THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 13

Affiliation Proceedings

Contribution by two or more Putative Fathers

REPORT

MARCH 1970

REPORT ON

AFFILIATION PROCEEDINGS

(Contribution by two or more Putative Fathers)

To: The HON. ARTHUR F. GRIFFITH, M.L.C.
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. As Project No. 13 of its first programme, the Committee was asked -

"To consider and report on whether in affiliation cases in which it appears from the evidence that there are two or more putative fathers, it is desirable that the law should provide for -

(a) contribution of maintenance by such persons; or

(b) additional or alternative relief for the mother."

EXISTING LAW IN WESTERN AUSTRALIA AND ITS EFFECTS

2. The maintenance of illegitimate children by their parents is governed in this State by the *Married Persons and Children (Summary Relief) Act, 1965-1967*. Section 17 places an obligation on the parents of an illegitimate child to provide for, or contribute towards, reasonable maintenance for the child. The section further provides that the mother of an illegitimate child may apply to the court for an order against the father of the child, and that the Director of the Child Welfare Department may apply for an order against either, or both, of the parents. Subsection (3) of the section empowers the court on being satisfied that a male defendant is the father of the child to order him to make such payments for the maintenance of the child, as the court considers reasonable. Section 96 provides that the court shall not make an order on the uncorroborated evidence of the mother, or if the mother was a common prostitute at the time of conception.

3. In a normal case, where the defendant admits his paternity, the mother has no difficulty in obtaining an order for the child's maintenance. If the defendant does not admit his paternity, the court must be satisfied, on the evidence before it, that the defendant is in fact the father of the child.

4. Where the woman has had sexual intercourse with more than one man during the possible period of conception she may have some difficulty in obtaining a maintenance order because she may not be able to prove who is in fact the father. If she applies for a maintenance order against one of the men she may be met with evidence from each of the others asserting that he too had had sexual intercourse with her during the relevant period. Applications in such circumstances however, are not common. The clerk of the Summary Relief Court at Perth can recall only one such case since the court was set up in 1966. The Clerk of the Children's Court at Perth estimates that there had been only a small handful of such cases in his court from 1956-1966, when jurisdiction was transferred to the Summary Relief Court. These estimates are at variance with that given by the Law Society (see paragraph 6 below), Of course, there may have been cases in which the woman has not commenced proceedings because of the unlikelihood of success.

5. Even where the woman has had sexual intercourse with one man only, his friends may testify to having had intercourse with her. The Committee has been informed by a Magistrate of the Summary Relief Court that attempts to introduce perjured evidence of this nature are very rare, though there is suspicion that a case recently heard was of this character. In that particular case the attempt, if it was one, was unsuccessful.

THE MOVEMENT FOR REFORM

6. The Law Society of Western Australia wrote to you as Minister for Justice on 14 July, 1966 (file No. CLD. 827/66), claiming that an application by the mother of an illegitimate child for an affiliation and maintenance order against the alleged father was frequently defeated on the evidence of male witnesses called by the respondent to testify that during the possible period of conception they also had had sexual intercourse with her. The Society expressed the view that unless the probability of a particular male tendering evidence of being the father was ruled out by scientific or other proof, all such males should be adjudged possible fathers and be made liable to contribute to the maintenance of the child.

The report then goes on to give what in the Commission's view are compelling reasons why provision along these lines should not be introduced into the law. The Commission adopted the views expressed in an article by Professor Arnholm, Professor of Law at Oslo University, about similar Norwegian legislation which had been repealed in 1956. The report quoted the following extract from Professor Arnholm's article -

> "The part of the Act (of 1915) which caused most criticism as time went by was that containing the rules providing for the establishment of a duty of support unconnected with paternity . . . The 1915 Act - much against the intention of the legislature - came to depress the social position of those children whose right of support was granted without the establishment of paternity. Such a decision involved an assumption of the sexual promiscuity of the mother during the period of conception and the scheme of support served to remind the child of this very fact during the whole of its adolescence. This means placing a severe psychological strain on the child. Experienced social workers affirm that children settle down more easily where no duty of support is imposed at all. The child can then find refuge in the thought that the mother has only had sexual relations with one man, who has deserted her and cannot be found. Against the scheme of imposing on several men the duty of supporting the same child particularly sharp criticism was forthcoming. From an economic point of view, of course, it might be advantageous to hold several persons jointly liable. But the advantage was dearly bought. It involved a particularly brutal reminder of the mother's lapse."

The Commission pointed out that Denmark, which had also earlier adopted joint contributors proceedings, had abolished them in 1960 for much the same reasons.

EXPERT OPINION IN WESTERN AUSTRALIA

11. The Committee has sought the views of some of the experts in this State on the possible psychological effects on the child of a maintenance order against more than one putative father. The Committee consulted Professor C.B. Kidd, Professor of Psychiatry, Professor W. B. Macdonald, Professor of Child Health, and Dr. W. Tauss, the Course Controller for the Diploma in Social Work, all of the University of Western Australia.

12. These three persons agreed with the English Commission's view that it would be harmful to the child if its maintenance were made up of contributions by several men who were possible fathers. The child would almost inevitably get to know of the situation in one way or another in the course of time. In Western Australia money due under a maintenance order is paid to the court and then transmitted to the mother, but the interposition of the court

between the mother and the contributors would not significantly lessen the likelihood that the child would sooner or later get to hear of the true position.

13. If the mother decides to keep the child but cannot obtain maintenance for it from the father, she may suffer financial hardship, but the Committee has been informed by the Child Welfare Department that the State readily gives financial assistance to unmarried mothers. They are thus not likely to be left entirely without financial support. The amount currently payable to a woman with one child is $21.50 weekly. In addition further payments are made in special cases.

14. The Committee is satisfied that the principle of joint contributors in affiliation cases should not be adopted in this State.

BLOOD TESTS

15. A possible alternative solution to the problem would be the requirement that the persons concerned submit to blood tests to assist the court in determining which of the men involved is the father.

16. As medical knowledge stands at present blood tests provide conclusive evidence only in a negative sense. That is, they can prove only that a man from whom a blood sample is taken could not, according to the biological laws of heredity, be the father of a particular child. To take a simple case, if the child's blood group is MM and the man's group is NN, it follows that he cannot be the father since the child must inherit one blood group factor from his father. As the man can only give N factors and the child has only M factors there is no possibility of the man being the father of the child. Where a person is wrongly accused of being the father there is about a 70% chance of establishing this fact, using all the blood and serum group typings available. This sort of exclusion could in some cases prove a positive conclusion by eliminating all possible candidates but one.

17. Moreover, though blood tests in themselves do not provide conclusive proof of paternity, in cases of rare blood groups, they could show that it is very likely that the man tested is the father. Even in cases of blood groups that are not so rare and where the degree of

Blood Testing - Witnesses

21. In 1968 the New Zealand Parliament, as part of a review of its maintenance legislation, introduced a provision empowering the court in affiliation proceedings to order not only any party, but also any **witness** who testifies that he is or may be the father, to undergo a blood test. If the witness refuses, the court is empowered to disregard his evidence [*Domestic Proceedings Act, 1968*, s.50].

22. The Committee assumes that this would enable a court to refuse to admit the evidence of such a witness and not merely to take the refusal into account in assessing the weight to be accorded his evidence. But the witness may be telling the truth when he says he had sexual intercourse with the mother. It would not forward the interests of justice to disregard his evidence if he refuses, as well he might, to undergo a blood test.

THE COMMITTEE'S VIEWS

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