, the woman who gestates the foetus may or may not be the intended social mother. The situation where she is not, is one of the instances sometimes called "surrogacy". Currently in Canadian law, the woman who gives birth is considered to be the legal mother of the child irrespective of the means of conception, although she may allow the child to be adopted and may end her legal relationship with the child. The model law proposed by the Uniform Law Conference of Canada codifies this common law position. This is also the position adopted in the draft *Status of the Child Act* in this Report. A more detailed consideration of both sperm and ovum donation follows. The main recommendation of the Commission is that, as with adoption, assisted conception be considered an exception to the principle that the biological parents are the legal parents of the child.

(i) Sperm donation

S.7(4) of the draft *Status of the Child Act* provides that the donor of sperm used in assisted conception is deemed not to be the father of the child. However, assisted conception may occur using the sperm of a man who also intends to be the social and legal father.[99] Sperm may be frozen for later use, thus permitting conception to occur after the death of the man. In such a case, s.7(5) of the draft *Act* deems the child to be the child of the deceased, but only for the purpose of birth registration and inheritance.[100]

While there is some debate on the issue, the Commission is of the opinion that the rights of the child posthumously conceived by artificial insemination using the sperm of the mother's husband or partner should be the same as they presently are for children born during the lifetime of the presumed father. However, to extend all rights to the child conceived posthumously may be unfair in some circumstances involving third parties. For example, to extend the availability of *Fatal Injuries Act* benefits to a child posthumously conceived is open to abuse to the detriment of the third party tortfeasor. The Commission recommends that legal recognition of the paternity of children conceived posthumously should apply for

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have also dealt with the issue: *Artificial Conception Act* 1984 (NSW); *Status of Children Act* 1984 (Vic); *Family Relations (Amendment) Act* 1984 (SA); *Status of Children (Amendment) Act* 1984 (Tas); *Artificial Conception Act* 1984 (WA); *Artificial Conception Ordinance* 1985 (ACT); *Status of Children Amendment Act* 1985 (NT); *Family Law Amendment Act* 1983 (Cth); *Marriage Amendment Act* 1985 (Cth).

[99] *E.g.*, where the man has a spinal cord injury; where the man has a reduced sperm count or the woman has an immune response to the partner's sperm, the sperm may be treated in a laboratory before being used to inseminate his partner; or when a man is to undergo gonadal surgery, sperm may be stored for later use.

[100] If the insemination where done after the couple had separated, the man would not be presumed to be the father under s.12(1) of the draft *Act* unless there was a joint acknowledgement or a court order to this effect.

the purposes of inheritance, maintenance after death under the *Testators' Family Maintenance Act* and birth registration. Perhaps the most contentious issue in extending the child status and parentage provisions to children conceived posthumously is the concern of personal representatives in distributing or ascertaining the beneficiaries of the deceased's estate. It is this issue which has persuaded other law reform agencies that children conceived posthumously should not receive the benefits of the law of succession.[101] However, recommendations have been made in at least one jurisdiction to alleviate these problems.[102] The Ontario Law Reform Commission suggests that dispositions of property already made at the time of conception should not be disturbed. Similarly, distribution should not be postponed because of the existence of frozen sperm. The Ontario Report would also see inheritance rights vesting in a foetus at the time of ascertainment of possible beneficiaries.

The provision in the draft *Act* on conception after death are consistent with the comparable recommendations in this Report for extending inheritance rights to children born outside of marriage generally. As noted above, the extension of presumptions of paternity to children conceived posthumously would need to carry with it the right to register the presumed father as the father of the child and will affect the interpretation of the *Vital Statistics Act.*[103]

The Law Reform Commission of Nova Scotia in the draft *Status of the Child Act* adopts the approach taken in other jurisdictions[104] that there be presumed consent of the person who will be the social and legal father of the child, to the assisted conception procedure. Although the presumption of consent may be rebutted by the father, it will operate to ensure

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[101] *E.g.*, the United Kingdom, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd. 9314, 1984) para.10.9 at 55 and para.10.15 recommended that a child who was not *in utero* at the date of the death of its father should be disregarded for the purposes of succession and inheritance. The Report expressed the view that posthumous insemination of a widow "should be actively discouraged" because it could cause problems with inheritance, para.10.9. The views were largely adopted in the New South Wales *Report on Artificial Insemination*. That Report recommended that the child not be considered a child of the deceased for the purposes of inheritance or succession to property, whether on the testacy or the intestacy of the father, an exception being where the father has made specific provision for the child in his will. The New South Wales Commission would allow the child the right to make a claim under the *Family Provision Act 1982*, for maintenance where inadequate provision was made in the father's will.

[102] The Ontario Report, note 94 at 182-83, makes proposals which the Commission recommends be adopted. However, the Ontario Report makes no recommendations concerning maintenance out of the presumed father's estate.

[103] *S.4(4) provides that the "birth of a child of a married woman shall be registered showing the particulars of the husband as those of the father of the child." The language of the Vital Statistic Act* may need more general reform to deal with common law relationships Nevertheless, the changes in the draft *Status of the Child Act* will not be inconsistent with this provision and may assist in interpretation.

[104] The consent for assisted conception is required of the husband or partner of the woman in all jurisdictions which have enacted legislation dealing with the subject. See the Ontario Law Reform Commission, note 94 at 176; the Alberta Law Reform Institute, note 8 at 92; and the Law Commission (England) Working Paper No. 74, *Family Law: Illegitimacy (1979)* 12, para 10-12 at 138.

that the child's interest in having responsible adults designated as caregivers is protected.

(ii) Ovum or embryo donation

In the case of women, the issue is not resolved as easily. In most cases the woman who gestates a foetus until birth will be the genetic mother. However, this is not the case where the woman receives an ovum donation or gestates an embryo of which she is not the genetic mother. The Law Reform Commission's recommendation in the draft *Act* reflects the common law presumption of a genetic link based on birth. An ovum donor, like a sperm donor, is not regarded as the legal parent of the resulting child. This approach assumes that the gestational mother intends to be the social mother of the child. This would not be the case where an arrangement has been made for the gestating woman to relinquish the child once it is born. These so called "surrogacy" arrangements are viewed as open to abuse and not in the best interest of the child.[105] Most agencies which have studied the issue have recommended that "surrogacy" arrangements be unenforceable against the gestational mother.[106] Although the Ontario Law Reform Commission has recommended recognition of these types of contracts,[107] the Royal Commission on New Reproductive Technology strongly urged that provinces that have not already done so to legislate to the effect that the

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[105] *E.g.*, Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, note 94 at 33. The Report suggests at 91 that it is the "transfer of custody, with the parental rights and responsibilities incident thereto, that lies at the heart of the surrogate motherhood controversy". The enforceability of agreements to transfer custody, even from one presumed parent (the surrogate mother) to another (the biological father) is in doubt. The common law has, historically, rejected attempts by either of the child's father or mother to transfer custody of the child, even to the other parent. An exception to this rule has developed where the agreement has been found to be "*bona fide* for the benefit of the child": *Roberts* v. *Hall* (1882), 1 O.R. 397 (Div. Ct.). The court was also prepared to recognize, as an exception to the general rule, circumstances where the failure to enforce the agreement would endanger the child. While these views received support by the Supreme Court of Canada in *Chisholm* v. *Chisholm* (1908), 40 S.C.R. 115, subsequent decisions have not uniformly followed the approach. Indeed, a decision of the English High Court of Justice, Family Division, dealing with an application for access by the biological father where there was a breach of the "surrogate" arrangement, found the agreement to be void as against public policy. Mr. Justice Cromyn stated, in *obiter*, that such an agreement was "pernicious" since it was for the purchase and sale of a child: *A.* v. *C.*, unreported (June 20, 1978), aff'd, unreported (July 18, 1978, C.A.). See also, M. Shanley, "*Fathers' Rights, Mothers' Wrongs?: Reflections on Unwed Fathers' Rights, Patriarchy and Sex Equality"* (1994) presented at Columbia University Law School, to be published in J.C. Callahan, ed., *Reproduction, Ethics and the Law: Feminist Perspectives* (Bloomington: Indiana University Press, forthcoming).

[106] *E.g.*, The American College of Obstetricians and Gynaecologists, "Ethical Issues in Surrogate Motherhood" in A.C.O.G. Statement of Policy, 1983; Queensland, *Report of the Special Committee Appointed by the Queensland Government to Enquire into the Laws Relating to Artificial Insemination, In Vitro Fertilization and Other Related Matters* (1984); New South Wales Law Reform Commission, *Artificial Conception, Report 3, Surrogate Motherhood* (December, 1988); *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technology* (Ottawa: Minister of Government Services Canada, 1993).

[107] *Report on Human Artificial Reproduction and Related Matters*, note 94.

woman giving birth is the legal mother until she decides to transfer the legal relationship.[108] After considering these issues, the Commission concluded that the birth mother should be considered the legal mother of the child in all cases of assisted conception, whether or not she is the genetic mother and whether or not she intends to retain custody of the child. This is consistent with provisions in the Uniform Law Conference's model *Uniform Child Status Act*.

The majority of the Commission recommends that:

1. **The draft *Status of the Child Act* contain two exceptions to the principle that the biological parents of the child are the legal parents, namely legal adoption and assisted conception.**

2. **The government consider reform of the law on adoption and other matters governing children to take into account customary parenting practices.**

3. **Further study and research on law and policy be carried out to respond more comprehensively to the regulation of reproductive technology in Nova Scotia.**

4. The law and legal system in Nova Scotia should be reformed by the adoption of the draft *Status of the Child Act* which reflects the principles of equality, clarity and certainty of the law.

It was pointed out in Recommendation 2 that the Commission in deciding to recommend reform considered two questions. The first, which was discussed in Recommendations 2 and 3, is whether the biological foundation of the parent and child relationship should be altered. The second question is whether the reform of the law should be in the form of a new *Act* or in the form of amendments to existing laws. In this section the way in which reform should occur is discussed. The majority of the Commission felt, after balancing a variety of factors discussed below, that a new law was required to fully address the reforms needed. One Commissioner favoured an *Act* which abolishes the distinction and lists consequential amendments but which would go no further.[109] This section outlines the reasons of the majority of the Commissioners for the recommendation and then considers the consequences of reform on various areas of law. In the draft *Status of the Child Act* these appear simply as a list of consequential amendments that remove such words as "legitimate" or "illegitimate" from the law. However, the majority of the Commissioners felt that, since these seemingly technical changes involve policy matters, it was important to set out the Commission's views in the Report.

The Commission has considered different ways that the law could be changed to carry out these principles for reform. To some extent, law reform can be achieved simply by removing the word's "legitimate" and "illegitimate" from the existing laws, and in fact, this is done in the consequential amendments proposed by the Commission.[110] However, the concept that

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[108] *Proceed with Care*, vol. 2, note 103 at 690.

[109] See dissent, note 68.

[110] These laws include: *Children and Family Services Act,* R.S.N.S. 1990, c.5, ss.3(1)(r), 67(1)(f), 72(4); *Fatal Injuries Act*, R.S.N.S. 1989, c.163, s.11; *Intestate Succession Act*,

children are treated differently, depending on their birth status, is embedded in the operation of the law[111] and also in the case law interpreting words in legislation such as "father" and "mother" or other social relationships. The case law also applies to the interpretation of seemingly neutral words such as "child", "issue", "next-of-kin" and "parent",[112] found in statute law and legal documents such as wills. As pointed out by the Alberta Law Reform Institute's in the context of Alberta's laws:[113]

> Although the *Status of the Children Act* is drafted as a separate statute, this is not essential. What is important is that all of the provisions be situated in one location. An option would be to locate them in a separate Part of an existing statute of general application. If the latter choice is made, we think that the *Domestic Relations Act* would be the appropriate statute.
>
> Our approach to reform has been both comprehensive and detailed. In our view, anything less would be unsatisfactory.
>
> To choose simply to abolish the status of illegitimacy, but not to grapple with the ramifications of abolition, would be unfortunate because a number of adverse consequences are likely to follow. Simple abolition of the status of illegitimacy, without more, would:...[(a) related to a specific law in Alberta]...
>
> (b) obfuscate the issue of legal entitlement where a claim by one person to the property of another now depends upon whether a third person is legitimate or illegitimate;
> (c) leave it unclear whether the rule of interpretation of a will that "child" means a

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R.S.N.S 1989, c.236, s.16.; *Settlement Act* R.S.N.S. 1989, c.423, s.5(1)-(2); *Solemnization of Marriage Act*, R.S.N.S. 1989, c.436, ss.10(2), 20(1), 44(2); *Victim's Rights and Services Act*, S.N.S. 1989, c.14, as am., ss.2(a); *Vital Statistics Act*, R.S.N.S. 1989, c.494, s.4(2). In some Nova Scotia statutes, children born outside of marriage are expressly included within the scope of the statutory language. With the introduction of the draft *Status of the Child Act*, the specific inclusion of "illegitimate" children in these statutes will no longer be necessary and, in some cases, would serve only to perpetuate the use of different terminology for children born within and outside of marriage.

[111] *E.g.*, the differences may result from specifications of the means to determine the paternity of children born outside of marriage. Since the draft *Status of the Child Act* establishes presumptions of paternity applicable to all proceedings in which parentage may be in issue, the existing "presumptions", found in various statutes, should be eliminated. These statutes include *Change of Name Act,* s.8(1)-(4); *Children and Family Services Act,* ss.3(1)(r)(i) and (iii)-(vii), 67(1)(f)(i) and (iii)-(vi) and the *Children and Family Services Regulations*; *Family Maintenance Act*, ss.2(i),(j), 8, 11(1) and 13; *Fatal Injuries Act*, 2(a), 11, 12(a) and (b); the *Tortfeasors' Act*, R.S.N.S. 1989, c.471, s.2(a) and 3; and the *Vital Statistics Act*, 4(6)-(9). Some statutes have no criteria for the determination of parentage. In these cases, different treatment for children born within and outside of marriage is established solely on the basis of the status of "legitimacy". Statutes which will require specific, substantive amendments, in order to achieve the purpose of the child status legislation include: *Intestate Succession Act*; *Public Service Superannuation Act*; *Settlement Act*; and *Solemnization of Marriage Act*.

[112] Some of the affected statutes and terms are: *Intestate Succession Act* R.S.N.S. 1989, c.236, s.2(b), "issue"; *Presumption of Death Act* R.S.N.S. 1989, c.354, s.2(b)(i), "next of kin"; *Probate Act* R.S.N.S. 1989, c.359, ss.21, 36(1), 79 and 95, "next of kin"; *Public Trustee Act* R.S.N.S. 1989, c.379, ss.23(1)(a) and (b), and 23(2), "next of kin"; *Wills Act* R.S.N.S. 1989, c.505, ss.2(a), "issue", and 3(2), 6(c), and 31, "next of kin".

[113] *Status of Children: Revised Report, 1991* at 4 and 5.

legitimate child is abrogated;

(d) attract litigation on the meaning of the words "lawful lineal descendants" in section 1(b) of the *Intestate Succession Act*;

(e) make it difficult to satisfy statutory and common law requirements that fathers be notified of matters affecting their child, or that their consent be obtained;

(f) preserve the necessity to prove parentage by evidence in every situation where the issue arises, instead of settling it for all purposes in one proceeding.

> To choose to make minor amendments, here and there, to incidents of the status would likely lead to unwanted effects in the bits and pieces tinkered with [as] well as in those areas left untouched. Piecemeal reform lends itself to ambiguous, if not inequitable, results.

As noted earlier, the law has been reformed in this area in most jurisdictions in Canada and many other parts of the world. In general, the changes have taken the form of adoption of a single statute. Both the Ontario *Children's Law Reform Act* and the *Uniform Child Status Act*[114] abolish the common law distinction of "illegitimacy" and declares the child to be the child of his or her parents regardless of birth outside of marriage.[115] In the Ontario *Act*, unless a contrary intention appears, all documents, *Acts* and regulations that refer to a child or a person related by blood or marriage are deemed to include the child regardless of the marital status of his or her parents. This provision ends the distinction created by the common law rule of construction, which excludes persons born outside of marriage from words denoting relationship. The *Uniform Child Status Act* is similar but makes the new rule of construction absolute in not containing the "contrary intention" proviso. Both *Acts* apply to all laws made before and after the legislation is in force but only to instruments such as wills made after the legislation is in force. This means that wills executed before the legislation is in force continue to be subject to the existing rules of construction which exclude children born outside of marriage.

The Alberta and British Columbia approach to "child status" differs from Ontario and the *Uniform Law Conference* approach in that reforms are made through amendments to various statutes,[116] which can lead to some uncertainty.

A different scheme from that described in either Alberta or Ontario is established under the *Civil Code of Quebec*. The *Civil Code* provides that, once filiation is established, all children have the same rights and obligations, regardless of the circumstances of their birth.[117] Filiation may occur as a result of biological connection or adoption. In this respect, the law

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[114] Comparable *Acts* in other Canadian jurisdictions include Saskatchewan, *The Children's Law Act;* Newfoundland, *Children's Law Act*; Alberta, *Domestic Relations Act*; New Brunswick, *Child and Family Services and Family Relations Act*; Northwest Territories, *Child Welfare Act*; Manitoba, *Family Maintenance Act*; Prince Edward Island, *Child Status Act*; and the Yukon, *Children's Act*.

[115] See the *Children's Law Reform Act*, Part I, "Equal Status of Children".

[116] *British Columbia, Law and Equity Act*, R.S.B.C. 1979, c.244. Child status and consequential amendments were introduced by the *Charter of Rights Amendments Act, 1985*, S.B.C. 1985, c.68. There are, however, statutes dealing with parentage for all purposes of the law of British Columbia. The *Family Relations Act,* R.S.B.C. 1979, c.121. contains presumptions of paternity for the purpose of child maintenance.

[117] Arts. 522 and 655 *C.C.Q.* However, as noted by P. Girard, "Why Canada Has No Family Policy: Lessons From France and Italy" (1994) 32 *Osgoode Hall L. J.* 579, filiation is itself conceptually different from the relationships established in the Common Law.

is similar to that of the common law provinces.

As noted earlier in the Report, statutory reforms have also been implemented in many parts of the United States.[118] A number of states have adopted legislation patterned on the *Uniform Parentage Act*[119] which eliminates the concept of legitimacy by stating that, "the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."

In Britain, following years of study, the recommendations of the Law Commission respecting the removal of legal disadvantages affecting children born outside of marriage, were adopted by Parliament in the form of the *Family Law Reform Act* of 1987.[120] Prior to 1987, England had for some years accorded equal treatment to children born within and outside of marriage, with respect to their mothers. With the passage of the *Family Law Reform Act* 1969 (Part II), inheritance rights were extended to children born outside of marriage.[121]

It appears that in most other jurisdictions, discrimination against children based on their birth status is removed through a comprehensive *Act* abolishing the distinction. The *Act* usually affects all legislation and common law.

The question of how to accomplish reform was raised in the Law Reform Commission of Nova Scotia's *Discussion Paper* in 1993 where the Commission suggested that "there should be a new law passed which clearly and comprehensively deals with the status of the child." The Commission believes that passing a new law is important, both as a way of clearly stating the law and as a way of educating society as to its importance. Furthermore, there is no single law in Nova Scotia that deals with most areas relating to children.[122] The majority of the Commission recommends that the government of Nova Scotia adopt the draft *Status of the Child Act* found in Appendix A of this Report. In cases where the language of a statute can be broadly interpreted,[123] the passage of the draft *Status of the Child Act* will not require

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[118] See Krause, *Child Support in America*, note 51 at 119, 161-62, 206-12.

[119] See note 52.

[120] U.K., c.42 and discussion earlier in this Report dealing with currency and consistency of the law.

[121] 18 Eliz. II, c.46 (U.K.).

[122] In Nova Scotia, child custody maintenance during the lifetime of the parents are dealt with in the *Family Maintenance Act*. The *Act* also deals with "legitimation" issues. However, parentage is only dealt with as a corollary to maintenance. Child protection and adoption fall within the scope of the *Children and Family Services Act*. "Parentage", for the purposes of birth registration, is dealt with under the *Vital Statistics Act*. Custody, guardianship, maintenance and property inheritance rights of a child, after the death of the child's parent(s), are dealt with under the relevant subject legislation: the *Guardianship Act*, R.S.N.S. 1989, c.189; the *Testators' Family Maintenance Act*; the *Intestate Succession Act*; and the *Wills Act*, respectively.

[123] These laws include: the *Education Act* R.S.N.S. 1989, c.136, s.2(k); the *Family Court Act* R.S.N.S. 1989, c.159, s.7(1); the *Guardianship Act* R.S.N.S. 1989, c.189, s.2(c); and the *Reciprocal Enforcement of Custody Orders Act* R.S.N.S. 1989, c.387, s.2(a).

express statutory amendments to ensure consistency of the law.

In the remaining Recommendations, the Commission outlines some of the provisions of the draft *Status of the Child Act* and discusses how the reforms either codify the existing law or change existing practices.

The majority of the Commission recommends that:

The government of Nova Scotia adopt the draft *Status of the Child Act* and the consequential amendments and principles recommended in this Report.

5. In order to provide for certainty, the *Act* should codify presumptions of parentage, set out provisions for the use of genetic testing, provide for declarations of parentage and the filing of those made in Nova Scotia or out-of-province in a public registry.

(a) Presumptions of parentage

The Commission has concluded that the legal relationship between parent and child should continue to be based on a biological connection, with exceptions for adoption and assisted conception. Since the biological connection may not always be possible to ascertain, the situations that will give rise to a presumption must be set out. Recourse to these presumptions will only be needed where the question arises in court in a particular case.

The Commission, in its *Discussion Paper,* proposed a series of social situations that would lead to a presumption of parentage, in general, paternity.[124] These presumptions found in s.12 of the draft *Status of the Child Act* in Appendix A, codify the rules already found in the law in Nova Scotia and elsewhere [125] or in the Uniform Law Conference of Canada's model

[124] The question of maternity would arise where a woman gestates a foetus derived from an ovum or embryo of another woman. Since such an arrangement would require the involvement of a physician, there would be no dispute as to the fact that the gestational mother was not the genetic mother. The question is, who should be considered the legal mother.

[125] *E.g.*, the United States *Uniform Parentage Act* sets out presumptions of paternity based on marriage or void or voidable marriage before the child's birth; or after the birth with acknowledgement of paternity or the assumption of child support obligations; receipt of the child in the father's home and holding out the child as his own; or a unilateral acknowledgement of paternity that is not disputed by the mother "within a reasonable time". The presumptions have an evidentiary effect in an action under the *Act* to declare that a "father and child relationship" exists, or under the statute law of a particular state to establish specific parental rights and responsibilities. In an action for a declaration that a father and child relationship exists, the *Act* allows for a pretrial informal hearing at which all relevant evidence of paternity may be introduced. The court evaluates the probability of determining the existence of the relationship at trial, and considers whether a judicial declaration to that effect would be in the best interest of the child. The court may recommend a voluntary compromise in which the alleged father acknowledges his paternity and agrees to undertake a defined economic obligation toward the child. If the recommendation is not accepted, the

Uniform Child Status Act. For the most part, they reflect situations where the people indicate by their actions that they are a genetic parent, e.g., cohabitation at the time of conception or signing a public registry regarding parentage with the other parent.

The main social presumption that currently exists is that of marriage. The Commission's recommendation to reform the law by removing the concept of "legitimacy" means that marriage should no longer be considered as a situation leading to a presumption of parentage. Although this is true in principle, the Commission felt that for most people it remains a social presumption and to remove it would cause more confusion than clarity. The majority of the Commissioners concluded that the existing presumption based on marriage should be included in the draft *Status of the Child Act.*

(b) Genetic testing to establish parentage

In all Canadian jurisdictions, legislation on child status provides for the use of genetic tests to establish parentage.[126] These provisions are largely drawn from the model proposed by the English Law Commission and implemented in the 1969 English *Family Law Reform Act*.

Currently in Nova Scotia such tests are not regularly used to establish parentage. However, there is statutory authority for their use in the *Family Maintenance Act* where the results are admissible in evidence to exclude a "possible father" for the purpose of child maintenance.[127] Recently, a Nova Scotia Family Court held that results which were determinative as well as those that are exclusionary may be admitted into evidence.[128] One of the issues of concern to the Commission is whether genetic testing should be expressly dealt with in the draft *Status of the Child Act*.

Where there is an application for a declaration of paternity, genetic testing of mother, child and alleged father may help defeat an application or provide evidence in its support.[129] Genetic testing includes blood typing, HLA typing, and DNA testing in order of increasing power. DNA testing, which is likely to become more frequent for paternity determination, can provide a high degree of probability that the person is a parent (close to 100%) as well as providing conclusive exclusionary evidence.[130]

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action is set for trial. As a result of the declaratory action, the court may order any ancillary relief in the best interest of the child, including support, custody, guardianship and access.

[126] *E.g.*, see *Child Status Act*, S.P.E.I. 1987, c.8, ss.11-12.

[127] S.27(3).

[128] *Shanks* v. *Benjamin* (1987) 80 N.S.R. (2d) 144 (Fam. Ct.).

[129] Genetic tests may establish that a person is not the father of the child (an "exclusion" result) or that he is the father (a "non-exclusion" result). The latter may be used in combination with other evidence to determine who the probable father is. In the interest of certainty, the court may use the test results to issue a declaration that a person is not a parent. Such a declaration could be registered.

[130] The Ontario Provincial Court recognized the use of DNA testing in affiliation proceedings in *S.(C.)* v. *L.(V.)* (February 14, 1992). The court held that the testing may properly be classified as "blood tests" for purposes of the *Children's Law Reform Act*. Where the results of traditional blood tests are inconclusive as to paternity, the court may order the

In most Canadian jurisdictions, courts have the authority to issue a directive[131] for genetic testing on their own initiative. This only applies where a declaration of parentage is not being sought. The Commission believes that this authority should be extended to declaratory proceedings and any other civil proceeding in which parentage is in issue. The authority to order genetic tests must be derived from statute, except where the submission to testing is voluntary.[132] The constitutional validity of the court's power has been upheld on the grounds that prior consent is required before testing will be done.[133]

The draft *Status of the Child Act* provides that the court may direct genetic testing in proceedings in which parentage is in issue on conditions and subject to terms it considers appropriate. This would include consideration as to cost. In some cases it may be appropriate

for the court to apportion the costs between the parties as is expressly permitted in Saskatchewan and Newfoundland.[134]

The provisions in the draft *Status of the Child Act* clearly state, as they do in several provinces, that no test shall be performed on a person without his or her consent.[135] Although the age of majority in Nova Scotia is nineteen years[136] the Commission considers that the age of consent to submit to genetic testing should be sixteen years. This is the age at which individuals may consent to medical or dental treatment to their benefit, provided that they

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parties to have DNA tests. See also, B.E. Dodd, "DNA Fingerprinting in Matters of Family and Crime" (1986) 26 *Med., Science & Law* 5, cited in M. Wilson, "Impact of the Uncertainty of Paternity on Family Law" (1987) 45 *U.T. Fac. L. Rev.* 1 at 23.

[131] There is some judicial authority to suggest that the court cannot compel the taking of blood or other invasive tests but is limited to issuing a directive. *Droit de la famille-206*, [1986] R.J.Q. 2038, reversing (1985), 49 R.F.L. (2d) 428 (C.S. Que.), leave to appeal to S.C.C. refused (1987), 7 R.F.L. (3d) xxxiv (note).

[132] *J.* v. *N.*, [1976] 5 W.W.R. 211 (Man. C.A.). But see *Re M.C. and L.A.C.* (1990), 66 D.L.R. (4th) 421 (B.C.C.A.) where blood tests were ordered in the absence of specific legislation on the basis that it would be wrong to deny the use of the best evidence to the court unless overriding considerations show it to be to the child's detriment.

[133] *Re Honsiger and Kilmer* (Oct. 11, 1984) (Ont. Prov. Ct.); *Re. N. and D.* (1985), 49 O.R. (2d) 490 (Prov. Ct.); *P.(K.)* v. *N.(P.)* (1988), 15 R.F.L. (3d) 110 (Ont. H.C.) and *H.(N.)* v. *R.(J.D.)* (1990), 104 N.B.R. (2d) 173 (Q.B.).

[134] The draft *Status of the Child Act* authorizes regulations governing genetic testing. In addition, the authority to make regulations should extend to setting test conditions, including the persons or facilities authorized to conduct genetic tests. Finally, there should be authority to prescribe procedures for the admission of genetic test reports into evidence. Enabling provisions to this effect have been enacted in Ontario, Prince Edward Island and the Yukon, although none of these provinces has yet passed any such regulations.

[135] Saskatchewan, Yukon and New Brunswick have provisions to this effect.

[136] *Age of Majority Act* R.S.N.S. 1989, c.4. The Act provides for a presumption of adult mental capacity in persons aged nineteen years and older.

are capable of appreciating fully the nature and consequences of the treatment.[137] This is in keeping with the common law position for persons below the age of "maturity" or "emancipation".[138] The Commission proposes that substitute consent should be permitted for mentally incompetent adults. The conditions for such consent are that it be given by the person having "care and control" of the adult and only where a legally qualified medical practitioner certifies that this will not be prejudicial to the adult's proper care and treatment.

It is anticipated that the court would order testing[139] unless it was contrary to the child's best interests.[140] The application for an order granting leave should be accompanied by admissible evidence, whether *viva voce* or affidavit.[141] Where there is an existing presumption of parentage, the courts have held that the presumption must be rebutted, on the balance of probabilities, before leave to obtain blood tests will be granted on application of the presumed father.[142] A court in another province required that a *prima facie* case of paternity, based on evidence of sexual intercourse at the relevant time and the existence of a "reasonable possibility" of biological parentage, be made out before leave will be granted.[143]

Under the provision in the draft *Status of the Child Act*, the court could name any person to submit to testing. The court would, as a matter of normal procedure, allow the person subject to the order an opportunity to be heard. The results of testing or the failure to consent to testing would be admissible as evidence. The evidentiary weight of the results in relation to other evidence would be a matter of judicial discretion. Where a person named in an order

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[137] E.I. Picard, *Legal Liability of Doctors and Hospitals in Canada* (Toronto: Carswell,1984) at 55; B. Dickens, *Medico-Legal Aspects of Family Law* 94 (Toronto: Butterworths, 1979).

[138] Picard, *ibid.* at 60.

[139] Ontario courts have held that leave to obtain blood tests should only be withheld where the health of the infant might be prejudicially affected, *Re H. and H.* (1979), 25 O.R. (2d) 219 (H.C.); *F.(M.)* v. *S.(R.)* (1991), 83 D.L.R. (4th) 717 (Ont. Prov. Div.). cf., *C.(M.)* v. *C.(L.A.)* (1990), 42 B.C.L.R. (2d) 379 (C.A.), where the court allowed an appeal from an application to compel submission to blood testing, brought by the husband in divorce proceedings. The court held that the interests of justice required it to have the best evidence available. In the absence of a strong reason to the contrary, the interests of justice were to override the interest of the child in preserving its "legitimacy". Delays of four and seven years have not prevented courts from granting an order for leave to obtain blood tests. See respectively, *Wilson* v. *Stewart* (1982), 45 O.R. (2d) 96 (Fam. Ct.); *F.(M.)* v. *S.(R.)*, cited above. In contrast see *McCartney* v. *Amell* (1982), 35 O.R. (2d) 651 (Fam. Ct.) and *Rhan* v. *Pinsonneault* (1979), 27 O.R. (2d) 210 where leave was denied on this basis.

[140] *J.(R.)* v. *M.(S.)* (1990), 27 R.F.L. (3d) 262 (B.C.C.A.), granted leave to appeal; to S.C. (1990), 25 R.F.L. (3d) 105 (B.C.S.C.). See, also, *Korolyk* v. *London* (1988), 53 Man. R. (2d) 31 (Q.B.).

[141] *D.* v. *S.* (1980), 30 O.R. (2d) 225 (Div. Ct.); and *D.(J.R.)* v. *S.(L.K.)* (1980), 20 R.F.L. (2d) 423 (Ont. Div. Ct.).

[142] *G.(F.)* v. *G.(F.)* (1991), 32 R.F.L. (3d) 252 (Ont. Gen. Div.), affirming November 6, 1990, Cork, Ont. Master.

[143] *Comeau* v. *McMaster* (1985), 67 N.B.R. (2d) 35 (Q.B.).

refuses to consent to testing, the Commission recommends, as in other jurisdictions, that the court be permitted to draw any inference it considers appropriate.[144] However, when a parent or legal guardian refuses to consent to testing of a child or where an adult is unable to consent[145] the inference drawn is to be "without prejudice to the child in future proceedings on behalf of the child".[146]

(c) Judicial declarations of parentage

In the Uniform Law Conference's model *Uniform Child Status Act* there are a number of presumptions, including marriage and legitimation by marriage that reflect the existing law and extend it to other situations. In all cases, the presumptions operate as *prima facie* legal recognition of parentage. Where a presumption exists, and is not successfully rebutted on the balance of probabilities, a court would confirm parentage by making a declaratory order.

The *Uniform Child Status Act* provides for judicial determination of the legal relationship of parent and child in the form of a "parentage order". The determination may be based on situations or behaviours of the parties that give rise to a presumption of parentage, or, with the consent of the parties, on genetic testing.

The draft *Status of the Child Act* provides for declarations of parentage. The evidence for issuing a declaration could come from the statutory presumptions set out in the draft *Act*, from genetic testing, or from other evidence considered by the Courts.

(d) Filing of a declaration of parentage made in Nova Scotia or out-of-province in a public registry

In order to provide for greater certainty, orders of parentage from Nova Scotia and out-of-province, should be filed in a public registry. Such a registry could also be used to record unilateral declarations of parentage, as well as statements, acknowledgements and joint declarations. Such a registry would facilitate legal notification of parents of children born outside of marriage who do not live with the child of matters affecting the child.

In Ontario, the local clerk or registrar of every court is required to provide the Registrar General with a statement respecting each order or judgment of the court that confirms or makes a finding of parentage. Once received, the Registrar General of Vital Statistics will presumably amend the birth registration to recognize the effect of a declaratory order although this is not mandated by the *Children's Law Reform Act*. Instead, the *Act* provides that nothing in the *Act* shall require the Registrar General to amend the registration, other than in recognition of a declaratory order. Under the *Act* parents may file a unilateral or joint

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[144] The Uniform Law Conferences's model *Uniform Child Status Act* provides that the court may give leave to obtain blood tests, which can be used in evidence if requested by a party to the declaratory proceedings. Where the person refuses to have blood tests, the court can draw any inference "it considers appropriate".

[145] The court in *Francis* v. *Robertson* (1987), 60 O.R. (2d) 47 (U.F.C.) held that where the putative father was comatose and his committee refused to provide a blood sample, it was unjust to draw an adverse inference since the *Act* did not require that an inference be drawn.

[146] See Alberta Law Reform Institute, *Status of Children*: *Revised Report 1991*, draft *Act*, s.15(5).

declaration of parentage. Any interested person may, once the Registrar is satisfied as to the reason for requiring it, inspect and obtain a certified copy of a statutory declaration. A copy of a statement respecting an order or judgment may also be inspected and obtained, but without the qualifications that attach to the request for a copy of a statutory declaration.

The model *Uniform Child Status Act* is substantially the same as the Ontario legislation in relation to the filing and inspection of parentage documents, orders and judgments. However, a few minor differences may be noted. Firstly, the *Uniform Child Status Act* provides for the filing and inspection of a written acknowledgment of paternity, with which the mother of the child concurs. Secondly, it makes provision for the inspection of a "statutory declaration" or "request" filed under the *Uniform Vital Statistics Act*. The "statutory declaration" referred to is that of a married woman who lives separate and apart from her husband, where she states that her husband is not the father of the child and names another person to be the father. The reference to a "request" under the *Vital Statistics Act* is a joint request filed by an unmarried woman and a person acknowledging himself to be the father of the child.

The Law Reform Commission's draft *Status of the Child Act* provides for the filing of parentage documents with the Registrar. These include orders or judgments of a Court on

matters relating to parentage, and written acknowledgements. Only the former will require the Registrar to amend the registry of births.

It is important that the draft *Status of the Child Act* provide rules for the recognition of orders or other determinations of parentage from outside the jurisdiction as has been done in the *Uniform Act*. It is also important that confidentiality of information in the registry be respected. To ensure this, the draft *Status of the Child Act* includes a provision to this effect.

The majority of the Commission recommends that:

1. **The presumptions of parentage set out in s.12 of the draft *Status of the Child Act* be adopted.**

2. **The draft *Status of the Child Act* contain provisions enabling the use of genetic tests to establish parentage.**

3. **The *Family Maintenance Act* be amended to allow that genetic tests be admissible to provide confirmatory as well as exclusionary evidence.**

4. **The draft *Status of the Child Act* provide for declarations of parentage.**

5. **To provide for greater certainty, declarations of parentage made in Nova Scotia and out of province be filed in a public registry. These declarations would be treated as confidential.**

6. The draft *Status of the Child Act* should comprehensively establish equality of children regardless of their birth status.

Distinguishing children born outside of marriage from those born within may have an impact on them in many areas. Even where the impact may not be adverse in every case, the distinction itself is discriminatory and should be abolished. The Commission looked at the

legal impact of abolishing the distinction in matters involving notice and consent (adoption, child protection, marriage of a minor); custody, guardianship and maintenance; inheritance; birth registration and change of name; and statutory rights and benefits. The underlying question in each of these areas is whether there are any social policy reasons for maintaining a distinction between children based on the marital status of the child's biological parents. As will be seen, this question arises since the distinction that now exists sometimes operates to the benefit of the child born outside of marriage. Where this is the case, the Commission believes that rules and procedures should be altered in favour of improving the situation for all children rather than by removing a benefit.

(a) Matters involving notice and consent

(i) Unilateral declarations of parentage

The Commission recommended earlier in this Report that the draft *Act* establish a parentage registry for orders of parentage. It is also recommended that voluntary unilateral declarations of parentage (usually paternity) could be registered in a parentage registry.[147] This is part of

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[147] Commissioner Ring dissents from this recommendation:

"I strongly disagree with this proposal. It ignores the rights of the mother and the social relationships important for the child's development. To acknowledge the rights of a child irrespective of the marital status of the child's parents, it is not necessary to enhance the rights of biological fathers. Allowing men to place notices at a registry reduces a woman's status to that of being a uterus within which a man has the right to create a child devoid of any relationship with the mother and then submit a proprietary declaration with respect to the child.

These recommendations would enable a man to pursue a unilateral objective of creating a child by seeking out a woman to bear his child and orchestrating her becoming pregnant. He could date a woman until they had sex or could engage in a one-night-stand. He could refuse the woman's request to use a condom, overpowering her wishes. Prior to even knowing if she is pregnant he could go to a paternity registry and place his name on the registry. He could refuse to have any relationship with the mother and child until the child is of an age he chooses, then elect to assume a parental role. At that point, irrespective of his character, he would receive full father and parenting privileges simply because of a ten minute sexual act.

At this point, the woman may have entered into a permanent relationship, in a loving and nurturing environment which is best for the child. In such a case the biological father is no more of a father to that child than is a student who is a sperm donor for artificial insemination.

What in this provision prevents a rapist from going and registering his name so that he can have privileges as a biological father?

Does this effectively constitute an attempt by society to control a woman's sexual activities by allowing any man a woman has sex with to go to a parenting registry and register his name? Who gets to view the registry? This is shades of Margaret Atwood's *A Handmaid's Tale*.

A woman who chooses to remain pregnant has a relationship with her child during gestation. As it grows she nurtures the fetus in her womb and after birth she nurtures her child in her arms and with her breasts. Always she is a mother. Who she chooses to share that parenting responsibility with is her choice."

the Prince Edward Island *Child Status Act*.[148] The registry would provide a means of determining, for a variety of purposes, who should receive notice of matters affecting the child. As noted by the Alberta Law Reform Institute in its recommendations:

> Parents have the right, independent of guardianship in some cases, to be notified of certain matters relating to their child. It is not always easy for a person who is required to give notice or obtain consent to know of the existence of a non-custodial parent.... Registration will help ensure that parents receive notice or are contacted for consent where they are entitled to it. Similarly, it will aid those persons who are under a duty to give notice or obtain consent to locate parents who should be notified or whose consent should be obtained.[149]

In the declaration, the person would specify an address for notification which he would be responsible for updating. Although a unilateral declaration would entitle the person to notice, it would not signify a determination of parentage, which would require an agreement with the mother or a court order nor would it have any determinative effect on the legal relationship other than providing for notice.

(ii) Limitation period for notice

In all situations, the time limitations for providing notice to persons entitled to receive it should remain the same. For example, in the *Children and Family Services Act*, the provision of notice to the father of a child born outside of marriage should be governed by the same rules as the current time period for providing notice to fathers of children born within marriage.[150] Similarly, where a man dies intestate (without a will) and it is uncertain as to whether there are any living children of the man born outside of marriage, the time limitations in the *Probate Act*, for giving notice of an estate to missing heirs, should apply equally to locate children born outside of marriage. The Commission also has some specific recommendations on inheritance discussed later in this Report.

(iii) Adoption

There are a number of laws where a distinction is made as to who should receive notice of a decision affecting a child according to the marital status of the child's parents. The most controversial issue that the Commission dealt with is whether the word "legitimate" should be removed from the section of the *Children and Family Services Act* dealing with adoption. This would allow fathers who are not married to the mother of the child but who meet the another criterion for notice to receive it. The current law on adoption in Nova Scotia requires notification and consent of the biological parents of the child to be adopted unless the child is in care. However, when the child is not "legitimate" or "legitimated" the father will not receive notice unless he is:[151]

> (ii) an individual having custody of the child,

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[148] S.P.E.I. 1987, c.8, which provides in s.s.13(1): "Any person may file in the office of the Director of Vital Statistics a Statutory Declaration in the form presented by the regulations, affirming he is the father of a child."

[149] *Status of Children: Revised Report, 1991* at 11.

[150] There is debate about whether or not a biological father who does not fit the *in loco parentis* provisions should receive notice at all. This is discussed later in the report.

[151] S.67(1)(f) of the *Children and Family Services Act*, S.N.S. 1990, c.5.

(iv) a individual, who, during the twelve months before proceedings for adoption are commenced, has stood *in loco parentis* to the child,

(v) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child and has, at any time before the proceedings for adoption are commenced, provided support for the child or exercised a right of access,

(vi) an individual who has acknowledged paternity of the child and who,

(A) has an application before a court respecting custody, support or access for the child at the time proceedings for adoption were commenced or

(B) has provided support for or has exercised access to the child at any time during the two years before proceeding for adoption are commenced....

Under the current law, a biological father who is not married to the child's mother and who does not meet one of these criteria will not receive notice of the proposed adoption and will not have an opportunity to go before the court to oppose the adoption. He may want to present a parenting plan for the child or to obtain parental rights where a step-parent adoption is proposed.[152] A father who falls within the definition of a parent in the *Children and Family Services Act* (he is or was married to the mother, or has, or had, a social relationship with the child) will be notified not later than one month before the adoption hearing. If he fails to appear, his consent is deemed to have been given. On application, the court has the discretion to dispense with consent where the person "is dead; is unable to consent by reason of disability; is missing or cannot be found; has had no contact with the child for the two years immediately preceding; has failed, where able, to provide financial support for the child for the two years immediately preceding the adoption placement; or is a person whose consent in all the circumstances of the case ought to be dispensed with"[153] where it is in the best interest of the child to do so.

It would be possible to achieve equality between children born within and outside of marriage by not giving notice to fathers in either group where the man is not present. If, on the other hand, all fathers are given notice, this would expand the notice provisions to include fathers of children born outside of marriage who had a relationship with the mother at the time of conception or who acknowledged paternity. The majority of the Commissioners believe that the expanded notice is preferable. As noted above, a unilateral declaration, while entitling a person to notice, would not, in and of itself, be determinative of parentage; additional

[152] In *T.(D.)* v. *Children's Aid Society and Family Services of Colchester County* (1992) 91 D.L.R. (4th) 230, the trial judge concluded that the father of a child born outside of marriage should have the opportunity to present a parenting plan. The Court of Appeal reversed this decision in *Re D.T.* (1992) 113 N.S.R. (2d) 74 holding that a father who does not meet the statutory requirements of the definition of "parent" has no standing to challenge the adoption proceedings.

[153] *Children and Family Services Act*, s.75(4).

evidence would be required. One Commissioner,[154] agrees with removing the distinction, but disagrees with the approach adopted by the majority.[155]

A number of reasons have been put forth for not extending notice to all biological fathers where the mother is placing the child for adoption. Where the woman does not know or will not reveal who he is, it may be impossible to trace him. Where there was sexual assault or

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[154] Commissioner Foster dissents from this approach in this instance:

"I agree with the importance of removing the distinction the law makes between children based on the marital status of the child's parents. I also, for the most part, agree with an approach that achieves equality by giving advantages to people who have been disadvantaged rather than by removing existing advantages. However, in the context of the laws regarding notice and the right to consent to adoption, I disagree with the underlying structure of the current provisions in that the definition of "parent" in the *Children and Family Services Act*, includes the father of a legitimate or legitimated child. This section requires the consent of the father to an adoption simply because he is or was married to the child's mother even though he does not fit any of the fairly broad social parenting definitions contained in the *Act*. We have received commentary expressing concern about the effect of delays in the adoption process which could jeopardize the child's opportunity to develop relationships with new parents. It seems to me that this concern applies equally to the married father who is not socially or financially connected with the child as provided in the *Act*. Accordingly, I am dissenting with the Commission's approach on this point and recommend that, rather than extending the range of absent fathers who should get notice and consent, I would remove the section defining a father of legitimate or legitimated child (s.67(f)(ii)) as a parent. This would not exclude the people who are married who have some sort of social or financial connection with the child since they would fall within the other definitions and would get notice on that basis. This would create equality in that it removes a distinction solely on the basis of marriage. I recognize that this section may be there to respond to cases where a woman may wish to remarry or has a relationship with another partner and wishes to have her second partner adopt her children but I believe, on balance, that the woman's view on this matter (since presumably she has decided not to give notice) should take precedence and the presumption should be that her decision is in the best interests of the child unless proven not to be. I realize this Report is not intended to deal with the law of adoption, however, it does affect the legislation in this one context. I also note that the whole question of rights and responsibilities is an area of law and social policy fraught with difficulty and inconsistencies. For example, I am aware that the male can still be called upon for maintenance should the woman decide to keep the child. This reflects a policy which seeks to ensure that there is some financial support for the child and it also serves to advance a social policy which seeks to require responsibility on the part of both people for the consequences of sexual relations. I am also aware of the concerns about people who, having been adopted, have lost cultural connections because of this and may wish to establish them. These are not easy problems and they are not easily reconcilable in our current legal system which seeks to deal with people as property that is owned. After weighing all of these issues, I feel that, in connection with adoption and the notice/consent provisions, the decision of the woman as to what will be in the best interests of the child, namely, in this case, adoption, should be recognized as an express exception to the other amendments and approach we are recommending."

[155] Although no express dissent was filed by Commissioner Ring on this point in her comments, notes 68, 70 and 144, she does not agree that the biological father should be entitled to notice of adoption and agrees with concerns expressed in comments received by the Commission.

other violence against the woman[156] she may not want him to have further contact with her or the child, with justification. Where this is the case, clearly her views should be respected by the court and her wishes prevail. Even where this is not the case, she may believe that the child would be better placed with an adoptive family and that involving the biological father would cause unwanted delay (which many believe can cause great difficulty for a child in bonding later with adoptive parents).[157] However, the Commission notes that this is a problem that could equally arise with respect to an absent father who is married to the child's mother. Justification for giving women greater power of decision is said to derive from her having gestated and nurtured the foetus and later the child. In some cases where men have attempted to intervene in adoption proceedings of a child, they have been excluded from presenting a parenting plan on the basis that they are "casual fornicators".[158] This notion of the "casual fornicator" is based on stereotypes which impose all responsibility for contraception and child-care on women and are based on the idea of the "irresponsible" male who could not be a good father. These ideas are based on long standing stereotypes around male behaviour and are not necessarily accurate or fair, particularly as society is increasingly interested in ensuring that financial responsibility is placed on individuals. The same issue was considered recently in Saskatchewan where the court reviewed the Ontario case, the Nova Scotia case and a decision to the contrary in British Columbia. The court noted the comment regarding unmarried fathers as "casual fornicators" and stated:

> With respect, this perspective seems somewhat out of date, I would rather adopt the reasoning of Huddart L.J.S.C. in *MacVicar, supra,* where the following comments were made (at p.500);
>
> If the concept of illegitimacy had its roots in the view that a child born out of wedlock was the product of her mother's weakness, and thus her burden, the enactment of paternity legislation reflected a changed social reality and a recognition of the weakness of the father. Illegitimacy is no longer a concept recognized by the law. The *Charter of Rights Amendments Act,* 1985 reflects the pluralism of family arrangements in the 1980s. It acknowledges that some parents choose not to marry. So does the *Family Relations Act*. So do the *Estate Administration Act* R.S.B.C. 1979, c.120. Moreover, ordinary experience would inform every fair-minded person that parents are choosing in ever-increasing numbers to have children without marrying. Legislation recognizes that the child should not be penalized for this parental decision.[159]

The best interests of children may mean that they should be given an opportunity for a relationship with their genetic father and mother rather than having the matter determined by the wishes of the mother alone. Actions involving children must be governed by the best interest of the child and, as set out in the United Nations *Convention on the Rights of the*

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[156] This was a concern also raised by the Canadian Bar Association (Nova Scotia), Family Law Section.

[157] This was the view of the Director of Adoptions for Nova Scotia who pointed to an Ontario court decision (*C.E.M.* v. *Ontario Attorney General and Nevins* (1988) 13 R.F.L. (3rd) 113) saying that:

> ...there was a legislative scheme in place [in Ontario] in which all natural fathers were within the definition of "parent". Those professionals in the adoption process found, and the legislature was convinced, that the delays which were often encountered in determining who the father was and getting his consent, or having it dispensed with, led to serious frustration of the legislative object of expeditious adoptions to the prejudice of the best interests of children and adoptive families.

[158] See *Re D.T.*,note 149, adopting the term from another case in Ontario.

[159] *MacVicar* v. *British Columbia* (Superintendent of Family and Children Services) (1986) 34 D.L.R. (4th) 488 (B.C.S.C.) regarding s.8(1)(b) and the *Adoption Act*, R.S.B.C. 1979, c.4.

Child, every child has the right to "know and be cared for by his parents."[160] This suggests that it may be in the best interests of a child to allow her or his biological father to present a parenting plan. If such a position is adopted, it must allow interested fathers to come forward, it must incorporate time limitations for responding to notice, and it must allow for dispensing with consent by the Court when it is appropriate to do so. The Commission suggests that a man who believes he may be the father of a child may place a unilateral declaration on the parentage registry to that effect. This would only entitle him to notice but would not constitute proof of parentage nor would it mean the Court would decide that his parenting plan is in the best interests of the child.

Others entitled to notice under the draft *Status of the Child Act* would be those for whom there is a declaration of parentage, and those for whom there is presumption of parentage. Where the mother wishes to defeat a presumption arising out of cohabitation she could do so by affidavit. In such a case, the notice of adoption to the cohabiter could be dispensed with so long as her motion was unopposed and there was no unilateral declaration of paternity registered.

The court would have the authority to direct inquiry as to the whereabouts of a presumed or declared father and join any person it considers appropriate into the proceeding. Where the whereabouts of the father is unknown, substitute service of the notice could be made to a member of his family or by advertisement where appropriate. For those who have filed a unilateral declaration of paternity, it could be sent to the latest address recorded. The person notified would be required to respond within a specific time period. It could be decided on a preliminary motion whether the rules concerning notice should apply. In cases of sexual assault or other violence the woman's view of the matter should prevail. Thus, when it is in the best interests of the child to do so, notice could be dispensed with.[161]

There has been debate over whether notification should be extended to include the parents of children who are adopted according to Aboriginal or other ethnic customary caregiving. In many cases they would fall within the *in loco parentis* category under the *Children and Family Services Act*. For greater certainty, the Commission notes in an earlier recommendation that the adoption provisions should be comprehensively reviewed to take into account customary adoption and caregiving practices.

(iv) Child protection

The issue of notice also arises in connection with child protection. The *Children and Family Services Act* determines who will be entitled to notice in the event that a child is taken into care by a government agency.[162] Under the *Act*, the definition of "parent" differs from that for adoption purposes. When the child is not "legitimate" or "legitimated" the biological father will not receive notice unless he is also:

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[160] See note 1.

[161] This problem was raised, and the proposed solution discussed, in written comments from the Canadian Bar Association (Nova Scotia) Family Law Section, in response to the Law Reform Commission's *Discussion Paper*.

[162] The procedure available under the *Act* for taking a child into care involves service of a notice on the parent or guardian "if known and available to be served" (s.33(1)). Subsequent to the child being taken into care, an agency must make an application to the court to determine whether the child is in need of protective services.

(iii) an individual having custody of the child,

(iv) an individual residing with and having the care of the child,...

(vi) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child,

(vii) an individual who has acknowledged paternity of a child and who

(A) has an application before a court respecting custody or access or against whom there is an application before a court for support for the child at the time proceedings are commenced pursuant to this *Act*; or

(B) is providing support or exercising access to the child at the time proceedings are commenced pursuant to this *Act*....

Where it is established that the child should not remain with his or her parents, the child may be adopted and existing parental relationships terminated.

The draft *Status of the Child Act* provides that where a person is a presumed or declared parent or has filed a unilateral declaration of parentage, there is an entitlement to notice of child protection procedures. In addition, as with the recommendation on adoption, the Commission suggests that the government consider expressly extending notice to include individuals who fulfil the role of social parent as recognized in customary caregiving practices.

(v) Marriage of a minor

The *Solemnization of Marriage Act* indicates that with few exceptions both parents of a child born within marriage must consent to the marriage of their minor child. In contrast, only the mother's consent is required where the child is "illegitimate".[163] In the draft *Status of the Child Act* both parents who are registered will be required to give consent. Where only the mother is registered, notice will be sent to anyone who has filed a unilateral declaration of paternity. Such a person will have an opportunity to be heard and, if there is a determination of parentage, will have a right to give or to refuse consent.

[163] S.20 (1)(a)(iv) and 20(1)(b).

The majority of the Commission recommends that:

1. **A person who believes he or she may be a parent be able to register a unilateral declaration to that effect in the parentage registry. The declaration entitles the person to notification but does not constitute a determination of parentage or provide any other entitlements.**

2. **Limitation periods that currently exist in legislation for notice be maintained but be interpreted as extending to locating children born outside of marriage.**

3. **The *Children and Family Services Act* be amended to remove the distinction between children based in the marital status of the parents so that the biological father would be entitled to notice of adoption subject to the courts discretion to waive notice and consent requirements when it determines that it is in the best interest of the child and is consistent with the mother's view of the best interest of the child.**

4. **The *Children and Family Services Act* be amended to remove the distinction between children based on the marital status of their parents so that in cases involving child protection proceedings, notice be given to biological parents of a child and to people who are recognized in law and by custom as fulfilling a social role of parent to the child.**

5. **The *Solemnization of Marriage Act* be changed to remove the distinction between children based on the marital status of their parents and the changes recommended in s.38 of the draft *Status of the Child Act* be adopted.**

(b) Custody, guardianship, and maintenance

The law has eliminated the distinction between married and unmarried parents with respect to custody. The *Family Maintenance Act* provides that the father and mother are "joint guardians" and are equally entitled to the care and custody of the child unless otherwise provided by the *Guardianship Act* or otherwise ordered by a court. The *Family Maintenance Act* defines "parent" as including "the father of a child of unmarried parents unless the child has been adopted."[164] The effect of the draft *Status of the Child Act* will be to ensure that any provisions using words such as "parent" or "father" do not distinguish between married and unmarried people.

Maintenance is dealt with in a number of statutes, both federal and provincial.[165] The *Family Maintenance Act* is the sole provincial statute addressing the matter of an individual's obligation to support financially or "maintain" a child. The *Act* obliges the parent or guardian to provide for the reasonable needs of the child. S.9 of the *Act* provides that a court may order a "parent or guardian" to pay maintenance of a dependent child. The Commission believes that this provision should be extended to include persons other than the parent or

[164] R.S.N.S., c.160, s.18.

[165] The *Divorce Act* R.S.C. 1985 (2d. Supp.), c.3, provides for child support as corollary relief in divorce proceedings. The children need not have been born within the dissolved marriage in order to qualify as "children of the marriage" for the purposes of support.

guardian. This is in keeping with the earlier recommendation regarding the definition of "parent".

The *Family Maintenance Act* establishes different regimes for children born within marriage and those conceived outside of marriage, even if born within. To eliminate the distinction between children on the basis of birth within and outside of marriage requires substantial changes to the *Act*. The Commission recommends that the separate "maintenance" provisions for children of unmarried parents be repealed in favour of the comprehensive provisions in the *Act* which should be extended to all children. This approach reflects the Commission's view that equality should not be achieved by removing advantages but rather by removing disadvantages and distinctions.

A court may order maintenance for the dependent child of a "single woman"[166] defined in the *Act* as a mother who, at the date of conception, was not married to the father of the child. The father includes a "possible father" of a child, defined as "any one or more persons who have had sexual intercourse with a single woman who is the mother of a child and by whom it is a possible that she was pregnant." This means that more than one person may qualify as a possible father.

The determination of who the "possible father" may be, and therefore who is liable for child maintenance, is assisted by blood testing ordered by the court. The results are admissible in evidence only where they "establish definite exclusion of the possible father as the father of the child".[167] This provision has been found unconstitutional by one court because it results in differential treatment on the basis of sex, contrary to s.15, the equality provision, of the *Charter*.[168] Thus, the court allowed into evidence blood test results indicating a 98.2% chance that the respondent was the father. As the Commission has recommended, the *Family Maintenance Act* should be amended so that not only test results excluding paternity but those providing evidence of paternity be admissible.

The "possible father" provisions may perpetuate distinctions between children born within and outside of marriage, since they will only be used where the paternity presumptions do not apply. There may be embarrassment to the mother and the child in that the mother's sexual conduct is in issue in the proceedings. There is also the disadvantage to a "possible father" who is not the biological father.[169] However, the Commission believes that these

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[166] *Family Maintenance Act*, s.2 and 11.

[167] S.27(3).

[168] *Shanks* v. *Benjamin*, note 125.

[169] The New Brunswick Department of Justice, Law Reform Division, *Status of Children Born Outside of Marriage, Their Rights and Obligations and the Rights and Obligations of Their Parents: A Working Paper* (November, 1974) criticized a similar provision in the *Children of Unmarried Parents Act* of that province and recommended that it be abolished and substituted with proceedings for a declaration of paternity. The authors stated:

> Imposing a duty of support on several men or on one of several "possible progenitors" implies the promiscuity of the mother and may be harmful to the child-mother relationship in those cases where the mother raises the child. In addition, it is hardly reasonable to force a father to support a child on the basis that he was a "possible progenitor" or to compel a man to pay the expenses of pregnancy simply because he had sexual intercourse with the mother around

disadvantages must be balanced against the best interests of the child. On balance the Commission favours retention of the provision in the *Family Maintenance Act* concerning "possible fathers". The provision offers the broadest possibility of financial support for children. Where no one has acknowledged paternity and there is no one who may be presumed to be the father of the child, some means of ensuring the financial responsibility is preferable to permitting the child to be unsupported or to become a state responsibility.

There should in fact be few instances where the "possible father" provisions will apply: where there is no applicable presumption of paternity under the *Status of the Child Act* nor an acknowledgement of paternity and agreement to pay maintenance. Furthermore, genetic testing, and in particular DNA testing, can exclude someone who is not the father and determine with a high degree of probability that a person is the father. Testing may also be used to challenge a presumption.

Another issue is that of contracting out of maintenance. The *Family Maintenance Act*, s.13, recognizes an agreement to provide maintenance, entered into by a person who admits the paternity of a child.[170] Such an agreement has the effect of suspending and prohibiting other proceedings for obtaining maintenance against the man while he is carrying out the terms of the agreement.[171] A Saskatchewan court commented on a similar provision which it found unconstitutional:

> [I]n the face of the societal and legislative evolution regarding children, there can be no justification for the arbitrary provision that prevents only single mothers from applying to vary a maintenance agreement. The arguments regarding freedom of contract have been amply addressed in [other cases] all of which have echoed the sentiment that the welfare of the child is the primary concern of the court notwithstanding that her parent may have agreed to an amount of maintenance which proves insufficient.[172]

In Nova Scotia, agreements under the *Family Maintenance Act* are confined to those where the Minister or agency is a party under the *Children and Family Services Act*. While this does not necessarily bar a woman's action, as in the Saskatchewan case, it does affect the rights of a child of unmarried parents negatively. The *Act* permits maintenance to be ordered on a "lump sum" or periodic basis, or a combination. Although the practice has often been to order lump sum maintenance as a means of terminating the father's financial obligation to

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> the time of conception. The procedure reflects an outmoded view of the sexual roles of men and women.

[170] *Family Maintenance Act*, s.13. Ss.(1) also provides that the Minister or an agency under the *Children and Family Services Act* must have been a party to the agreement; that it be for a lump sum and/or periodic payments, and that it cover, in addition to maintenance, any other expenses the man might be ordered to pay under the *Act*.

[171] A provision of similar effect in the Saskatchewan, *Children of Unmarried Parent Act*, R.S.S. 1978, c.C-8, was repealed by the *Family Maintenance Act*. The latter, which eliminated the distinction between children based on birth status, was found unconstitutional and of no force and effect, being in contravention of s.15 of the *Charter* in *Panko* v. *Vandesype*, note 42. The court noted that, in contrast to the situation of children born within marriage, children of formerly married parents were entitled to variation of maintenance, regardless of whether an agreement or order had been respected.

[172] *Panko* v. *Vandesype*, *ibid.* at 738.

the child[173] not all courts have treated such an award as unreviewable,[174] and one refused lump sum maintenance despite a finding that the child was born "as a result of a casual sexual relationship".[175]

The Commission is of the view that parents should not be allowed to contract out of a child's maintenance because it is contrary to the best interests of the child. Accordingly it is recommended that s.13 of the *Family Maintenance Act* be repealed.

The *Family Maintenance Act*, s.14, places a time limitation on the initiation of an application under s.11 for the maintenance of a dependent child of unmarried parents but it sets no limitation period where the parents are married. An application cannot be made later than two years after the child's birth (unless the father left the province before the two years had expired). This section was struck down by a Nova Scotia Family Court as unconstitutional in

infringing s.15, the equality provision, of the *Charter* by discriminating against both children of unmarried parents and of custodial parents.[176]

The factors to be considered when determining the amount of maintenance are set out in s.10 and s.12, for married and unmarried parents respectively. Only the latter includes the "reasonable needs and means of the child's mother during lying-in". Consistent with the central recommendations of this Report, the factors to be considered when determining the amount of maintenance should be uniform.

At common law, a parent is required to provide in his or her will for the adequate maintenance after the parent's death, of a child born within marriage. The *Testators' Family*

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[173] H. Hueston, "Ruling May Alter Support Payouts, Council Head Says" *Halifax Chronicle Herald* (9 October 1993). The article notes that, under the *Children of Unmarried Parents Act*, the predecessor to the present *Family Maintenance Act*, lump sum payments could not be ordered beyond a maximum of $1,500. Under the *Family Maintenance Act*, while no ceiling is in place, orders of between $2,500 to $7,500 are common. In *Arndt* v. *MacKenzie* (1991), 105 N.S.R. (2d) 31 (Fam. Ct.), a lump sum payment was substituted for periodic maintenance by the "natural father" of a child born outside of marriage. The purpose was to achieve a "clean break", given that the mother had remarried and the natural father did not want contact with the child.

[174] See, *Mahoney* v. *Woodside* (1988), 95 N.S.R. (2d) 1 (Fam. Ct.); and *Ivey* v. *Muir* (1989), 93 N.S.R. (2d) 347 (Fam. Ct.).

[175] *W.(K.A.)* v. *D.(K.P.)* (1989), 91 N.S.R. (2d) 73 (Fam. Ct.). The court noted that a lump sum was difficult to supervise, and there was no evidence that the father had the means to pay a substantial lump sum that would cover 18 years of the child's expenses. Periodic maintenance was ordered.

[176] *P.A.D.* v. *L.G.*, note 42. A similar ruling was made under the now repealed *Children of Unmarried Parents Act* (Sask.), which provided for a one year limitation period: *Perry* v. *Gerry* (June 28, 1990) (Sask. Prov. Ct.), unreported, where the court ordered retroactive child support for the previous fifteen years of the child's life, despite the fact that the mother's right to recover was barred by statute prior to the *Charter*; E.F.A. Merchant, *Case Comment, Perry v. Gerry: The Support Rights of Children Born Outside of Marriage in Saskatchewan*, 17 *C.F.L.Q.* 359.

Maintenance Act compensates for any failure on the part of a parent to make such adequate provision, by permitting a court to make an order out of the testator's estate for the support and maintenance of dependants.[177] The *Act* extends the scope of relief to the children of the testator born outside of marriage by defining "child" as including a child "of which the testator is the natural parent".[178] This and the rule of construction set out in the draft *Status of the Child Act* will ensure equality in the law between children born within and outside of marriage.

The majority of the Commission recommends that:

The *Family Maintenance Act* be changed to remove the distinction between children based on the marital status of their parents and the specific amendments set out in s.33 of the draft *Status of the Child Act* be adopted.

(c) Inheritance (succession)

Succession (or more commonly inheritance) arises in two situations - where a person dies with a will (testate succession) and where a person dies without a will (intestate succession). In all other jurisdictions in Canada the law has been changed to give equal rights as between children born within and outside of marriage, with respect to succession. Elimination of the status of legitimacy affects statutes as well as documents such as wills and their interpretation. There are a number of policy issues regarding the balance to be struck between the rights of known and unknown children which will be examined.

(i) testate succession

Where a person dies with a will, the *Wills Act*[179] applies. It uses a number of terms such as "child" and "issue" and provides an interpretation of their meaning. For example, "issue" includes "all lawful lineal descendants of the ancestor".[180] Because of the express limitation to "lawful" heirs, any reference to "issue" in a will or other testamentary document will be interpreted as excluding descendants born outside of marriage. The heirs of such descendants would similarly be excluded. There is a common law rule of construction that any reference to "child" or "children" in an instrument or a statute excludes children born outside of marriage. However, recent case law has reversed this common law presumption, such that children born outside of marriage now will be included.[181] Under the *Wills Act* where a person dies before his or her parents, and that person stood to inherit under the parent's will, a child of the person who dies will be entitled to receive the inheritance from the grandparent (as the "issue" of the parent). However, because of the uncertainty of the

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[177] R.S.N.S. 1989, c.485. Unlike comparable statutes of some other provinces, the *Act* does not provide for maintenance for dependants where the deceased has died intestate, but only where he or she has left a will.

[178] Ss.2(a),(b).

[179] S.N.S. 1989, c.505.

[180] Ss.2(a).

[181] *E.g.*, see *Gingell* v. *R.* and *Plummer* v. *Air Canada*, note 35.

common law definition of "child", the entitlement of the grandchild (as "issue") may only apply where his or her parent could have been considered a "child" born within marriage. It is important to remove doubts as to the interpretation of "child" and analogous terms found in statutes such as the *Wills Act*. All children, regardless of the circumstances of birth should be included in a reference to "child". Also of significance is the reference to the grandchildren as "issue". Unlike the term "child", "issue" is specifically defined in the *Wills Act* to include only the "lawful lineal descendants of the ancestor".[182] Therefore, "issue" would still exclude any of the grandchildren who are born outside of marriage.

Related to this issue is the question of whether a draft *Status of the Child* should operate retrospectively or prospectively for statutes and documents. That is, if the draft *Status of the Child Act* is passed, should it only affect documents such as a will after it comes into force or should it affect all wills or other instruments that exist? If the latter, this would mean that people with wills who believe they have a child born outside of marriage would have to change the will to clarify that they do not intend such a child to benefit. In order to correct past injustices, the majority of the Commission believes that the draft *Act* should apply retrospectively so long as it does not affect property that has vested.

A number of provincial Law Reform Commissions have addressed this question. The Alberta Law Reform Institute[183] suggested that testators probably did not direct their mind to how words denoting relationships (for example, "child") would be interpreted. Consequently they recommend retrospective application of a change in a law on the status of the child. On the other hand, both the New Brunswick Law Reform Division Report[184] and the Ontario Law Reform Commission Report [185] argued against retrospective application on the grounds that testators should not be forced to change their wills to effect their purpose. The Commissioners of the Uniform Law Conference of Canada agreed and suggested that it be expressly stated in the law that all instruments executed and all intestacies taking place before the implementation of the law relating to succession are not affected by it.[186]

Despite views to the contrary, the Commission is in favour of making the law apply to all documents except for cases where the interest has already vested in others. Although the Commission recognizes concerns about inconvenience in altering wills, the Commission believes that often wills or other instruments are updated to take account of other changes in the law, such as taxation changes, and that this should not be viewed any differently. The

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[182] S.2(a).

[183] *Status of Children: Revised Report, 1991* at 38.

[184] See note 166 at 95. A provision to this effect can be found in the legislation in New Brunswick: *The Family Services Act*, S.N.B. 1980, c.F-2.2.

[185] Ontario Law Reform Commission Report, note 8 at 16. See also, the British Columbia Royal Commission Report, *Fifth Report of the Royal Commission on Family and Children's Law: Part II, The Status of Children Born to Unmarried Parents* which at 55, recommended exempting from the operation of the child status legislation executed instruments in existence at the time the new legislation comes into force. It also recommended exempting intestate deaths which occur before that time and that final judgments or orders of a court be governed by the law that would have applied to them if no new legislation had been passed.

[186] In the *Proceedings of the Fifty-Ninth Annual Meeting* (1977) at 163-75.

Commission agrees with the Alberta Law Reform Commission's view that many people do not turn their minds to the particular question of whether they wish to include or exclude a particular beneficiary born outside of marriage. This change in law will ensure that the issue is specifically raised and will allow the testator to express his or her wishes if he or she wants to exclude a child. Vested interests can be protected by making them an exception to the operation of the legislation.[187]

(ii) intestate succession

When someone dies without having made a will, the inheritance of his or her property is governed by the *Intestate Succession Act*. The *Act* defines "issue" in the same manner as does the *Wills Act* and states in s.16 that an "illegitimate child" is to be treated as if the child were the "legitimate" child of the child's mother. The *Act* makes no provision for inheritance on the intestacy of the child's father and, by implication, disallows the child born outside of marriage to inherit through the father. As a result of this discrepancy, the Supreme Court of Nova Scotia recently ruled that the offending section was unconstitutional and of no force and effect, being in contravention of s.15 of the *Charter*.[188] The court held that children should inherit under the *Act* if they are the "natural but illegitimate" children of the deceased. A later decision agreed with this conclusion but decided that to repeal the section would mean under current interpretation that the child born outside of marriage could not inherit from either the mother or the father.[189] Accordingly the Court in the second case suggested "reading in" a phrase to include the father as well as the mother of a child born outside of marriage. In so deciding, the court removed the major problem in the legislation. All children, regardless of birth status, may now inherit on the intestacy of either parent. The *Intestate Succession Act* has not been amended to this effect. However, if the *Status of the Child Act* is adopted, the offending provision will be unnecessary and can be repealed. Repealing s.16 would permit all children, regardless of the circumstances of their birth, to inherit on intestacy from either parent and from all ascendants of either parent.

(iii) identification and location of heirs

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[187] The Ontario Law Reform Commission Report, note 8 at 28-29, illustrates the operation of a saving with respect to a vesting provision, as follows:

> A disposes of a segment of his property by way of trust "in equal shares to all my children" living at the date of the trust deed "providing that they shall attain the age of eighteen years". All of A's children born within marriage reach eighteen and take their respective shares. Two years later a child, Z, born to A outside of marriage establishes paternity against A. Although in theory all of A's children who benefited from the trust ought perhaps to disgorge a portion of their shares to recompense the child born out of wedlock, we do not think it practical to impose such a burden on them. We emphasize, however, that where rights have not become vested, a finding of paternity which may alter the subsequent distribution of property ought to be given full effect. For example, in the hypothetical situation which we outlined above, where no child of A has reached the age of eighteen at the time when Z establishes paternity against A, Z should obviously take his share of the property at the appropriate time.

[188] *Surette* v. *Harris,* note 2.

[189] *Tighe* v. *McGillivray Estate*, note 2.

Some administrative difficulties may arise if the distinction between children born within and outside of marriage is removed. The difficulties are the identification and the location of heirs of a deceased for the purpose of notice. The existence of children born outside of marriage will often be unknown or concealed, particularly if the child is a result of adultery. The extent to which the personal representative of the deceased must search for possible issue of the deceased is, therefore, a critical question. This is more than an administrative concern; the rights of others entitled to the estate may be affected and there may be additional cost and delay in the execution of the estate.

Law reform agencies of other jurisdictions have made a variety of recommendations on this issue. The Ontario Law Reform Commission suggested that there be a positive duty to search for children born outside of marriage but not beyond the geographic boundaries of the province.[190] The approach of the British Columbia Royal Commission on Family and Children's Law was to place the onus on the child to come forward within a specified time period[191] to establish that he or she is the child of the deceased. At the same time, the legal representative would have the duty to make a "reasonable inquiry" as to whether a child exists by searching the vital statistics records of paternity; any records disclosing presumptions of paternity; and additional sources as determined by the case law. The New Brunswick Law Reform Division supported a limitation on the duty to search for beneficiaries to those whose paternity has been established or presumed and envisaged a "registry system" to assist in identifying beneficiaries.[192]

The Nova Scotia Law Reform Commission supports the principles of "reasonable inquiry", public notice, and a "registry system" and these have been included in the draft *Status of the Child Act*. Presently, trustees or representatives are only required to advertise the estate in the Royal Gazette, Part I. This should be extended to advertising in a newspaper of wide circulation so that potential beneficiaries, particularly those who are not registered in the Vital Statistics or parentage registries, may receive actual notice. To accommodate the search and advertisement requirements, it is suggested that the period of search be six months from the date of death. The present law does not require that an estate be advertised outside of the province. No change in the present law will be necessary if parentage documents from outside the jurisdiction are registered as recommended.

Closely related to the question of the identification and location of heirs is the liability of legal representatives and trustees in the event that a "missing heir" makes a claim subsequent to the distribution of the estate. The Alberta Law Reform Institute suggested that those who act reasonably in the administration of the estate or the distribution of property should not be liable for claims arising from an undisclosed relationship of a father and his child.[193] A similar recommendation was made by the British Columbia Royal Commission. They noted that there are conflicting claims of searching for heirs and winding up the estate without

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[190] See note 8 at 16. In keeping with this suggestion a positive duty to search for potential beneficiaries was enacted in the *Estates Administration Act* R.S.O. 1990, c.E-22, c.24(1):

> A personal representative shall make reasonable inquiries for persons who may be entitled by virtue of a relationship to be traced through a birth outside of marriage.

[191] See note 8 at 56 suggested a time period of ninety days for this purpose.

[192] See note 166 at 93-103.

[193] See note 180 at 64.

delay.[194] The Commissioners recommended statutory protection of legal representatives who distribute an estate after a specified time period where the duty of "reasonable inquiry" is met.[195]

Under the Ontario *Estates Administration Act* the personal representative is protected where "reasonable inquiries" have been made; the entitlement of the person was not known at the time of the distribution; and a search of the relevant parentage records failed to disclose the existence of the person.[196]

The Nova Scotia Law Reform Commission suggests that there be a specific provision protecting legal representatives and trustees from liability to reflect recognition of the inherent difficulties in locating those born outside of marriage who may claim against the estate and the inequity of making the representative assume responsibility. However, this would not bar a "missing heir" from applying to the court to determine whether the "reasonable inquiry" standard was met. Even where the inquiry was reasonable, the heir could follow the property into the hands of the person to whom it was distributed under the law governing estates and trustees.

Acts such as the *Trustee Act,*[197] the *Probate Act*[198] and the *Public Trustee Act* have provisions on the duty to search and on protection from liability. For example, the *Trustee Act* permits the executor or administrator to distribute an estate after notifying creditors and taking into account their claims. This protects the executor or administrator from liability but does not prejudice the right of a creditor or claimant to follow the assets into the hands of the person who has received them. The Commission is concerned about creating obligations in the *Status of the Child Act* that differ from these *Acts*. These changes, like the suggestions on customary adoption and caregiving, are not strictly speaking consequential amendments arising for the draft *Status of the Child Act*. However, it would be useful that the provisions in these *Acts* on search, notice, limitation periods and liability be reviewed for consistency.

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[194] *Re: Lord Llangattock*, 34 T.L.R. 341, cited in the British Columbia Report, note 182 at 55-56.

[195] The Commissioners allowed that such a provision would not prevent a late claimant from following the property into the hands of a person, other than a purchaser, who may have received it. A provision to this effect is found in the *Family Law Reform Act*, 1969, s.17, referred to in the British Columbia Royal Commission Report, note 182 at 56, in note 28. The Ontario *Estates Administration Act*, note 187, s.14(3) also provides for the following of property into the hands of a person to whom it has been distributed. However, where there has been "no presumption or court finding of the parentage of a person born outside of marriage until after the death of the deceased, a person...is entitled to follow only property that is distributed after the personal representative has actual notice of an application to establish the parentage or of the facts giving rise to a presumption of parentage."

[196] *Ibid.*, at s.14(2).

[197] R.S.N.S. 1989, c.359.

[198] R.S.N.S. 1989, c.379.

The majority of the Commission recommends that:

1. **The draft *Status of the Child Act* apply to statutes and instruments retrospectively except for cases where rights have vested.**

2. **The *Intestate Succession Act* be amended to reflect case law which extends succession rights of the child born outside of marriage to include the father as well as the mother.**

3. **The search, notice, limitation periods and liability provision in the *Trustee Act*, *Probate Act* and *Public Trustee Act* be reviewed in light of the draft *Status of the Child Act*. In particular:**

   (a) **There be a limitation period of six months for the search for heirs by executors or trustees. The search should include advertisement in a newspaper of wide circulation.**

   (b) **There be statutory protection from liability for executors and trustees who have conducted a reasonable inquiry for heirs.**

(d) Birth registration and change of name

The *Vital Statistics Act* distinguishes between "legitimate" and "illegitimate" children. A child born within marriage (a "legitimate" child) is registered by a parent and a child born outside of marriage (an "illegitimate" child) is registered by the mother[199]. Under s.4 of the *Act*, the names and particulars of both parents of a child born within marriage must be provided to the Registrar, except where the woman was not cohabiting with her husband at the time of conception and she declares that he is not the father. However, only the name of the mother of a child born outside of marriage is required to be given except where a man acknowledges that he is the father. In that case he and the mother of the child (an "unmarried woman") must file with the Registrar a joint statutory declaration to that effect. Parents of a child born within marriage have a choice as to the surname of the child as do the mother and father of a child born outside of marriage where they have filed a joint statutory declaration (a "joint request"). Where a joint request has not been filed, the child may only be registered under the surname of the mother.

A certificate of registration can be issued on the written authority of the Minister or an order of a judge or court.[200] However, while it is admissible in court as *prima facie* evidence of the

[199] Ss. 4(2)(a) and (b), respectively.

[200] *Vital Statistics Act*, s.37. However, a full certificate may be issued to a person who requires it for use in connection with a petition for adoption, and may be issued to the Attorney General, on written request that the certificate will be used in connection with the administration of justice.

facts, it cannot be used "to affect a presumption of parentage".[201] This means that currently, even where a man other than the woman's husband is registered as father, this cannot defeat the presumption that her husband is the father. Removing the distinction between children based on birth status will mean that a child can be registered by the father's name with his agreement.

Once a child is registered, the procedure for changing the child's name under the *Change of Name Act* differs depending on the marital status of the parents. Where the parents are married, the consent of the spouse is required to change the child's name. Where the child was born outside of marriage, the mother of a child may apply to change the child's name without the consent of the father, unless the child has been registered with the surname of "a person acknowledging himself to be the father".[202] In this case, the father's consent to the change of name is required. Where it is the father who applies for a change of name for the child, the mother's consent is always required. Furthermore, if his name does not appear on the child's birth registration, he must supply the Registrar of Vital Statistics with a copy of the court order that makes a finding of paternity in his favour.

The majority of the Commission recommends that:

1. **The *Vital Statistics Act* be amended to remove the distinction between children based on the marital status of their parents.**

2. **The *Change of Name Act* be amended to remove the distinction between children based on the marital status of their parents; and the changes set out in s.30 of the draft *Status of the Child Act* be adopted.**

(e) Statutory rights and benefits

In its *Discussion Paper*, the Commission suggested that a number of *Acts* be amended including the *Workers' Compensation Act* to remove the term "illegitimate". The *Workers' Compensation Act* has recently been comprehensively amended and this provision has been removed as part of the amendments.[203] Similar changes are needed in other statutes.

(i) Family Benefits Act

The purpose of the *Family Benefits Act* is "to provide [financial] assistance to persons or families in need, where the cause of need has become or is likely to be of a prolonged nature".[204] The *Act* establishes different eligibility requirements for provincial social assistance, based on the birth status of a child for whom benefits are sought and based on the

[201] *Vital Statistics Act*, s.39.

[202] *Change of Name Act*, R.S.N.S. 1989, c.66, s.8(1),(2).

[203] Bill 122, *An Act to Reform the Law Respecting Compensation for Workers*, 2d sess., 56th Leg., Nova Scotia, 1994-95 (assented to 6 February, 1995, S.N.S. 1995, c.10).

[204] *Family Benefits Act*, R.S.N.S. 1989, c.158.

gender of the parent having care of the child. Some of these provisions have been struck down by the Nova Scotia Court of Appeal because the *Act* discriminates against single fathers with dependent children.[205] The Court held these sections of the *Act* were unconstitutional in violating the equality provisions of the *Charter*. These provisions in the *Act* will be examined in greater detail since they have not been repealed.

Ss.5(3) of the *Act* indicates that a "woman with a dependent child" is eligible to receive benefits where she "no longer cohabits with her husband and he does not provide her with the monetary requirements for regularly recurring needs". By way of contrast, an "unmarried mother whose dependent child was born out of wedlock is eligible to apply for benefits on her own behalf and on behalf of her dependent child" if she has attained the age of majority and is not married at the time of her application.[206] While need is a prerequisite to granting benefits, an unmarried mother, as opposed to a woman who was married (and whose child was presumably born within marriage) need not establish that she is not receiving funding from the father for the child.

Another provision of the *Family Benefits Act*, which has not been overturned by a court, may discriminate on the basis of birth status. Ss.5(7)(b) of the *Act* permits a person to apply for family benefits "on behalf of a child born out of wedlock where his mother is ineligible for benefits on her own behalf, as well as on behalf of the child". This provision, which allows an application by a third party for a child born outside of marriage but not for one born within, is an anomaly.

There are two ways that equality could be achieved: by extending benefits to include children born within and outside of marriage or by disallowing them in both groups. The former may create additional costs which have been estimated at $6.5M.[207] The Commission believes that equality should be achieved by removing a disadvantage rather than by removing an advantage and thus we recommend that all offending sections of the *Family Benefits Act* be repealed.

(ii) Fatal Injuries Act

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[205] *Reference Re: Family Benefits Act (N.S.), Section 5* (1986), 75 N.S.R. 2(d) 338 (C.A.).

[206] S.5(4).

[207] Comments to the Law Reform Commission, from the Department of Community Service, January 1994. This is based on the practice whereby married mothers but not unmarried mothers have a waiting period of 6 months to receive family benefits. If married mothers and their children were treated in the same way as unmarried women, the government would have to pay an additional 6 months of benefits to married mothers (who have been deserted or divorced). In addition, because of government administration practices relating to responsibility for the costs of apprehending children born outside marriage, removal of the distinction between these children potentially could result in a shift of $1.8M in costs from the province to the municipality. However, changes are currently being made to the financial relationship between the municipal government and the provincial government. This means that this distinction, which is based on a history of shame regarding birth outside marriage and which reflects an attempt to preserve the privacy of the woman from her municipality, may ultimately be of no real effect. If the distinction remains, it will maintain, in law, this historical attitude to sexual relationships outside of marriage.

The *Fatal Injuries Act* permits recovery from a tortfeasor for the benefit of the "wife, husband, parent or child" of a deceased person.[208] The *Act* defines "child", but does not expressly include a child born outside of marriage.[209] The interpretation of "child" was considered by the Nova Scotia Supreme Court, which held that the definition in the *Fatal Injuries Act* does not include an "illegitimate" child.[210] The court held that this interpretation should apply despite the Supreme Court of Canada decision reaching a different conclusion, because the legislation establishes "separate and different treatment" for "illegitimate" children elsewhere in the *Act*. Under s.11 of the *Act*, all children have the same rights with respect to their mother but not their father except, as set out in s.12, where he has demonstrated a "settled intention to treat the person as a child of the family". The Commission recommends that the distinction between children based on the marital status of their parents be changed by repealing s.11 of the *Fatal Injuries Act.*

(iii) Public Service Superannuation Act

The *Public Service Superannuation Act* provides that a dependent child "of a marriage contracted before retirement" is entitled to a percentage of the superannuation allowance which the public sector employee had been granted before death.[211] Thus the *Act* does not allow children born outside of marriage to benefit when their father dies. The Commission recommends an amendment to s.17(1)(b) of the *Act* to remove the criteria of birth within marriage, thereby extending superannuation benefits to all children of employees who are otherwise eligible.

(iv) Settlement Act

The *Settlement Act*[212] creates a distinction between children born within and outside of marriage. The place of settlement of a person determines the municipal unit responsible for his or her financial support under the *Social Assistance Act.*[213] The *Settlement Act* provides that a "legitimate" child has the settlement of his or her father but, if he has no settlement, then the settlement of the child is that of the mother, if she has any. The settlement of an

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[208] Ss.5(1), 2(a).

[209] Instead, the relevant provision states that child "includes son, daughter, grandson, granddaughter, stepson and stepdaughter", s.2(a). This discussion is applicable, with necessary changes, to the *Tortfeasors' Act* since, in accordance with s.2(a) of the *Act* expressly relies on the definitions of "child" and "parent" found in *Fatal Injuries Act*. However, the *Tortfeasors' Act* does not contain provisions similar to those in the *Final Injuries Act* which mitigate the effects on children born outside of marriage. The *Tortfeasors' Act* permits a child to recover damages, to a limited extent, from each of two or more persons responsible for the death of the child's father or mother.

[210] *McGuire* v. *Fermini*, note 36.

[211] *Public Service Superannuation Act* R.S.N.S. 1989, c.377, s.17(1)(b).

[212] R.S.N.S. 1989, c.423.

[213] R.S.N.S. 1989, c.432.

"illegitimate" child is that of the mother, if she has any.

The settlement of a child was also used to determine who, between the province and municipality, was responsible for costs under the *Children and Family Services Act.* However, that *Act* has recently been amended so that the municipality is no longer "liable for the costs of apprehension, maintenance or care pursuant to the *Act*".[214]

The distinction for the *Social Assistance Act* has no financial impact on a child since it relates to division of costs between governments. However, the distinction is based on prejudice, and perpetuates discrimination both in language and practice. Accordingly, the Commission recommends replacing the provision in the *Settlement Act* with one stating that settlement is determined on the basis of the residence of the person who has custody of the child.

(v) Victims' Rights and Services Act

The *Victims' Rights and Services Act* provides that a child will be entitled to damages under the *Act* if the child is a "dependent" of a person killed in circumstances involving the commission of an offence or involving a lawful arrest.[215] Recent amendments to the *Act* specifically extend its coverage to "illegitimate" children and children to whom a victim stands *in loco parentis*.[216] Accordingly, the only change required is to remove the phrase "illegitimate child" since "child" will cover all children under the draft *Status of the Child Act.*

The majority of the Commission recommends that:

The *Family Benefits Act,* the *Fatal Injuries Act*, the *Public Service Superannuation Act*, the *Settlement Act*, and the *Victims' Rights and Services Act* be amended to ensure that they are consistent with the principles in this Report, and the specific changes set out in Part 5 of the draft *Status of the Child Act* be adopted.

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[214] Bill 114, *An Act to Provide for Municipal Reform*, 2d sess., 56th Leg., Nova Scotia, 1994-95 (assented to 6 February, 1995, S.N.S. 1995, c.7).

[215] Ss.2(a)(a), 11A(1).

[216] S.N.S. 1989, c.14, s.2(a), as am. by S.N.S. 1992, c.326, s.1(a).

III SUMMARY OF RECOMMENDATIONS

To remove the distinction between children based on the marital status of a child's parents and to fulfil Nova Scotia's obligations under the United Nations *Convention on the Rights of the Child* the Law Reform Commission of Nova Scotia recommends that:

1. The law and legal system in Nova Scotia be reformed to abolish discrimination based on the marital status of the child's parents as required by the United Nations *Convention on the Rights of the Child* and the *Canadian Charter of Rights and Freedoms*.

The majority of the Commission recommends that:

2. The biological connection remain the foundation of the parent and child's legal relationship with specific exceptions.

3. The draft *Status of the Child Act* contain two exceptions to the principle that the biological parents of the child are the legal parents, namely legal adoption and assisted conception.

4. The government consider reform of the law on adoption and other matters governing children to take into account customary parenting practices.

5. Further study and research on law and policy be carried out to respond more comprehensively to the regulation of reproductive technology in Nova Scotia.

6. The government of Nova Scotia adopt the draft *Status of the Child Act* and the consequential amendments and principles recommended in this Report.

7. The presumptions of parentage set out in s.12 of the draft *Status of the Child Act* be adopted.

8. The draft *Status of the Child Act* contain provisions enabling the use of genetic tests to establish parentage.

9. The *Family Maintenance Act* be amended to allow that genetic tests be admissible to provide confirmatory as well as exclusionary evidence.

10. The draft *Status of the Child Act* provide for declarations of parentage.

11. To provide for greater certainty, declarations of parentage made in Nova Scotia and out of province be filed in a public registry. These declarations would be treated as confidential.

12. A person who believes he or she may be a parent be able to register a unilateral declaration to that effect in the parentage registry. The declaration entitles the person to notification but does not constitute a determination of parentage or provide any other entitlements.

13. Limitation periods that currently exist in legislation for notice be maintained but be interpreted as extending to locating children born outside of marriage.

14. The *Children and Family Services Act* be amended to remove the distinction between children based in the marital status of the parents so that the biological father would be entitled to notice of adoption subject to the courts discretion to waive notice and consent requirements when it determines that it is in the best interest of the child and is consistent with the mother's view of the best interest of the child.

15. The *Children and Family Services Act* be amended to remove the distinction between children based on the marital status of their parents so that in cases involving child protection proceedings, notice be given to biological parents of a child and to people who are recognized in law and by custom as fulfilling a social role of parent to the child.

16. The *Solemnization of Marriage Act* be changed to remove the distinction between children based on the marital status of their parents and the changes recommended in s.38 of the draft *Status of the Child Act* be adopted.

17. The *Family Maintenance Act* be changed to remove the distinction between children based on the marital status of their parents and the specific amendments set out in s.33 of the draft *Status of the Child Act* be adopted.

18. The draft *Status of the Child Act* apply to statutes and instruments retrospectively except for cases where rights have vested.

19. The *Intestate Succession Act* be amended to reflect case law which extends succession rights of the child born outside of marriage to include the father as well as the mother.

20. The search, notice, limitation periods and liability provision in the *Trustee Act*, *Probate Act* and *Public Trustee Act* be reviewed in light of the draft *Status of the Child Act*. In particular:

    (a) There be a limitation period of six months for the search for heirs by executors or trustees. The search should include advertisement in a newspaper of wide circulation.

    (b) There be statutory protection from liability for executors and trustees who have conducted a reasonable inquiry for heirs.

21. The *Vital Statistics Act* be amended to remove the distinction between children based on the marital status of their parents.

22. The *Change of Name Act* be amended to remove the distinction between children based on the marital status of their parents; and the changes set out in s.30 of the draft *Status of the Child Act* be adopted.

23. The *Family Benefits Act,* the *Fatal Injuries Act*, the *Public Service Superannuation Act*, the *Settlement Act*, and the *Victims' Rights and Services Act* be amended to ensure that they are consistent with the principles in this Report, and the specific changes set out in Part 5 of the draft *Status of the Child Act* be adopted.

APPENDIX A

DRAFT STATUS OF THE CHILD ACT

APPENDIX B

MEMBERS OF THE ADVISORY GROUP

and

LIST OF PEOPLE WHO RESPONDED IN WRITING TO DISCUSSION PAPER

Members of the Advisory Group

J. Jones, Metro Legal Aid Clinic
E. Paul, MicMac Family and Childrens' Services
Judge R. Levy, Nova Scotia Family Court
A. Shaw, Director of Adoptions, Department of Community Services
E. Theriault, Public Trustee
E. Etter, Registrar of Vital Statistics
F. Comeau, Nova Scotia Human Rights Commission
L. Rantala, Parent Finders-Nova Scotia
Professor R. Thompson, Dalhousie Law School

List of People Who Responded in Writing to Discussion Paper

Canadian Bar Association (Nova Scotia) Family Law Section
Dr. Patricia Ripley, Deputy Minister, Department of Community Services and Staff
Mr. I. Johnson, Halifax.

APPENDIX C

COMMISSION PROPOSALS IN DISCUSSION PAPER 1993

Commission Proposals in Discussion Paper 1993

1. The distinction between children based on their birth within or outside of marriage should not be maintained in the laws or legal system of Nova Scotia.

2. The biological parent of the child should be recognized as the parent for all purposes of the law. There are two exceptions to this:

    - the case of legal and custom adoptions
    - some cases of assisted conception, where there is a donation of sperm or ova.

In both these situations, persons who are not biologically related to a child will be recognized as parents.

3. A majority of the Commission suggests that the biological connection between a child and his or her biological mother and father be recognized in relation to notice of an adoption, and that the child have the right to have both biological parents be given an opportunity to establish a parental relationship with the child. However in the interest of the child, there should be a time limit placed on the requirement for notice. This time limit on notice should apply equally to cases where the father is married to the mother of the child.

4. The biological connection between parent and child should be recognized in the law of inheritance. The *Intestate Succession Act* should be changed and laws which discriminate should be clarified to support rights based on a biological connection. In order to meet concerns about locating and identifying unknown heirs there should be clear time limits established to allow the executor or administrator to distribute the estate of a deceased person.

5. Donors of sperm and ova should not be recognized as the "parents" of the child born as a result of assisted conception. However, the Commission seeks public comment on this topic and, in particular, as to whether a woman giving birth to a child in the context of assisted conception should automatically be regarded as the biological mother unless adoption has taken place.

6. The majority of the Commission suggests the following tests for establishing biological paternity in Nova Scotia:

    - marriage to mother of child at time of birth of child;
    - married to mother of child by marriage terminated by death, nullity or divorce, within 300 days, or longer period as the court may allow, before birth of child;
    - marriage to mother of child after birth of child and acknowledgement of paternity;
    - cohabitation with mother of child in a "relationship of some permanence" at time of child's birth or conception, where child born within 300 days or longer time as court may allow after cohabitation ceased;
    - filing of a statutory declaration of paternity or joint request with mother of child under the *Vital Statistics Act* or similar legislation in another province;

- judicial finding or recognition of paternity during lifetime of father;
- recording of name on the Indian Register as the father of a child entitled to be registered.

7. In some instances, the definition of parent should include people who have taken on a role which entitles them to be recognized as a "parent" although they may not have formally adopted the child and are not biologically related to the child.

8. There should be a new law passed which clearly and comprehensively deals with the status of the child. The law should include tests for paternity and should treat children equally without discrimination based on the child's birth within or outside of marriage. This law should state that any distinction in status between children born outside of marriage is abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined in accordance with this law. This law should provide some time limitations for establishing biological connections where they are not easily determined. There should be changes made to existing laws to make them consistent with this law.

APPENDIX A

DRAFT STATUS OF THE CHILD ACT

DRAFT STATUS OF THE CHILD ACT

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