A CAMPAIGN TO REDUCE EX-NUPTIAL BIRTHS?

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No-one is a greater admirer of the tennis ability of Pat Cash that I. He virtually won the Davis Cup off his own racquet. And he and Stephan Edberg provided me and the other spectators at Kooyong with a marvellous final in the Australian Open.

It is, however, with some concern that I have seen pictures of him, his girl-friend and his son, glamourising him as a father. For the fact is, his son can potentially still suffer discrimination being born outside marriage.

As a successful sportsman, his influence on young people is potentially enormous. If his example gives respectability to the production of children outside marriage, it will be doing great harm. For the fact is that children born outside marriage still suffer considerable legal and social disadvantages, compared to those born within marriage. They are innocent, but they suffer. And, I regret to say, although some of the discrimination can be, and should be, removed, it is unrealistic to expect that they can be placed on an equal standing with children born in marriage.

No doubt babies have always been, and always will be, conceived impulsively. But deliberately to conceive a child outside marriage seems to be a thoughtless act of adult irresponsibility. It was thus also disturbing to read recently in "The Age" a generally sympathetic vignette of a prominent female trade unionist, who, it was reported, "decided" to have a child outside marriage.

The rate of ex-nuptial births in Australia is now an alarming 16%. [P. McDonald address given to the Second Conference of the Australian Institute of Family Studies, November 1986.] Despite the ready availablity of contraceptives, and the legality of most abortions, this rate has continued. And, of course, this figure does not include the instances of children conceived outside marriage, but born within it. This figure should cause the greatest concern to society. Trendy advocacy of "alternative family structures" cannot obscure the self-evident truth that ideally a child is best brought up by its biological father and mother in a loving, stable family atmosphere.

But apart from the initial handicaps of a child born in a one-parent home, there is abundant evidence that social and legal disadvantages remain throughout his life.

With a view to minimizing there, legislation was passed in all States of Australia, which purported to "abolish illegitimacy" and make all children of equal status. The relevant Act in Victoria is the *Status of Children Act* 1974[1]. It is astonishing how few people, including lawyers, are aware of its existence. For the provisions of this Act which requre some positive action appear to be unused.

I will try to set out the areas of law in which children born outside marriage have traditionally been discriminated against legally, and the extent to which this differentiation has been removed.

1 Name

One of the ways in which a child born outside marriage has suffered is that of actually being termed, "illegitimate". This word implies that the child has done something illegal. Accordingly, the 1974 Act removed the word, "illegitimate", from all statues in which it had previously appeared, and replaced it by a lengthy phrase, "[children] whose parents were not married to each other at the time of its birth or after the time of conception". In practice "ex-nuptial" is being increasingly favoured. But it is astonishing how often "illegitimate" continues to be heard, even from lawyers. This word is no longer acceptable, and should never be used.

2. Maintenance

The chief source of income for most ex-nuptial children is welfare payments. Nevertheless the child is entitled to be maintained by its parents. There is much evidence, however, that many ex-nuptial children hardly receive any maintenance from their fathers. Mr. Don Edgar, the Director of the Australian Institute of Family Studies, has suggested that it is unduly punitive to pursue teenage fathers.[2]

With respect, this view is not tenable from the child's point of view Maintenance is not a form of punishment. It is a basic right of a child. And there is another, very important reason why fathers of ex-nuptial children should be pursued. An order for maintentance constitutes *prime facie* evidence of paternity under the Status of Children Act and thus is invaluable to a child who seeks to claim *inheritance*[3].

Furthermore, if a man is not "pursued", this perpetuates the discrimination against ex-nuptial children. For it leaves them fatherless. And it is now well accepted that a child needs to know his biological origins, in order to avoid an identity crisis. This is the reason why adopted children will in future be able to ascertain who their natural parents were.[4]

As concerns maintenance, ex-nuptial children are severely disadvantaged, compared to children born within marriage. For the procedures for securing maintenance awards are much inferior to those in the Family Court of Australia, which is only available to children of a marriage.[5] Awards tend to be much lower than those granted to children of divorcing parents. They are also less flexible. And ex-nuptial children have no rights to the *property* of their parents, no matter how wealthy they are.

This is an area ripe for reform. Ex-nuptial children are severely prejudiced financially.

3. Guardianship, custody and access

This is a difficult area where in theory the rights of children born outside marriage are the same of those as children born within marriage, but where in practice things work out very differently.

When a couple is married, the Family Law Act provides that each of them shall be joint guardians and custodians, until the Court decides otherwise. In practice, therefore, it is only on separation or divorce that one party to a marriage might lose the right of custody and occasionally, in very rare circumstances, guardianship as well. Invariably, the non-custodian, on divorce, will be granted access to any child. The position as far as fathers of ex-nuptial children are concerned is very different. For the first problem is that the jurisdication over ex-nuptial children does not vest in the Family Court, therefore the Family Law Act does not apply.[6] And so counselling services, which normally provide welfare reports in divorce cases, are not available.

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Accordingly, decisions relating to custody and guardianship are not likely to be given the same degree of intense social work assistance as when the parents are divorcing. In theory, it is a right of the child to enjoy the guardianship, custody and access of both parents. It is the right of the *child* and not that of the parent. In practice, however, a Court will always have a discretion to act in the best interests of the child and usually they will take into account the various circumstances in which the father and mother of the child find themselves.

Now fathers of ex-nuptial children come in many "shapes and sizes". The father may be in a long-standing de facto relationship. On the other hand, the child might have been born as a result of a casual one-night stand, or of a rape. The dilemma is, should the father in all circumstances have automatic custody and guardianship? In practice, the courts will not accord a father the same virtually automatic rights to custody and guardianship as they would do a father of legitimate children.[7]

The position as far as access is concerned is even more difficult for a father of an ex-nuptial child. There is a strong tendency for the courts to deny access to such fathers on the basis that it would be disturbing to the mother of the child. In addition, frequently a mother of ex-nuptial children feels some hostility to the father, especially if the father has refused to marry her. For this reason, access may be traumatic. Accordingly, in practice, very few children who are born outside marriage will have the same quality of relationship with their fathers as do legitimate children.

Should this position be changed? Here we come to the great difficulty of equalising the rights of children born within marriage and outside marriage. For there is a welter of difference between allowing the father of an ex-nuptial child born in a stable de facto relationship to see his child and allowing access to a rapist. Accordingly, it seems inevitable that fathers of ex-nuptial children will be divided between goodies and badies. This has indeed been recommended by a recent English Report.[8]

There is no way in which the ex-nuptial child can be guaranteed the same contact with both parents as can a legitimate child. And this is another excellent reason for discouraging the conception of children outside marriage.

4. Nationality and Citizenship

There has been a valiant attempt to equalise the position of children born within marriage or outside marriage in this area. Again, doctrinal dogma must give way to social reality. Normally, the citizenship and nationality of a child follow that of his father. In the case of an ex-nuptial child, normally the nationality and citizenship will follow that of his mother. There are exceptional circumstances in which this position can be changed, especially where the father has custody of the child.

5. Surname

The choice of surname is a matter of great importance for both the child and its parents. It used to be thought that the surname of a legitimate child automatically followed that of his father whereas the surname of a child born out of marrige followed that of the mother. This position

can no longer be dogmatically stated as the law.

There have been a number of important recent cases in which the surname of the child has become a matter of major proportion. The cases both in respect of children born within and those born outside marriage, have shown that the surname of the child is a crucial matter on which the interest of the child should prevail. What is the interest of the child, in practice, may be a matter of great dispute.

Suppose a mother of an ex-nuptial child, born of a *de facto* relationship, names the child after the father. A few days later, however, she leaves the father and goes and marries another man, taking her child with her. They live in a new neighbourhood. Everyone assumes that the child is the product of that marriage. It may cause great embarrassment to the child to be *forced to bear the name of his natural* father, and thus clearly to show that he is not a product of the marriage. Clearly, this is a factor to be taken into account. On the other hand, the courts are inclined to say tht it is not good for a child to be deprived of the name of his real father. In these instances the welfare of the child dictates the child must bear the name of the father of the child.

Now the law, in theory, has been declared to be the same for children born outside marriage and within marriage. However, in practice ti is very rare that the courts will accord the father of an ex-nuptial child the same degree of favour on this matter as they would if the child had been born within marriage.[9]

6 Inheritance

It is in this area that the Status of Children legislation has done most for ex-nuptial children. Before 1974, a child was virtually unrelated to his ex-nuptial father. Accordingly, even if the father died leaving one million dollars, the ex-nuptial child could not gain any part of that, unless a will was made in his favour. Moreover, if a testator in a will specifically named the child, then of course the child would benefit. But if, in fact, he did not name the child but left property to be divided "amongst my children", the word, "children", *prime facie* means legitimate children only.

These two rules of common law have now been changed. The position is that the word, "child", in any document must be interpreted to mean legitimate or ex-nuptial child, unless the circumstances show otherwise. Moreover, a child born outside marriage has the same rights to inherit on an *intestacy* as if he had been born within marriage.[10]

In theory, that looks very good for the child born outside marriage. In practice, there are great difficulties. First, the new rules apply only to wills *made* afte the coming into force of the legislation, that is after March, 1975. It might have been more fair to apply the legislation to *deaths* occuring after that Act came into force. In any case, there are still many old wills and bequests which will have no application whatsoever to ex-nuptial children for they will be interpreted according to the law that existed before 1975.

The next difficulty is that an ex-nuptial child cannot benefit from this legislation unless his paternity has been recognised, either impliedly or expressly, before the death of the testator. And so this perpetuates the inequalty. Suppose a father dies in a road accident, for instance, while the mother is pregnant. In this case it would be virtually impossible for the child to benefit.

The irony is that in cases where fathers have failed to acknowledge their children during their lifetime, their estate will escape liability after the death. In other words, the children who have been treated least fairly during their lifetime will continue to be treated least fairly after the death of the father.

The final difficulty, of course, exists by virtue of the fact that while fathers of children born within marriage are usually proud to acknowledge their paternity, the position is otherwise with fathers of ex-nuptial children.

Suppose a married man dies intestate. To all appearances he was a good family man, and has two children. Can the administrators of his estate be safe in paying out the wife and children of the marriage? Or must they seek to ascertain whether he had sown any wild oats, and perhaps has some ex-nuptial children somewhere in the world.

To guard against this possibility, the personal representatives of every person who dies should be required to place an advertisement prominently in newspapers requesting that any person who thinks that he is the ex-nuptial child of the deceased should apply for consideration. That would place an unduly onerous burden on executors and administrators, who have been given blanket exception from the general rule that they are personally liable if the wrong beneficiaries are paid. But the legislation still permits that children born outside marriage may not have been acknowledged before the death and therefore not benefit by the statutory rules. The discrimination against ex-nuptial successors still persist.

Summary

The above brief discussion of areas in whic children born outside marriage are differentiated legally from those within marriage proves beyond doubt that the position of ex-nuptial children, legally, is inferior to that of children born within marriage.

Nevertheless, the courts have tried to assimilate the two statutes. And it is very probably that they will lean towards equality, where a man has *acknowledged paternity or has been declared the father.* This is the key provision of the whole Act. A child or a father who thinks that the relationship between the child and the father is one of biological paternity can apply to the Court for a Declaration of Paternity. Moreover, a father can acknowledge paternity and again this acknowledgement may be filed in the Supreme Court. If this is done, then the father is virtually in the same position as if the child has been born legitimate.

One might have thought, therefore, that this revolutionary change in the law, which is of most benefit to ex-nuptial children, would have been brought to the attention of the public.

Yet my research reveals that hardly any lawyer, let along layman, is aware of the provision of the Status of Children Act allowing for declarations and acknowledgements of paternity. Remarkably few have been filed in any of the Supreme Courts. At a recent conference organised by the Australian Institute of Family Studies, not one person in the audience of fifty experts which I was addressing had ever heard of this legislation.[11] It is an excellent example of a law which has been brought to the Statute Book without any attempt to publicise it. And it is this failure to provide a ready, easy method of acknowledgement of paternity which most handicaps ex-nuptial children.

Surely cheaper and les complicated ways of allowing for Declarations of Paternity could have been adopted, and can still be adopted to do fairness to ex-nuptial children.

The social stigma of being an ex-nuptial child is undoubtedly less than it was. The legal disabilities remain, and I do not see any way in which the law can prevent this situation.

The answer lies in preventing ex-nuptial births. The climate of opinion, which has been permissive towards ex-nuptial births, must change. Of course, when births have unavoidably occurred, the position of the ex-nuptial child should be ameliorated as far as possible. However, a vigorous campaign is needed to reduce drastically the number of children born outside marriage.

1. For similar legislation in other States, see F. Bates and J.N. Turner, The Family Law Case book (Law Book Co. Ltd., 1985), page 427.
2. See Newsletter of Australian Institute of Family Studies, January 1987.
3. See e.g. Status of Children Act 1974 (Vic.), s. 8(3).
4. See Adoption Act 1984 (Vic.)
5. The position *may* change as a result of recent reference to the Federal Parliament of powers over ex-nuptial children.
6. See note 5, *supra.*
7. This is explicitly stated in *Nobels* v. *Anderson* [1972] V.R. 821, by Crockett J., and it does not appear that this has been changed by *Douglas* v. *Longano* (1981) 47 C.L.R. 212.
8. Law Commission, Illegitimacy (Law Comm. No. 118, 1983, paras 4.15 *et seq.*).
9. Cases on change of surname include:- *W. v. H.* [1978] E.R. 1; *G. v. P.* [1977] V.R. 44; *In the Marriage of Chapman and Palmer* (1978) 34 F.L.R. 405; *In the Marriage of Putrino and Jackson* (1978) F.L.C. 90-441.
10. See e.g. Status of Children Act 1974 (Vic.), sections 3, 4, 6 and 7.
11. Conference in Melbourne in November 1986.