THE IMPACT OF THE VICTORIAN *STATUS OF CHILDREN ACT* 1974 ON THE LEGAL AND SOCIAL RIGHTS OF CHILDREN BORN TO UNMARRIED PARENTS

by

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A. *Introduction*

The *Status of Children Act* 1974, s. 3 (1) removed the word 'illegitimate', as it applied to children, from the law of Victoria. The objective was to provide equality of status between children born outside marriage and those born within a legal marriage.[1] In this paper it is proposed to examine how far the Act has achieved this end since it became operative in March 1975.

The Victorian Act was introduced very shortly after a similar Act had been passed in Tasmania[2] and both of these Acts were largely based on the New Zealand *Status of Children Act* 1969. Since 1975 most other Australian States have passed similar legislation.[3]

In 1975 the Commonwealth *Family Law Act* was passed and although it was not designed to affect the legitimacy status of children, a subsequent High Court decision, *Russell* v. *Russell*,[4] interpreted the Act in such a way that access to the Family Court was denied to children of unmarried parents. In *Russell* v. *Russell* the High Court interpreting s. 51 (XXII) of the Constitution[5] held that the Commonwealth Parliament could declare the rights and obligations of the parties to a marriage, to each other and to their children (natural or adopted). Consequently Parliament could create a jurisdiction with respect to such matters as custody, marriage and property even when they were not ancillary to principal relief. This jurisdiction was restricted to proceedings involving parties to the marriage and the natural and adopted children of the marriage.[6]

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1 Victorian Parliamentary Debates (L.A.) 1974, 317, 42, 97.

2 *Status of Children Act* 1974 (Tas.).

3 *Children (Equality of Status) Act* 1976 (N.S.W.); *Status of Children Act* 1978 (Qld.); *Family Relationships Act* 1975 (S.A.). Western Australia has achieved a similar effect by amending its relevant law piecemeal and the Northern Territory also has a *Status of Children Act* (1979).

4 (1976) 134 C.L.R. 495.

5 *Commonwealth of Australia Constitution Act* 1901 (Imp.).

6 Per Mason, J. in *Russell* v. *Russell* (1976) 134 C.L.R. 495 at p. 542.

B. *Approaches to Changing Legal Status of Ex-Nuptial Children*

Legislation may be used to improve the position of ex-nuptial children in three main ways:

1. The status of illegitimacy may be simply abolished by legislative fiat.
2. Ex-nuptial children may be deemed to be 'legitimate'.
3. Attempts may be made to remove, as far as possible, the adverse consequences of ex-nuptial birth.

There is a fourth indirect means of improving the position of ex-nuptial children and parents: they may be included in the general group of economically deprived families and so receive income support provided under government schemes thus making their economic and social conditions, if not their legal status, nearer to those of other families.[7]

The Victorian Act used the three direct approaches mentioned, the fourth was embodied in the Commonwealth *Social Security Act* 1947.[8]

1. *Eliminating the Concept of Illegitimacy*

At first sight the Victorian Act appears to be designed to eliminate the concept of illegitimacy, so that it is an example of the first approach described above. S. 3 (1) (a) of the Act provides that:

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

The Act abolishes the common law rule of construction whereby the word 'children' in relation to parents is construed to mean legitimate children only.[9]

The major obstacle to abolishing the distinction between the two kinds of children lies in treating the unmarried father in the same way as the married father. In the first place a willing unmarried father cannot establish his paternity on the same footing as a married father, where there is a presumption of paternity. Secondly, no reform of the law can compel ex-nuptial fathers to acknowledge, care for and maintain their children, with the same ease that it can in the case of married parents. Thirdly, if the father for his part is unwilling or is not aware that he is the father, it is not very helpful to say that his ex-nuptial child has rights with respect to him equal to those of a nuptial child with respect to his

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7 This approach is not new. In the 18th Century in France bastardy was specifically abolished by law in 1793, although this law ceased to have effect in 1795. In the U.S.S.R., a 1918 version of the New Bolshevik Code of Laws stated that 'no differentiation whatsoever shall be made between the relationship by birth in or out of wedlock'. But by 1944 the operation of this law had also ceased. Teichman, J., *The Meaning of Illegitimacy* (1978) at pp. 66, 70 and Teichman, J., *Illegitimacy: A Philosophical Examination* (1982) at pp. 153-157.

8 S. Charlesworth, *Single Mothers Who Keep Their Children in Victoria 1969-75* (M.A. Thesis, 1976). Chapter 3.

9 *Hill* v. *Crook* (1873), L.R. 6 H.L. 265. M. A. Neave, 'The Position of Ex-nuptial Children in Victoria' (1976) 10 *Melbourne University L.R.* 330.

or her father. The Victorian Act attempts to cope with this difficulty in making provision for establishing paternity but, in a paradoxical way, thereby reinforces the difference between nuptial and ex-nuptial children in this regard.

2. *Deeming or Imputing Legitimacy*

The device whereby a child is deemed to be a child of the marriage of his parents when they marry after conception, but before birth, is termed legitimation. Where the mother of the child is already married to someone else, the child is deemed to be the child of the husband unless it can be proved beyond all reasonable doubt that he is not. S. 5 of the Victorian Act recognises this by codifying the presumption of legitimacy where the birth occurs within ten months of parental separation or the parents are presently married.[10]

3. *Mitigating the Adverse Consequences of Ex-Nuptial Birth*

This approach leaves the legitimate/illegitimate distinction largely in place, although the term 'legitimate' itself may be changed, as it is in the Victorian Act s. 3 (1), to a, '. . . child of parents who have not been or are not married to each other'. The Act operates in a framework of pre-existing State laws, which have not been amended in the spirit of s. 3 (1), therefore most of the decided cases have turned on the interpretation of the new provisions in relation to the older ones. With the earlier cases, it seemed that the *Status of Children Act* 1974 (Vic.) had minimal impact on the relationship between an unmarried father and his child. However, in later cases, judicial initiative in using the wardship powers of the Supreme Court has led to some gain in guardianship rights for unmarried fathers. Further, the proposed legislation on adoption presently before the Victorian Parliament provides that a father who is not married to the mother of a child must give consent before the adoption can proceed in circumstances including registration of his name on the birth certificate or where he has been declared the father by a court order.[11]

C. *The Context of the* Status of Children Act *1975-84*

There have been a number of social changes which have affected the status of unmarried parents and their children during the seven years since the Victorian Act was passed and which have provided a general context for the operation of this Act.

1. The absolute number of ex-nuptial births has been increasing, and as this has occurred in the contexxt of a falling total birthrate their

10 There are no provisions in Australian law for a court to confer legitimacy status on a particular child by allowing a single parent to adopt him. Compare the situation with the case, *Paula and Alexandra Marchx,* European Court of Human Rights, 13 June 1979.

11 *Adoption of Children Bill* 1984, cl. 33.

presence has become more obvious.[12] The proportion of mothers keeping their children, rather than having them adopted, has increased markedly.[13] The effect of these trends is to increase the number of children affected by the *Status of Children Act* 1974.

2. The introduction of a subsidy for all supporting parents by the Commonwealth Government has previously been mentioned. Before 1969 security provisions for illegitimate children were a matter of private law, *i.e.*, maintenance rights by the putative father, as there was no public income security provision for low income non-married parents before the 1970's. Since that time ex-nuptial mothers, and since 1978 supporting ex-nuptial fathers, have received payments similar to widows, divorced and separated parents.[14]

3. The presence of many more *de facto* unions, and some limited recognition of such relationships, has inevitably affected the children in these families.[15] From 1971, after almost universal rates of marriage, the number and crude rate of marriages has declined among women in the younger child-bearing ages of 15-40 years.[16] This trend, combined with increasing numbers of divorces, is likely to be associated with more *de facto* unions, and this is in fact what is happening. In 1971, 34,166 people lived in *de facto* unions, in 1976, 131,876 people, and in 1982, 337,316 people were living in such unions.[17] Although these couples are less likely to have children than are married couples, the numbers of such families having children has increased dramatically. In 1971, 10,407 *de facto* families contained dependent children; in 1976, 32,188 did, and in 1982, 59,640 families had dependent children.[18] These children are technically ex-nuptial and so are of interest to this paper. If the parental relationship is

12 The numbers of ex-nuptial births in 1975 (the first year of operation of the Act) was 4,316. This represented 7% of total births. In 1982 there were 6,165 ex-nuptial births which represented 10.3% of total births, *i.e.*, an increase of nearly 50%. In Tasmania the proportion of ex-nuptial births in all births was 9.8% in 1975 and 15.2% in 1982, an increase of 55%.

13 Charlesworth, *supra* n. 8, Chapter 6.

14 See *State Grants Act* which introduced a Commonwealth subsidy for limited State payments. This was followed by an amendment to the *Social Services Act* 1947 in 1973, S. 83AAA(1) which introduced the Supporting Mothers Benefit. (Changed to Supporting Parents Benefit in 1978 when supporting fathers also became eligible for income maintenance payments.)

15 Some of the reasons given for not wishing to marry include the fact that there are elderly people who wish to preserve a single status pension, or wish to ensure that their estates do not pass by inheritance to an elderly spouse; low income couples who would not have Supporting Benefit if they formed a permanent household; a desire to avoid the legal effects of marriage, especially a property and maintenance obligation; a wish to try out the relationship; a lack of permanent commitment and interest in legal rights and duties that flow from *de jure* marriage, J. S. Wade, *De facto Marriages in Australia* (1981).

16 N.S.W. Law Reform Commission (1981): *De facto Relationships Issues Paper* Paras 2.4: 2.7 Table 1.

17 N.S.W. Law Reform Commission, *Report on De facto Relationships* (L.R.C. 36) June 1983, 41.

18 Ibid.

stable, however, there will be no reason for the *Status of Children Act* 1974, to be invoked on their behalf.[19] It is worth noting in passing that legal recognition of *de facto* relationships is not universally desired.[20]

4. In 1977 the Victorian *Equal Opportunity Act* 1977-82 was passed prohibiting discrimination on the grounds of sex or marital status. Marital status included single, married, separated, divorced or widowed spouses, but the Act made no mention of *de facto* relationships. The Act was used to good effect, in the case of six beneficiaries of the Supporting Parent Benefit in 1982. The complainants, two men and four women, were able to successfully claim discrimination by the Victorian Government which had denied them concessions granted to female once-married parents (*i.e.*, those eligible for Widows' Pension).[21] The men claimed discrimination on the grounds of sex, as men are not eligible for Widows' Pension either. The success of these claims led to the granting of concessions in the 1982 Victorian Government Budget, and also to widening of the powers of the *Equal Opportunity Act* 1977-82 to include discrimination against those living in *de facto* relationships. Thus, the widespread interest in anti-discrimination legislation has given ex-nuptial children and their parents some scope for seeking remedies outside the *Status of Children Act*.

5. Another development in parent/child relationships, scarcely envisaged at the time of drafting the Victorian *Status of Children Act* 1974, has posed quite new and thorny legal problems which have tended to remove the remaining disabilities of ex-nuptial children from the centre of the stage.

   In 1974, the use of alternative conception techniques was confined to artificial insemination by donor (A.I.D.). The original Act made no specific mention of children conceived in this manner although they are technically illegitimate *Roberts* v. *Roberts*.[22] In 1971 their numbers were not sufficiently large to receive much attention, but the situation changed rapidly with increasing use of this technique.

   A 1984 amendment to the Act, *Status of Children (Amendment) Act* 1984, proclaimed to commence from 1 August 1984, is directed to this issue. The relevant sections are sections 10A to 10F of the

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19 The courts have recognised *de facto* relationships; see for instance *Ogilvy* v. *Ryan* [1976] 2 N.S.W.L.R. 504, *Hohol* v. *Hohol* [1981] V.R. 221 *Baxter's Case* [1976] *Legal Services Bulletin* 2 : 6, *Lambe* v. *Director General of Social Services* (1981) 1 *S.S.R.* 5, 6. An excellent commentary on the history and present position of recognition is contained in Jordan, A., *As His Wife — Social Security Law and Policy* (1982) Department of Social Security Research Paper No. 16.

20 R. Deech, 'The Case Against Legal Recognition of Cohabitation' (1950) *I.C.L.Q.* 480.

21 These include transport, motor car registration, third party insurance, municipal and water rates; *The Age*, 12 February 1982.

22 [1971] V.R. 160. This difficulty, it may be noted, is often circumvented by both doctor and patients making the assumption, however slight the chance, that the mother's husband fathered the child.

Amendment Act. These sections deal with the status of a child conceived as a result of artificial insemination or implantation. In both cases, the husband (including a *de facto* husband) is deemed to be the father of the child. The producer of the semen is deemed not to be the father and the presumption is irrebuttable, ss. 10C and 10D. S. 10E deems a woman to be the mother of a child resulting from an implanted ovum, with provisions similar to ss. 10C and 10D in respect of the father and the donor, and again the presumption is irrebuttable. S. 5A of the *Family Law Act* deems a child, conceived by implantation or artificial insemination, to be the child of its mother's husband. The Federal Act requires the consent of the husband, whereas the State Act presumes that consent has been given but the Federal Act 'includes as a child of the marriage, a child who is deemed under State or Territory law to be a child of the couple where the child is born as a result of a medical procedure'.[23] The *Family Law Act* does not deal with the situation in which the ovum is donated.

The consequences of the new techniques of artificial insemination and in vitro fertilisation have left the law a long way behind.[24] The introduction of confusing and conflicting State and Federal legislation does not assist in clarifying the issue of a child's status.

6. There has been steady pressure for reform with reference to the divided jurisdiction between Federal and State courts apropos ex-nuptial children. The National Council for the Single Mother and Her Child (NCSMC) which played an influential role in securing the Supporting Parents Benefit in 1972 for single mothers has continued to press for the abolition of discrimination against ex-nuptial children. The NCSMC was active at the Hobart Constitutional Convention in 1976 at which an amendment was passed to the effect that the Constitutional provision which perpetuated discrimination against unmarried parents and children should be removed.[25] In 1977 the NCSMC made submissions to the Federal and State Attorneys-General on uniform provisions for all children under the *Family Law Act* 1975.[26]

   In 1978 the Council published the names of thirteen influential bodies which supported its policy, *i.e.*, that the States should refer to the Commonwealth their powers relating to the custody, guardianship and maintenance of ex-nuptial children.[27] In 1979, the Council again approached the Federal and State Attorneys-General on the juris-

23 'In Vitro Veritas? Institute says Waller Committee's recommendations need more study.' [1984] *Law Institute Journal* 468.

24 C. G. Weeramantry, *The Slumbering Sentinels* (1983).

25 Item H4 137.

26 National Council for the Single Mother And Her Child, *Family Law and the Filial and Parental Status of Ex-nuptial Children and their Families, Submission to the Federal and State Attorneys-General, 1 September 1977.*

27 National Council for the Single Mother And Her Child, *Family Law and the Status and Rights of the Ex-nuptial Child and his Family, Submission to the Federal and State Attorneys-General, 14 May 1978.*

dictional question and on the deficiencies of the Status of Children Acts passed by the various States.[28]

Recent amendments to the *Family Law Act* have widened the notion of 'children of the marriage'. A child of a marriage now includes, a child born to both parties before or after they marry, a child adopted since marriage by both parties, or by one of them with the consent of the other, an ex-nuptial child of either party or a child adopted by either party if that child was ordinarily part of the parties' household at the relevant time, and any other child who also was ordinarily a member of the parties' household, and who was treated by them as a child of their family, at the relevant time.

As mentioned above 'test tube' children born of donated semen come within the province of the Family Court.

Third parties can now institute proceedings, the only proviso being that one of the parties to the relevant marriage be joined to the proceedings.

The effect of these changes is to increase the jurisdiction of the Family Court, diminishing that of the Supreme Court, *i.e.*, the changes go some way towards eliminating the distinction between legitimate and illegitimate children.[29]

These then are some of the changes that have occurred with respect to the status of ex-nuptial children and their parents, concurrently with the operation of the Victorian *Status of Children Act* 1974, and that have affected its reception.

D. *Legal Consequences of the Status of Children Act*

To see the consequences of the *Status of Children Act* it is necessary to study how its provisions have been interpreted by the courts in the few cases that have come before them.[30]

1. *Rights of the father (and reciprocal rights of the child)*

The first recorded case to test the efficacy of s. 3 (1) of the *Status of Children Act* was in *Re A.C.*[31] It concerned two university students. Their sexual relationship was brief, and the mother decided unilaterally that the child born as a result of this relationship should be adopted. A single judge of the Supreme Court decided that, notwithstanding the change in legislation, the putative father did not have any right to block the adoption of his child. S. 23 of the *Adoption Act* 1964, which described the mother of an ex-nuptial child as the appropriate consent giver, was held not to have been amended by the new Act. In August

28 National Council for the Single Mother And Her Child, *The Scarlet Letter*, April 1979, June 1981.

29 These provisions have already been challenged but the High Court has not yet handed down its decision.

30 Neave, *supra n. 9.* R. Chisholm, 'Justice for Ex-nuptial Children: Another Step Forward' [1977] *A.C.L.R.* 40. N. Turner, 'Victorian Laws Affecting Ex-Nuptial Children' in *The Law and the Citizen* (1977).

31 Unreported Supreme Court Case Vic. 1976 per Jenkinson. See also *L.* v. *B.* and another at the same date cited in N. Turner, *supra* n. 30.

of the same year, more limited rights of the father were recognised in *G.* v. *P.*[32] where Kaye, J. held that s. 12 of the Act amended s. 147 of the Victorian *Marriage Act* 1958 to allow the Court to direct the mother of an ex-nuptial child be known by his natural father's name. Kaye, J. remarked that the alterations in the law, affecting the status and rights of an 'illegitimate' (*sic*) child, ought to be taken into account when determining whether a child should use her father's name.[33] He also mentioned the fact that by the operation of s. 3 (1) the father of an illegitimate child was his natural guardian, although the basis of the decision was the interests of the child as expressed in s. 137 of the *Marriage Act* 'that she should retain a warm and full relationship with the father'. The difference between the decisions in the two cases may well be that in *Re A.C.* the father had no relationship with his newborn child before his application. In the *G.* v. *P.* case, the natural parents had lived together for ten years.

In 1978, the case of *W.* v. *H.*[34] was before the Court. Here the father had cohabited with the mother of their children for three years. Later they separated and the mother married someone else. The father continued to see the children. When he heard that the married couple were preparing to adopt the children, he applied to have the children made wards of the Court, to secure his access to them, and was successful. The fact that the father's consent to adoption was not required was reaffirmed. However, if the *Adoption of Children Bill* passes into Law this will no longer be the case.

In this case, Jenkinson J. referred to a cultural revolution in popular attitudes to the offspring of both nuptial and ex-nuptial children, and to the relationship of parent and child.[35] He took the opportunity to expand on the different rights and duties comprised under the term 'guardianship', *i.e.*, strict guardianship rights which flowed to all parents from s. 3 (1), as distinguished from those broader rights which include care and control, and those which are required for consent to adoption.[36] In this case, because of the father's rights in the strict sense, the children were made wards of the Court. Custody was given to the mother and access to the father.

In 1979, an apparent set-back to a father's rights was contained in a first instance judgment by Anderson J., who treated the father's refusal to marry the mother, and the mother's later wish that he be denied access, as relevant to a decision to refuse the father's application. This judgment was overturned by the Full Court. The mother, who chose to rely on her priority as custodian in s. 147 of the *Marriage Act*, rather than the paramountcy of the welfare of the children in s. 142 of the same Act, appealed to the High Court, but the Full Court's judgment was

32 [1977] V.R. 44.
33 Evidently the judge had not yet adverted to the objective of the Act which was to abolish the use of this term altogether in a legal context.
34 [1978] V.R. 1.
35 Note the change in terminology since in *Re A.C.* was decided.
36 *Hewer* v. *Bryant* [1970] I.Q.B. 357.

upheld. The conclusion of the Court expressed in a joint judgment by Gibbs C.J., and Murphy J. was that after the passing of the *Status of Children Act*, the Court may make such order in relation to the custody or control of a child as it thinks fit, having regard to s. 142 (*i.e.*, the welfare of the minor), and that s. 147 should conform to this. This statement implies a considerable progress with respect to the decision in *Re A.C.* as it almost equates the criterion for custody decisions in the case of ex-nuptial children with that of nuptial children in the *Family Law Act* s. 64 (1), the paramount interest is the child.[37]

It is of interest that a N.S.W. case, *Youngman* v. *Lawson*, says explicitly in respect of the N.S.W. *Children (Equality of Status) Act* s. 6 (which implements the same policy as s. 3 (1) of the Victorian Act) that s. 6 imports into the relationship between an illegitimate child and its parents so much of s. 61 (1) of the *Family Law Act* 1975 as affects or regulates the relationship between a legitimate child and its parents.[38]

The effect of s. 61 (1) would therefore be to constitute both parents of an illegitimate child its joint guardians (unless the father is unknown and then the mother is the guardian). This decision has not been tested in Victoria but it would seem to run counter to s. 147 of the *Marriage Act* 1950 (Vic.) which awards custody to the mother unless this is contrary to the welfare of the child.

2. *Adoption Rights*

Although the original Act gave fathers of ex-nuptial children no rights as far as adoption consent is concerned, it is likely that the position may change in the near future. Where paternity is legally acknowledged, the father will have rights of consent if proposed amendments to the *Adoption of Children Act* are passed. This will bring it into line with the spirit of the *Status of Children Act* and will represent a considerable change in Victorian Law which has not changed much since 1875. In the case of *Re Bates*[39] a devoted father of ex-nuptial children was denied custody when his *de facto* wife died. The children were sent to an orphanage.

3. *Court Wardship*

Some improvement in paternal status has also occurred outside the context of the *Status of Children Act*. The device of court wardship (which has its historical origin in the equitable jurisdiction of *parens patriae*)[40] was used in the cases after in *Re A.C.* This device was discussed in considerable detail in the High Court Case of *Fountain* v. *Alexander*.[41] In this case, the child whose custody was in dispute was

37 See also *Gorey* v. *Griffin* [1978] 1 N.S.W.L.R. 739 and in *Re Hall* (*infant*) O.S. 119/1979.
38 [1981] N.S.W.L.R. 439 per Street, J., at p. 444.
39 [1875] 1 V.L.R. 197.
40 N. J. White and R. A. H. White, *Wards of Court* (1979).
41 (1980) 56 A.L.J.R. 321.

not an ex-nuptial child, but the child of a marriage whose mother's former *de facto* husband sought custody. The *Hewer* v. *Bryant* distinction, within the bundle of rights comprised by guardianship, was again spelled out. It was made clear the Family Court does not have the equitable jurisdiction of wardship (unlike State Supreme Courts). Gibbs J. has, however, recognised that ex-nuptial fathers seeking court wardship are only trying to seek a right to be heard on custody and access issues, similar to that given to married parents under the *Family Law Act*. He took the opportunity to comment on the '... confusion and inconvenience that is caused by the fact that jurisdiction in cases, relating to custody of children, is divided between State and Federal Courts'.[42] A substantial amount of the litigation based on *Status of Children* legislation has been an exercise of these limited guardianship rights by fathers.[43]

4. *Testamentary Issues*

The lack of retrospectivity in the abrogation of the rule in *Hill* v. *Crook* with regard to testamentary dispositions has not attracted much litigation, although its implications have been discussed at length. This means that the rule does not apply to wills drawn up before the Act, and that in the case of intestacy, executors of wills are not obliged to enquire into the possible existence of ex-nuptial heirs. It is considered that executors may be over protected.[44] However, one ex-nuptial child in N.S.W., who was born after his father's death, was able to rely on this provision.[45]

5. *Filius Nullius and Habeas Corpus*

There have been cases decided in other States which could well influence interpretation of the Victorian Act.

The abrogation of the term *filius nullius* (son of nobody) was upheld in a Queensland case[46] on similar provisions to those of the Victorian Act. In *Holland* v. *Hobcroft*, *habeas corpus* was held not to be an appropriate remedy for one ex-nuptial parent against another.[47]

6. *Maintenance*

As far as maintenance is concerned, an ex-nuptial child still comes under the Victorian *Maintenance Act* 1965 (ss. 10-16). Although the ways of proving paternity have been simplified, there has been a decrease in the number of affiliation actions in the magistrates' courts, probably because of more generous social security provisions. Single parents who are supporting children can now obtain a certain if minimal income in

42 Ibid at p. 332.
43 *Pylarinos and Reklitis* [1978] F.L.C. 60-609; *Chapman* v. *Palmer* [1978] F.L.C. 90-510; *Arnd* v. *McIntyre* [1980] F.L.C. 90-876; *C.* v. *S.* [1980] F.L.C. 90-846.
44 Turner, *supra* n. 10.
45 *V.* v. *G.* [1980] 2 N.S.W.L.R. 366.
46 *Re S. (an infant)* (1980) 5 Fam. L.R. 84.
47 [1980] F.L.C. 90-865.

the form of a pension or benefit. The existence of maintenance orders is now less crucial to either married or unmarried parents. Since 1975, there have been no recorded cases in the Victorian Supreme Court which turn on the issue of maintenance alone.

The inequality between married and unmarried parents is still part of the law of Victoria. The *Status of Children Act* does not give the mother rights to maintenance for herself. Indeed in some respects the *Family Law Act* 1975 has increased equality by *reducing* the rights of married women in the same position.[48] The underlying reason here is probably that claims for maintenance of an ex-nuptial child are against the State, while with regard to nuptial children they are against the parent (usually the father).[49]

7. *Proof of Paternity*

A child clearly has no useful rights in relation to a father who cannot be identified. There are deficiencies in the Victorian Act with regard to proof of paternity. There is no power to order blood or tissue tests (although the Victorian Supreme Court, under its *parens patriae* jurisdiction can do so).[50] In some States there is a statutory power to order blood tests, for example, *Children (Equality of Status) Act* 1976 (N.S.W.) ss. 19-22; this power was confirmed in *D.* v. *S.*;[51] *Status of Children Act* 1974 (Tas.) s. 10 (3) and (4); *Status of Children Act* 1978 (Qld.) s. 11; *Community Welfare Act* 1972 (S.A.) s. 112 affiliation proceedings, but no Australian legislation has taken into account the modern techniques of tissue typing which can almost eliminate uncertainty with regard to paternity.[52]

There is a South Australian case, *P.* v. *T.*[53] which deals with the rules of proof needed to rebut the presumption of legitimacy beyond reasonable doubt. It is of interest that an English case suggests that the issue of paternity should not be tried at all, unless it has a bearing on the child's welfare.[54]

In Victoria, it seems that most of the paternity proceedings have been uncontested applications for declarations under s. 10 (1) of the Act. In four such unreported cases heard in the Supreme Court the mother who had borne a child to a man who was not her husband had believed she would render her child illegitimate if she established the natural father as legal father. In these cases the natural mother was not married to or

48 See s. 72. A married woman only retains the right to be maintained if unable to support herself adequately.

49 *Ward* v. *Byam* [1956] 1 W.L.R. per Denning J.

50 *R.* v. *Jenkins ex parte Morrison* [1949] V.L.R. 22.

51 (1982) 8 Fam. L.R. 571.

52 M. Meulders, 'Fondements nouveaux du concept de filiation', *Annales du Droit* (1973 Tome XXXIII), 'Cohabitation and Children in Europe', *The American Journal of Comparative Law* 1981, 29, 359, Lee, 'Paternity: An Administrative Approach', *Clearing House Review,* June 1977, 22.

53 1980 F.L.C. 75-189.

54 *Re J.S.A. a Minor* [1980] 1 All E.R. 1061.

living with, the natural father at the time of conception, but she subsequently wanted the child to have the latter's name and acknowledgement.

In all of these cases, the parties showed that they had no knowledge of the consequences of their earlier (illegal) actions in declaring their former husband as father, nor any appreciation of the significance of the *Status of Children Act* until it had been in operation for a minimum of three years. (In the matter of *Eberhardt*, July 1977. In the matter of *Guddal*, September 1978. *Markes* v. *Anderson*, March 1978. *James* v. *Foster*, November 1980.)

8. *Domicile and Nationality*

Discriminatory provisions regarding domicile and nationality for ex-nuptial children still prevail. With the children of a marriage, domicile follows the custodial parent, whereas with a child of unmarried parents, it remains with the mother. The same is true of nationality.[55]

E. *Review and Conclusion*

1. The most significant legal discrimination against ex-nuptial children under Australian Law is their exclusion from the operation of the *Family Law Act* 1975. To a certain extent the situation has improved for some ex-nuptial children who are living in households with a now married parent. The matters concerning children living with an unmarried parent must still be brought before State courts.
2. The pre-existing framework of laws in Victoria has severely limited the intention expressed in s. 3 (1) of the Act. First, the mother is specifically mentioned as having custody of an ex-nuptial child in the *Marriage Act* 1958 s. 147. The position of ex-nuptial mothers has not changed in this respect and adheres to the original common law rule.[56] Second, orders for maintenance and custody are still made under the *Maintenance Act* 1965 s. 17.

   This means that an ex-nuptial child is disadvantaged in two main respects in comparison with a child of married parents and for whom maintenance questions are decided under the *Family Law Act*. First, an ex-nuptial mother has no right to receive maintenance from the child's father on her own behalf and a custodial ex-nuptial father has no right to receive maintenance for himself or his child from the child's mother. Under the *Family Law Act*, parents have equal obligations to support each other and their children. Second, there is no provision for counselling or consultation which could assist the Court in reaching a decision in the child's best interests.[57]

55 Turner, *supra* n. 10.

56 *Bernardo* v. *McHugh* [1891] A.C. 891.

57 Some Supreme Court judges request such services and order welfare reports but no machinery exists to provide court services of this nature.

3. Influential community groups are pressing for constitutional change or the ceding of State powers to the Commonwealth to overcome the jurisdictional problems of the *Family Law Act*. The High Court has commented on the anomaly in *Vitzdamm-Jones* v. *Vitzdamm-Jones*.[58] The position has been somewhat ameliorated by the addition of s. 5A to the *Family Law Act*, but it is not known whether this amendment will withstand constitutional challenge.

4. As far as the *Status of Children Act* is concerned, judges have tried to ameliorate some of the inequalities between mothers and fathers of ex-nuptial children, as compared with the position of parents of nuptial children, by the use of court wardship powers. It has to be recognised, however, that there are special circumstances in the lives of *some* ex-nuptial children that make it impossible to equate their situation with that of nuptial children.

5. At the moment there seems to be a certain inertia, or perhaps a slowing down of reported court activity based on the Act. This may be due to a preoccupation with a new class of legally disadvantaged children, *i.e.*, those who are conceived artificially. On the other hand, the growing interest in the rights and status of *de facto* married couples may well lead to a move to give *their children* equality as well. Where a stable marriage-like relationship between the parents exists, this should not be an insuperable problem since here the children clearly have ascendents (parents, grandparents, etc.) the law can recognise. If, however, the fathers are unknown or quite remote from the children, the law cannot fill in the gaps in the parent and child relationship.

6. The *Status of Children Act* in Victoria, as well as similar legislation in other States, must be given credit for what it *has* achieved. First, it has had a most important symbolic value, as the dignity and rights of *all* children are acknowledged. Second, the Act has also had an educative effect, not least in changing the terminology used by the judges !

   In sum, the main provision of the Act as expressed in the s. 3 (1), has cut across the long established common law situation, but the extent of the changes has been limited by failure to amend other State legislation in keeping with the spirit of the Act, and the provisions of the Commonwealth Constitution, which have limited the operation of the *Family Law Act* 1975, have exacerbated some pre-existing disabilities of ex-nuptial children.

58 [1981] 55 A.L.J.R. 192.

BOOKS RECEIVED

Bates, F., *Principles of Evidence*, 3rd Edition, Law Book Co., Cl. $37.50, L. $25.00.

Blood, D. C., *Veterinary Law*, The Law Book Co., Cl. $29.50.

Cope, M., *Duress Undue Influence and Inconscientious Bargains*, Law Book Co., Cl. $36.00.

Derham, S. R., *Subrogation in Insurance Law*, Law Book Co., Cl. $38.00.

Dickey, A. F., *Family Law*, Law Book Co., Cl. $60.00, L. $45.00.

Duncan, W. D., *Estate Agency Law?*, Law Book Co., L. 29.50.

Finn, P. D. (Ed.), *Essays in Equity*, Law Book Co., Cl. $39.50.

Flint, D. E., *Foreign Investment Law in Australia*, Law Book Co., Cl. $69.50.

Luntz, H., Hambly, A. D. and Hayes, R. A., *Torts : Cases and Commentary*, Butterworths, L. $55.0.

Partlett, D. F., *Professional Negligence*, Law Book Co., Cl. $48.00.

Porter, K., et al., *Mortgage Debenture*, 3rd Ed., Law Book Co., L. $19.50.

Renton, N. E., *A Guide for Meetings and Organisations*, 4th Ed., Law Book Co., L. $12.50.

Rossiter, C. J., *Vendor and Purchaser*, Law Book Co., Cl. $52.00, L. $35.00.

Sharpe, A., *Credit Acts Handbook*, Law Book Co., L. $24.00.

Sharpe, D., *Performing Artist and the Law*, Law Book Co., L. $24.00.

Sheridan, L. A. and Keeton, G. W., *Equity and the Supreme Court*, Barry Rose (Publishers) Ltd., London, £6.50.

Trindade, F. A. and Cane, P. F., *The Law of Torts in Australia*, Oxford University Press, Cl. $65.00, L. $39.50.

Inclusion in this section does not preclude review in a subsequent issue.
