

## WHO'S LEGITIMATE NOW?

### Status of Children Act 1969

The Universal Declaration of Human Rights of 1948 provides in article 7 that

All are equal before the law and are entitled without any discrimination to equal protection of the law . . .

and in article 25 (2) that

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

As if by way of implementation of these texts the New Zealand Parliament passed the Status of Children Act on 22 August 1969. The principle embodied in this enactment is found in section 3 (1):

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

This statement immediately raises the question of proof of paternity and maternity. In New Zealand law the fact of birth usually results in the establishment of maternal filiation, and proof of maternity is only in question in the case of foundlings; and there is no legislative provision for that rare occurrence. As far as paternity is concerned the matter is covered by Part VI of the Domestic Proceedings Act 1968, and by sections 8, 9 and 10 of the Status of Children Act. For the purposes of the latter Act paternity is proved by written acknowledgment, a paternity order made by the Magistrate's Court, by the unrebutted presumption of section 5 where the mother and father have been married, or by a declaration of paternity made by the Supreme Court under section 10.

However, only one of these means is good for all circumstances and this is the presumption as to paternity of section 5. Only this provision avoids the difficulty of the somewhat anomalous and discriminatory rule of section 7 (1) which provides that for *succession purposes* the relationship of *father* and child and other relationships traced through the father are recognised for the child's benefit only if paternity has been admitted by or established against the father *in his lifetime*.<sup>1</sup> The child born of parents married to each other at the time of its birth or conception (ss. 5 and 7 (1) (a)) or after conception but before birth is not excluded by section 7 (1) but the child born out of wedlock who establishes paternity after his father's death is (s. 7 (2)

1. In spite of the fact that paternity may be established after the father's death for other purposes, cf. s. 10.

and s. 10). If a man and a woman marry in January, the man dies in June, and the child of the marriage is born in November, the child is in a legally privileged position compared with X whose family history is similar except that his parents established a common household instead of marrying. The marriage of a child's parents can, in terms of section 3, be only of evidentiary value in New Zealand as from January 1970. However, section 7 does significantly derogate from the general principle set out in section 3 and serves to maintain a distinction declared abolished.<sup>2</sup>

The crucial point for children born out of wedlock is their succession rights, and it is in this vital area that the Act fails. Interestingly enough, section 2 (3) of the Family Protection Act 1955 which requires (for the purposes of that Act) the establishing of paternity or *maternity* before death, has been repealed leaving section 7 (1) of the Status of Children Act which refers to paternity only.

The legal disabilities of children born out of wedlock relate principally to succession rights, maintenance, name, and nationality, and the position of such children after 1st January 1970 will be very much the same as that of children born in wedlock.

Both on testacy and intestacy the rights will be the same except for the provisions of section 7 relating to succession between father and child. Equally in the case of maintenance the position will be the same for children whether born in or out of wedlock. The provisions of section 38 of the Domestic Proceedings Act 1968 go no further than to establish at what stage a man can at law be said to be the father of a particular child.

The question of name poses something of a problem as the rights vary depending on whether or not a child's parents were married at the relevant time. However, in view of the New Zealand practice of distinguishing by title between married and unmarried women the present solution is probably the best that can be achieved.

Nationality, domicile, and jurisdictional rights are effectively dealt with by the Domestic Proceedings Act 1968, and the British Nationality and New Zealand Citizenship Act 1948. In all these matters, though the aim is equality, the nature and wordiness of the provisions<sup>3</sup> leaves room for the suspicion that because of the relevance for the law of knowing whether the child is establishing his status re his mother, his father, or both, the question of marriage still has more than evidentiary value.

The Status of Children Act repeals the Legitimation Act 1939 and in the case where a child's parents marry after its birth that marriage

2. "There seems little doubt . . . that recognition for the purposes of s. 7 can take place by conduct. If the Courts place a liberal construction on the requirement, and are ready to give almost anything the potentiality of an admission in proper cases, the objectionable features of the provisions may be largely overcome." Cameron, "The Twilight of Illegitimacy" [1969] N.Z.L.J. 621, 624. The distinction is further emphasised by the provisions
3. "At the cost of some circumlocution [the Act] has removed the term 'illegitimate' wholly from the Statute Book." Cameron op. cit. 621.

will now have no more relevance to the status of the child than will the establishment of paternal filiation. In fact it will have less because the marriage without the establishment of paternity will not give the child rights as regards its father. To the extent that section 7 (1) (a) by the words "at some subsequent time" refers to situations not covered by section 5, it is redundant. In every case where the marriage does not give rise to the presumption of paternity (and this would be the position of many of the former legitimation cases) only section 7 (1) (b) will avail the child. The marriage of his parents is irrelevant.<sup>4</sup> Under the Legitimation Act 1939 the emphasis was on marriage; under the Status of Children Act 1969 the emphasis is on established parenthood. Of course it was necessary to establish parenthood for the purposes of the Legitimation Act but provided the child's parents married his succession rights were secure from that date as the establishing of filiation even after the death of the father did not affect the rights secured by the marriage.<sup>5</sup>

By way of summary, it seems that in terms of legal status, there are the following classes of children in New Zealand:

- (1) Those in respect of whom the presumption of section 5 is un rebutted.
- (2) Those in respect of whom the presumption is rebutted, and those born out of wedlock other than foundlings.
- (3) Foundlings.
- (4) Adopted children.

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4. Cf. section 3.

5. Cf. sections 3, 4 and 6 of the Legitimation Act 1939.

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