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I recommend that the obligatory Essay prepared under my supervision by Loveness Kolala entitled **MAINTENANCE AND INHERITANCE RIGHTS OF ILLEGITIMATE CHILDREN IN ZAMBIA**, be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing obligatory essays.

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(ii)

THE MAINTENANCE AND INHERITANCE RIGHTS OF
ILLEGITIMATE CHILDREN IN ZAMBIA

By

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in partial fulfillment of the requirements for the award of the degree of Bachelor
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DEDICATIONS

This paper is dedicated to my husband **MR ALBERT MBALUKU** and children **GREG, TECLA** and **LARRY** for their patience during my absence from home and the encouragement I received from them.

To my loving family I promise that after this program, God willing, I will be back in the kitchen.

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TABLE OF CONTENTS

	<u>Page</u>
Supervisor's certificate	(i)
Title	(ii)
Dedications	(iii)
Acknowledgements	(iv)
1. INTRODUCTION	1
2. CHAPTER 1	3
Definition Historical background .	
3. CHAPTER 2	10
Public's attitude towards illegitimacy generally Safe-guards under the law .	
4. CHAPTER 3	19
Maintenance rights of illegitimate children Affiliation proceedings and orders Maintenance agreements	
5. CHAPTER 4	33
Inheritance rights of illegitimate children . Proof of paternity where the alleged putative father is dead	
6. CHAPTER 5	42
Public's perception of maintenance and inheritance rights. Impact of the law .	
7. CHAPTER 6	50
Conclusion Recommendations for the future .	
8. BIBLIOGRAPHY	53

MAINTENANCE AND INHERITANCE RIGHTS
OF ILLEGITIMATE CHILDREN IN ZAMBIA

INTRODUCTION

Despite the fact that Zambia's population stands at about 50% men and 50% women(1) and the fact that Zambian men being African, are potentially polygamous, the number of unmarried mothers keeps on increasing. The increase in unmarried mothers necessarily mean an increase in illegitimate children.

This obligatory essay seeks to examine the status of illegitimate children in Zambia, their rights and whether there is justification for treating them differently from legitimate children.

Chapter one looks at who is an illegitimate child, situations leading to children being born outside wedlock and the historical back ground.

Chapter two analyses the attitude of people towards illegitimacy generally and how the law protects the illegitimate children.

Chapter three looks at maintenance rights examining affiliation proceedings and enforcement of orders. It also looks at maintenance agreements.

Chapter four examines the inheritance rights of illegitimate children and proof of paternity where the alleged putative father is dead.

Chapter five analyses how society perceives the maintenance and inheritance rights provided for under the law, whether the provisions are adequate or inadequate and whether they are being utilised.

Chapter six concludes by looking at the ways of changing society's negative attitude towards illegitimacy and ways of improving the law and its enforcement.

FOOT NOTE

- 1 GRZ Fourth National Development Plan 1989 - 93 (Lusaka : Office of the President, National Commission for Development Planning 1989) P 441.

CHAPTER 1

1.1 At times something which starts as a simple love affair, involving parties with no intention to marry what-so-ever, may end up in the birth of a child who innocently finds himself or herself with the status of illegitimacy.

An illegitimate child is a child whose parents were not married at the time of conception, birth and thereafter(1). There are several situations that give rise to the birth of such children and the following are some of them :

1. SINGLE WOMEN

A single woman may find herself pregnant in a situation where the man responsible is not willing to marry her and there are other situations where a single woman loses hope of getting married and decides to have her own child, in both circumstances the child born is illegitimate.

2. VOID MARRIAGES

A void marriage is no marriage at all. Therefore where a child is born it will be prima facie illegitimate. However, Section 4(i) of the Legitimacy Act provides that.

"Subject to the provisions of this Act a child of a void marriage shall be treated as the legitimate child of the parents if at the time of the act of intercourse resulting in the birth... both or either parent reasonably believed that they were validly married".(2)

3. EXTRA MARITAL AFFAIRS

The fact that one is married does not bar him or her from admiring other members of the opposite sex. It all depends on the restraint one possesses. Therefore it is not unusual to find husbands and wives alike straying and involving themselves in extra marital relationships. This may lead to the birth of a child who if the parties do not subsequently marry is illegitimate. However, it should be pointed out that **where a married woman** conceives, there is a rebuttable presumption of legitimacy(3) unless sufficient evidence is brought to the contrary. If the husband successfully proves that the child could not possibly be his then the child will be declared illegitimate.

4. JUDICIAL SEPARATION

Couples on judicial separation are released from the duty to cohabit and other ancillary duties thereto. Therefore sexual intercourse is presumed not to take place. As such, a child born during judicial separation is presumed illegitimate until(4) the contrary is proved.

5. CHILD CONCEIVED BY ARTIFICIAL INSEMINATION

A child conceived by artificial insemination is the child of the mother and the donor. Where the donor is not the husband, the child is deemed illegitimate. Hence the need for the couple to jointly adopt the child(5).

law was more concerned with the exposure and punishment of those who brought them into the world than their welfare. The attitude may be readily inferred from the preamble of the 1576 statute, which was one of the first Bastard Laws, which in part stated thus

"concerning bastards begotten and born out of lawful matrimony (an offence against God) the said bastards being now left at the charges of the parish where they are born to the great burden of the same parish defrauding the relief of the impotent and aged true poor of the same parish and the evil example and encouragement of the lewd life, it so be ordained and enacted"(10).

This same statute empowered a judge to make an order charging the mother or father of the child with costs of keeping the child in the parish in default they were liable to imprisonment.

Several amendments followed and by 1844 the Bastards Law Amendment Act was passed. This Act for the first time recognised the mothers rights and granted her a civil remedy against the father whether or not the child was chargeable to a parish or she received poor relief.

Later in 1872 the Bastard Laws Amendment Act was passed which provided for affiliation proceedings. This Act applies to Zambia by virtue of Section 2 of the English Law Extent of Application Act(11).

Despite the amendments illegitimate children were subjected to severe incapacities such as lack of capacity to inherit from their father s' estates.

1.3 POSITION IN ZAMBIA

Zambia has a dual system of law. The 1872 Bastard Laws of England together with the Legitimacy Act(12) and Section 20 (1) (f) of the subordinate Courts Act apply as part of general law on one hand and customary law apply on the other hand.

The issue of illegitimacy is recognised under Zambian customary law only as far as it describes the circumstances under which the child was born and not as a condition, status or class. Therefore customary law does not make any discriminatory provisions as is the case under English Law. The illegitimate children are regarded as human beings entitled to same treatment afforded to legitimate children. Thus the stigma is not as great as that attached to illegitimate children in England.

The Africans have an extended family set up such that when an unmarried woman becomes pregnant, it becomes the concern of relatives as this means an addition of yet another member to the family. Usually the man responsible is called and a small tribunal may be held to find out whether he accepts paternity and what his plans are. In case of woman who has never had a child before, the man may be asked to pay compensation (which in the local courts is known as "damages"). In case of a woman who has had a child before a small token may be paid. Once the child is born he becomes a member of the family. Because of the family set up, children whether illegitimate or legitimate belong to the parents and their kinship groups. They are valued so much in that they are considered by most people as a source of labour, old age security and in case of girls as a valuable economic resource in terms of bride price(13).

Kinship is one of the factors which determines the child's membership to a family. Customary law does not look at a child in terms of individuality but as a member of the community of the parent's kin. Therefore the question of being a "nobody's child" does not arise even

if the parents were not married. In Zambia we have three family systems patrilineal, matrilineal and bilateral. In patrilineal the blood is traced through the father and children are regarded as belonging to the father's clan. In matrilineal blood is traced through the mother and the children are considered as belonging to the mother's clan. In bilateral blood is traced through both parents and the children are regarded as belonging to both parents. Payment of lobola is another factor which gives more rights to the father whether the child is legitimate or not. Thus no real distinction exists between the legitimate and illegitimate children. Once the child is born he or she is readily accepted as either belonging to the father's clan, mother's clan or both(14). This is why it has been asserted that illegitimacy does not exist in African Customary Law. However this is not to say that the illegitimate children are not stigmatised at all. They may be treated differently from legitimate children in one way or the other but this is not provided for under our Customary Law. Any different treatment afforded to illegitimate children by the society is of society's own making. This is due to the fact that adultery and fornication are considered immoral in most societies. Thus it is not possible for a person to go to court and enforce any form of discrimination on ground of illegitimacy under customary law. At common law it was possible to deprive a child from inheriting from his parent's estates on ground of illegitimacy and the court recognised this incapacity.

FOOTNOTES

1. Muggett B.M., Parents and Children (London: Sweet and Maxwell) 1981 P120
2. Chapter 214 of the Laws of Zambia
3. Francis V Francis 1960 Probate P17
4. Grant H.R., Family Law (London: Sweet and Maxwell Ltd)
5. Muggett B.M., Parents and Children 2nd Ed (London : Sweet and Maxwell) 1981 P120
6. Mc Gregor O.R., Separated Spouses (London: Gerald Duckworth and Company Ltd) 1970 P166
7. Deuteronomy 5 : 18. Adultery an offence against God's commandments punished by stoning. Also see Deuteronomy 22 : 22 - 24
8. 1 Corinthians 6 : 13 - 18
9. Mc Gregor O.R., Separated Spouses (London : Gerald Duckworth and Company Ltd) 1970 P167
10. 18 Eliz C3
11. Chapter Four of the Laws of Zambia
12. Section 3 (i) of Legitimacy Act
13. Himonga C.H., International Kidnapping of Children and Determination of Custody Common Wealth (Law Conference Papers Newzealand : Commerce Clearing House) 1991 P3
14. Ibid P4

CHAPTER TWO

ATTITUDE OF SOCIETY TOWARDS ILLEGITIMACY GENERALLY

There has been a general consensus from the public on the fact that illegitimate children are innocent and should in no way pay for their parent s' sins. No one has the opportunity of applying to be born in a certain family and as such children who find themselves in the category of those termed illegitimate should not be afforded different treatment from the legitimate children. This is in line with our Customary Law which treats all children equally(1).

However, the Zambian society at the same time treasures the institution of marriage which must be kept sacred. Therefore young men and women are advised, by the older generation, not to have sexual intercourse before they are married. Once married, couples are advised to stick to their partners and avoid extra marital affairs at all costs. Pre-marital sex and adultery are therefore considered immoral. For instance in Lamba customary law a man has the right to divorce his newly wedded wife if he finds out that she is not a virgin. The same goes for a man who finds his wife infragnanto delicto(2). It is this immorality attached to premarital sex and adultery which attracts a negative attitude towards the children born therefrom.

Survey carried out seemed to reveal a distinction between illegitimate children born from pre-marital sex and those born from adulterous affairs. The former seemed to be readily accepted than the latter. This is so because it is believed that the latter pose a threat to the institution of marriage considering that parents involved are already

married. Where a single man and woman have a child born out of wedlock, the child would readily be accepted as a child of the family even if both of them subsequently got married to different partners. The new partners would readily accept the child considering that the sin was committed in the past. However, where a married woman conceives by another man, and this fact is proved rebutting the presumption of legitimacy, it will be very unlikely that the husband will accept the child, as part of the family. In most cases this means an end of the marriage considering that such pregnancy is prima facie evidence of adultery.

One illegitimate child, about fourteen years old, who was the child of the mother and her brother in law (young brother to the husband) indicated that she has not been accepted by her half brothers and sisters who accuse her of having broken their parent s' marriage. She has also not been accepted by the uncle (brother to her father who was her mother's first husband)(3).

In the same vein, where a married man makes another woman pregnant during the subsistence of the marriage, a child born is rarely accepted as the child of the family. Wives find it difficult to keep such children because they allegedly remind them of their husband s' adultery. In most cases, husbands hide such children from their wives in order to maintain stability in the home. They only come to light at their fathers' funerals.

Wives believe that illegitimate children and their mothers pose a great danger to the stability of their marriages. Therefore some try as much as possible to make their husbands have nothing to do with them.

One house wife stated that her husband had an illegitimate child. She got to know about it and asked her husband who did not deny paternity. She forgave him on condition that he broke off the relationship with the woman, but continue maintaining the child. To her surprise the woman conceived again because the husband continued seeing her on pretext that he was taking money for the maintenance of the child. When the second child was born there were financial problems in the home because the husband's salary had to be shared between two families. She later made sure that her husband had nothing to do with the woman and her two children. She threatened the woman with a beating if she ever associated herself with her husband and threatened her husband with a divorce. She admitted knowing that she was punishing the two innocent children but claimed that their continued support adversely affected the welfare of her six children in the home and threatened her marriage. Eventually one of the two children died of malnutrition. Since then the poor woman has had to struggle own her own to look after her remaining child(4).

Most wives indicated that they were not against the idea of their husbands maintaining their illegitimate children as long as this was done through the courts so that the illicit **relationships do not continue.**

Somesuggested that they would **rather** have illegitimate children brought home on condition that their mothers do not visit them every now and

then. Others indicated that they would rather have nothing to do with their husband's illegitimate children. Whether they are maintained or not should not be their concern.

The other factor which contributes to the negative attitude towards illegitimate children is the fact that most men are not sure whether they were the only partners. As a result some deny paternity despite the fact that they had sexual intercourse with the mothers. Others admit paternity but still maintain some doubt. Therefore when the question of maintenance arises, some men reluctantly accept, while others from the word go behave in a manner that sends signals that they wish to have nothing to do with the child, whether or not the child is theirs. This explains the tendency by some men to treat their legitimate children better than their illegitimate children.

One man narrated how he was picked as having been responsible for the birth of twins. At that time he was married and could not marry their mother. However he maintained them up to the age of ten years when their mother went to stay at the village. When they were about fifteen years one of the twins who could not make it to secondary school was getting married. He was called and he received the bride price. Later when the other twin completed her nursing course and was getting married to a very rich man he was not called as the father. He however attended the wedding and to his surprise there was another man who looked well to do posing as the father in a colourful wedding ceremony. After the wedding he confronted the mother who indicated to him that after all he was not the father and should have nothing to do with her and her children. Here are twins with two different fathers(5).

There are several factors which attract a negative attitude towards illegitimate children. They are not treated exactly the same way legitimate children are treated partly because of either the circumstances they find themselves in or partly because they are considered to be products of premarital sex or adultery which are seen as morally wrong in our society.

2.2 SAFE GUARDS UNDER THE LAW

Common Law

We have noted that common law in fact enunciated the discrimination of illegitimate children. This was due to religious reasons. Illegitimate children having been brought on earth by parents who had committed offenses against God were stigmatised(6). For instance an illegitimate child had no capacity to inherit. He was not considered in both testate and intestate succession(7). Therefore where in a will a gift was bequeathed to "children" this excluded illegitimate children, unless a contrary interpretation could be inferred.

In the case of HILL V CROOK(8) it was held that the word "children" in a will prima facie meant legitimate children. However in the course of judgement Lord Chancellor pointed out that two classes of cases in which the prima facie interpretation may be departed from were

- (1) In circumstances where no legitimate child could take under the bequest that is where there is no legitimate child.
- (2) In cases where on the face of the will it was clear that on proper construction of the word "children", illegitimate children were also included.

It was slowly realised that the discrimination under common law was causing a lot of injustice not only to the children but also to their parents who were subjected to severe punishment. This prompted Parliament to enact laws to lessen the effects of common law.

This position has been adopted by Zambia's Wills and Administration of Testate Estates Act as well as the Intestate Succession Act(10). Therefore in Zambia illegitimate children are able to inherit from their parents in the same way as legitimate children.

CUSTOMARY LAW

We have noted that there is no rule under Customary Law which provides for discrimination. This has helped in the acceptance of illegitimate children by African societies into families, although it has not managed to completely wipe out the stigma.

The law generally has tried to remove the discrimination of illegitimate children, what has been left is for the people to realise that these children are innocent and should not suffer for their parents sins.

2.3 INTERNATIONAL STANDARDS

The Universal Declaration of Human rights of 1959 which Zambia has adopted stated thus

"mankind owes to the child the best it has to give"

The United Nations Convention on Rights of the Child 1990 provides the following articles for the protection of children's rights(11).

1. Article 2(i) states that "states parties shall respect and ensure rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or parent's race..... birth or other status.

2. Article 7 provides inter alia thata child has the right to know and be cared for by his or her parents.

3. Article 18 provides that "state parties shall use their best efforts to ensure recognition of the principle that both parents have the common responsibilities for the up-bring and development of the child".

This shows that the world body does not support discrimination of any kind. All children are entitled to same rights.

FOOTNOTES

1. Interviews with people stretching from Lusaka to Chililabombwe. About 67 people were interviewed and this included 15 single mothers, 15 single fathers, 15 married women whose husbands had illegitimate children, 5 married women who conceived by other men (4 of them married to soldiers who were in the bush at the time of conception), 7 illegitimate children and 10 legitimate children. They all agreed on this point.
2. Interview with Mr Mukosha, Local Courts Officer, Ndola
3. Interview with Mevis Banda, one of the illegitimate children
4. Interview with Mrs Nyambe whose husband had illegitimate children
5. Interview with Mr Fackson Chola, who was a father of illegitimate twins
6. Mugget B M, Parents and Children (London : Sweet and Maxwell) 1981 P120
7. Ibid
8. 1873 LR 6 HL 265 at P282
9. Chapter 214 of The Laws of Zambia
10. Section 3 of Act No.5 and No.6 of 1989
11. First Call for Children : United Nations Conventions on the Rights of the Child UNICEF New York 1990 at P79

CHAPTER 3

3.1 MAINTENANCE RIGHTS OF ILLEGITIMATE CHILDREN

The law recognizes the relationship between the mother and her illegitimate child. She has the right to custody and corresponding obligation to maintain it. However very little has been done with regard to the relationship between the putative father and his illegitimate child, such that he is under no obligation to maintain it unless he contracts to do so or has an affiliation order made against him by a court of law(1).

AFFILIATION PROCEEDINGS

These are brought in the subordinate courts and are usually set in motion by the mother as opposed to the father. This is so because the father has no right to custody unless he applies to court and the welfare of the child requires that he or she be placed in his custody. However Section 20 (1)(h) of the Subordinate Courts Act provides that

"...on application of the person for the time being having the custody of the child either legally or by any arrangement approved by the court to make or vary an affiliation order so as to provide that the payment made thereunder shall be made to that person".

This provision shows that the mother, the putative father, (if in custody of the child) or any other person having custody of the child either legally or by any arrangement approved by the court can make an application for the grant or variation of an order. This shows that the father can apply so that the mother is ordered to pay maintenance but in practice the provision is not used this way(2).

Where the mother applies the application will be against the person she alleges to be the father of the child. In the event that she succeeds in proving paternity the man will be adjudged the putative father and an affiliation order will be made ordering him to pay a sum of money for maintenance of the child.

In Zambia Section 20(f) of the Subordinate Courts Act gives power to the Subordinate Courts to handle affiliation cases. They have the power to make or vary affiliation orders. However the substantive law applied is according to the 1872 Bastard Laws Amendment Act of England. Under this law it is required that the mother be single in order to be illegible to apply. The proceedings must be brought during pregnancy or within twelve months of the child's birth, unless the mother is able to show that the father had been away or that he had been maintaining the child. Section 5 of the Act provides that the maintenance shall end when the child reaches thirteen or dies unless the court directs that it continues until sixteen years.

SINGLE WOMAN

This includes widows, spinsters, divorcees or those on bonafide separation. A married woman who is separated from her husband and who has lost her right to maintenance (probably due to adultery resulting in the birth of the child) is considered as a single woman within the meaning of the Act. This must be a genuine separation.

Thus in JONES V DAVIES(3)

A married woman whose husband was at sea conceived by another man. When he came back they continued staying together. Later they arranged that they live separately for the purposes of instituting affiliation and proceedings. She was held not to have been on bonafide separation and thus not a "single" woman within the meaning of the Act.

In the case of JONES V EVANS(4), on the other hand, a married woman who was genuinely separated from her husband due to her adulterous affair was held to be a "single" woman within the meaning of the Act.

However, the law does not show reasonable justification for depriving an illegitimate child of his or her father's support merely because the mother is married and her husband has accepted him or her in the family(5).

THE COMPLAINT

The action takes the form of an accusation of paternity levelled against the alleged putative father, which is brought by way of summons to the subordinate court. As already noted it should be brought during pregnancy or within 12 months of the birth of the child. However, this is of no application where the putative father has been away, in which case the complaint should be lodged within 12 months of his return, where he had been maintaining the child, or where the marriage is subsequently declared void by a court of competent jurisdiction(6).

3.2 PROOF OF PATERNITY

It has been noted that in affiliation proceedings there is a great danger of miscarriage of justice. An abandoned lover may vindictively implicate a man as the father of her illegitimate child. Therefore the law requires that the mother's evidence should be corroborated in some material particular by evidence independent from her testimony(7). By material particular we mean evidence that has some relevance to the conduct of the father or the probability of him being the putative father.

In REFFEL V MORTON((8) a mother of an illegitimate child adduced evidence that she went to the defendant's home to look after his children. On the defendant's request she moved from the bedroom she occupied to one near his. She spent every night with him returning to her own room in the morning.

It was held that the change of rooms on its own did not amount to corroboration in material particular. Corroborative evidence must be evidence having some relation to the conduct of the father or probability of him being the father.

However where there is evidence of close association for a long time including the time of conception, and there is evidence of close affection, this is material evidence which the court is entitled to treat as corroborative.

In MOORE V HIWITT(9) a woman adduced evidence that the alleged father visited her and took her to cinemas, licensed houses and danced with her for a period of one year. During that time, they were in each others company at certain hours in the evenings and there was evidence that he visited her home on four occasions.

It was held that there being no evidence of association with other men, there was evidence which the court could regard as corroborative.

Corroboration in affiliation cases may come in form of admissions, written statements, circumstantial evidence of intercourse at relevant times, (this may include opportunity or close association) similarities or results from blood tests.

ADMISSIONS

This may be direct admission of paternity in court. It may also be inferred from the conduct, that is where the putative father had been maintaining the child or where he allowed his name to be registered.

In the case of CN V MS(10) the alleged putative father maintained the two illegitimate children from birth up to 1975. Proceedings were brought in 1979 the magistrate held that this fact satisfactorily corroborated the complainant's evidence in material particular.

In the case of MAS V KM(11) the complainant produced a birth record bearing the defendant's name. The birth record was held to be corroborative evidence.

Admissions may come in form of statements made to the third parties thus in the case of

GRAHAM V LUPPER (12) the alleged putative father was asked by his friend how the mother was he replied "she has not got rid of it yet". This statement was held to amount to an admission and thus corroborative.

Courts have also held the absence of denial where one is naturally expected as indirect admission. However this does not apply where a denial is not naturally expected.

WRITTEN STATEMENTS

Statements contained in letters written by the father to the mother may be corroborative.

In JEFFREY V JOHNSON(13) a mother produced letters written to her by the alleged putative father. It was held by the court of first instance that the letters were not admissible since she was not competent to prove his hand writing. On appeal it was held that the mother was competent to prove his handwriting and the contents. The contents amounted to corroboration.

CIRCUMSTANTIAL EVIDENCE OF INTERCOURSE OPPORTUNITY AND CLOSE ASSOCIATION

Corroboration involves something more than mere possibility. It involves evidence tending to show probability. Therefore evidence of opportunity per se will not suffice unless there is some indication that parties were likely to take advantage of it.

In BURBURY V JACKSON(14) the parties worked together on a farm and in the course of their work they were in and out of the cow sheds, bans and other places.

It was held that evidence of parties being together in those circumstances would not amount to corroboration of the fact that connection took place.

However where circumstances are such that they were likely to take advantage of the opportunity this may amount to corroboration.

In MOORE V HIWITT (15) where the man used to be in the company of the mother in the evenings and took her out to cinemas, circumstances showed they were likely to take advantage of the opportunity. Moreover this kind of close association revealed a love affair and may be treated as corroboration.

SIMILARITIES IN FEATURES

The court is entitled to treat the striking similarities in features between the alleged putative father and the child as corroboration. However similarities may be difficult to detect during the child's early months. Besides this, some children take after the mother.

BLOOD TESTS

Although the court on its own has no power to order blood test, it can nevertheless direct the same on application of a party. The court has a discretion to whether or not direct the blood test. These tests can only be carried out with the consent of the partner. Where the child is under 16 and can not give valid consent then the one having care and control may give consent. Willful refusal may entitle the court to draw reasonable inferences(16).

Blood tests are of a negative character. While they may exclude one from being a father, they can not pin point who is the father. Where for example, the mother and father of a child are group O positive there is no way the child would be A positive. If the child is A positive then the O positive man is excluded from being a father. If on the other hand, the mother is O positive and two men are also O positive they can all be possible fathers. The test can not pin point who amongst the two men is the father. However, there have been developments in the tests.

The gene patterns in the blood are compared. This is more reliable in that it points out who exactly the father is (17).

Corroboration is needed as a matter of law, therefore, no matter how credible the evidence of the mother is, it will not be enough to prove paternity.

3.3 EVIDENCE IN REBUTTAL

The defendants single testimony is enough to rebut the complaints evidence. For instance the alleged father may call only his evidence to prove that he was not the only lover and this need not be corroborated by independent evidence. He may also cite the abnormal gestation period to show that even if he was the complainant's lover and sexual intercourse took place, he could not possibly be the father of the child.

3.4 THE ORDER

This is usually of periodic sums of money paid to the mother through the courts or as agreed. This may be varied from time to time. Section 20 (f) and (g) of the Subordinate courts Act provide for the making of an order of not exceeding One Thousand Kwacha per week and variation of such order respectively. It has been observed that at the time when the provision was made the Kwacha was stronger and One Thousand Kwacha was a lot of money. For instance an order of Five Hundred Kwacha per week may be made and this could be varied from time to time. However as of now One Thousand Kwacha per week is not enough to see the child through to the next week. Therefore, there has been a tendency by the

magistrates to call the father and mother in chambers where the two agree on a reasonable sum. This usually exceeds One Thousand Kwacha if parties are agreeable. Whether or not this is right will depend on how the High Court looks at the matter, whether in strict terms of provisions of the law or reality(18). No case was found where the father had offered to pay more than One Thousand Kwacha but later turned round and appealed against the order.

In making the order the court must consider material needs and resources of both the mother and the father, financial needs of the child and resources he may have together with any physical or mental disabilities(19).

In addition the court may order a lump sum to be paid for expenses incurred before the order.

In FOY V BROOKS(20)it was held that an order could be made of payment of a lump sum of money to compensate for liabilities or expenses incurred before the making of an order including expenses in connection with birth or death of the child.

ENFORCEMENT

Enforcement may be by way of attachment of earnings (where by the father's salary is deducted periodically) or by way of distress or committal to prison where one willfully disobeys the court order. Before any form of enforcement is carried out the father must be given an opportunity to be heard. However evidence has shown that not many orders are enforced.

The Following cases of affiliation proceedings and orders illustrate what goes on in the Subordinate Courts.

1. CONSTANCE CHISANGA V FRANCES KASONGO(21)

The complainant a single mother of an illegitimate child instituted affiliation proceedings against the father under Section 20 (f) of the Subordinate Courts Act as read with Section 4 of the 1872 Bastard Laws Amendment Act.

The alleged father was summoned but did not appear. A bench warrant was issued for his arrest and when he was brought before court he readily admitted paternity. The parties then retired to chambers where it was agreed amicably between them that the man pays Eight Hundred Kwacha out of his Five Thousand Kwacha earnings per month. The court took into consideration the responsibilities of the putative father at home and both parties were satisfied with the order.

2. DR JANET BANDA V GEORGE KALENGA(22)

Summons were issued by Dr Banda a single woman stating that she delivered twins and the father was Mr Kalenga. Mr Kalenga disputed paternity.

During trial there was no dispute that in fact there was a love affair between the two. The complainant produced a birthday card sent to her by the defendant where he expressed deep felt love for her. There was no dispute of sexual intercourse having taken place between the two, but where as the complainant indicated that there was no protection, the defendant insisted that they used condoms all the times for fear of Acquired Immunity Deficiency Syndrome (AIDS). The complainant's evidence was corroborated by two witnesses who testified that they had discussed the issue of the twins at a funeral where the defendant was quoted as having said that the twins were a graceful donation to the complainant.

The complainant exhibited the similarities between the defendant and the twins and said that when she first broke the news to the defendant, his reaction was favourable since he had indicated that there was no problem.

On the alleged use of condoms, learned counsel for the complainant submitted that even if condoms were used they were not hundred percent protective. He cited the FAMILY PLANNING METHODS PRACTICE IN AFRICA which states on page 213 thus

"For consistent users or those who used the condom exactly as directed with each act of intercourse the failure rate indicated that where 100 couples were using condoms 10 women were likely to become pregnant.

The defendant in rebuttal testified that they were strictly on condoms. He said the evidence of the two other witnesses implicating him was malicious. The three women had just teamed up to implicate him but he gave no reasons or motive. He further stated that there was in fact another man by the name of Raphael who used to go out with the complainant. On the similarities between him and the twins he said that was a mere coincidence.

His defence counsel surprisingly submitted that the two corroborating witnesses did not give evidence implicating the defendant in material particular in that they never actually saw the complainant and the defendant having sexual intercourse.

In his judgement the Principal Magistrate found that (1) there was a love affair between the two, (2) which lead to the conception of the twins basing on the striking similarities between him and the twins. (3) that there was no evidence of intimacy between Raphael and complainant basing his finding on the fact that the complainant's evidence on the point was more credible than that of the defendant. Raphael was a friend to both the defendant and the complaint.

He thus adjudged the defendant as the putative father and adjourned the case for assessment in chambers. The defendant did not appear to give evidence of means, therefore the court ordered that he pays One Thousand Kwacha per week per child as against the Fifteen Thousand Kwacha asked for by the complainant.

3.5 LOCAL COURTS

There are some maintenance orders being made by the Local Courts in Zambia ordering the putative father to either pay lump sum or make periodic payments according to his ability. However, the method of proof of paternity used is of great concern in that there are no strict rules of evidence. There mere fact that a man is picked from the entire community is

proof enough especially where the man admits having had sexual intercourse with the mother. The burden is on him to prove that he is not the father. There is a danger of injustice being perpetuated in the Local Courts(23).

AGREEMENTS

The mother and father of an illegitimate child may enter an agreement for the maintenance of the child and the agreement will be enforced by the courts of law.

In WARD V BYHAM(24) it was held that the court can enforce such agreements so long as terms are clear and unambiguous.

There is however no need for formalities although it is advisable to have a properly drawn up document. The ingredients of a contract must be present thus in

JENNING V BROWN(25) an undertaking by the mother to also contribute to the maintenance of the child was held to constitute sufficient consideration for the contract.

ADVANTAGES

1. The embarrassment of affiliation proceedings is avoided
2. Private agreements may make provisions for which the court may not have power to order.

DISADVANTAGES

1. The death of the mother determines the agreements. No subsequent action may lie unless there was provision for such.
2. Although the courts are able to enforce agreements, they have no power to vary them and it is up to the parties to decide(26).

FOOT NOTES

1. Seaborne Vs Maddy 1840 9 C and P at P497
2. Law Development Commission's report on Affiliation and maintenance orders project. (Lusaka : Government Printers) 1988 at P20.
3. 1901 1 KB at P118
4. 1945 1 ALLER at P582
5. Chislett A J, Affiliation Proceedings 2nd Ed (London : Butterworths) 1958 at P20.
6. Ibid
7. Grant H B, Family Law (London : Sweet and Maxwell Ltd 1970) at P144.
8. 1906 J P at 347
9. 1947 2 ALLER at P 270
10. 1979 M/O/4 unreported
11. 1979 Subordinate Court case unreported
12. The Times 18th November 1965
13. 1952 ALLER at P50
14. 1917 1 KB at P16
15. 1947 2 ALLER at P270
16. Grant H B, Family Law (London : Sweet and Maxwell) 1970 at P14
17. 1) Mason J K, Forensic Medicine for Lawyers 2nd Ed (London : Butterworths) 1983 at P184
2) Interview with Dr Mbewe, Medical Doctor, University Teaching Hospital.
18. Interview with Mr Katenewa, Principle Resident Magistrate, Ndola.
19. Chislett A J, Affiliation Proceedings 2nd Ed (London : Butterworths) 1958 at P25

20. 1977 1 WLR at P160
21. Case No.35 of 1991 unreported, (Ndola Magistrate Court)
22. Case No.94 of 1992 unreported, (Ndola Magistrate Court)
23. Interview with Mr Mwamba, Provincial Local Courts Officer
24. 1956 1 WLR at P496
25. 1842 9 M and W at P496
26. Muggett B M, Parents and Children (London : Sweet and Maxwell)
1981 at P135

CHAPTER 4

INHERITANCE RIGHTS OF ILLEGITIMATE CHILDREN

4.1 As already noted the general rule is that rights and duties in respect of an illegitimate child are vested in the mother. The law does not put much emphasis on the father-child relationship unless a positive step is taken by either the mother, the father or the child to assert it. It is thus extraordinary that the law having denied the legal relationship between father and his illegitimate child when he was alive, is nevertheless prepared to recognize it, without any positive step being taken, when he dies.

This chapter concentrates on the inheritance of an illegitimate child from the father and not from the mother which does not usually pose problems.

4.2 POSITION IN ENGLAND

At common law an illegitimate child was nullius filius and thus could not inherit from the parents, half brothers and sisters born of the same mother and other natural relatives. Although he later acquired the right to inherit from the mother, the right ceased as soon as she had legitimate children(1).

However an illegitimate child has always been able to inherit under a will. Despite this, the rule had been that the word "children" in a will excluded illegitimate children unless the contrary was stated or could be inferred.

In HILL V CROOK(2) it was held that where there was a general gift to the "children" or "issue" this was presumed to exclude illegitimate children unless the contrary was stated.

This rule was reversed by section 15 of the Family Law Reform Act 1969. The position now is that the word "children" includes illegitimate children.

The courts have discretionary powers of adjusting the disposition made under a will or intestacy, if the same fails to make reasonable provision for any eligible member of the deceased's family. This previously did not extend to illegitimate children. However, this is no longer the position. In England, since the Family Law Reform Act 1969, an illegitimate child is able to make a claim against his parents estate on ground that the deceased's will or law of intestacy did not make reasonable financial provision for him.

In CA V CC(3) a man asked an 18 year old girl to be his house keeper. He made it clear that they were to live as man and wife and bought her a ring. They remained unmarried and the girl received no wages but was given house keeping money. They later had an illegitimate child. The man had made a will leaving all his property to the legitimate son he had with his former wife. Where-as a subsequent marriage revokes a will a cohabitation does not. Therefore the will remained in force. The girl and her illegitimate child received nothing. She applied on ground that the will did not make any financial provision for her and her illegitimate child. The court held that there was a steady relationship between her and the man. Therefore the girl, her illegitimate child and the legitimate son of the deceased had to be provided for from the deceased's estate.

Although the position has changed this far, it has not changed with regard to the rights of inheritance of an illegitimate child from other relatives. He still can not participate in intestacy of his grandparents, uncles, aunties, half brothers and sisters.

4.3 POSITION IN ZAMBIA BEFORE 1989

Zambia has a dual system of law consisting of customary law and general law based on English law. Before the enactment of Intestate Succession Act and the Wills and Administration of Testate Succession Act the position as

to which law of succession applied to what cases was unsettled. In other African jurisdictions like Nigeria the position is that the Law of Succession depends on whether the marriage is statutory or customary. English Law of Succession applies to statutory marriages while Customary Law applies to customary marriages(5).

Section 16 of the Subordinate Courts Act states inter alia that in matters of inheritance and testamentary dispositions of Africans, African customary law applies. However there is no legislation excluding or modifying the application of customary law of inheritance and succession to Africans married under the Marriage Act. In practice, however customary law was applied to cases involving Customary marriages and English law to christian marriages and marriages under the Marriage Act. This was not a strict rule in that a woman married to a rich man under Customary Law would "pray in aid" the circumstances rule. Where she succeeded in arguing that she was used to comfort and it would be unjust for a person of her status to be stripped off all her possessions under African Customary Law, she would be allowed to apply for letters of administration of her husband's estate. This would be according to English Law(6).

Another factor which determined the law to be applied was the deceased's way of life. This was considered to determine whether or not the deceased had opted out of customary law.

In the case of MUNALO V VENGE SAI(7) the deceased and the plaintiff were married under Shona Customary Law. The deceased was killed in a road accident. The widow took out summons to obtain an order that the deceased's estate be administered in the High Court under English probate law and not the Local Court under African Customary Law. The application was opposed by the deceased's

cousin who argued that the estate was governed by Shona Customary Law. The High Court held that on the evidence the parties were married under Shona Customary Law and there was no indication from the deceased's mode of life that he had opted out of Customary law. Since the deceased had not lived in a manner to divert himself from customary law it followed that the law to be applied was Shona Customary Law.

This meant that where customary law applied the inheritance rights of an illegitimate child were determined in accordance with customary law. In the event that the English law was applied the rights were determined according to English Law principles of Succession.

Under Customary law inheritance may be classified according to three dominant modes. Patrilineal, matrilineal and bilateral. The Ngoni, Mambwe and Tumbukas are commonly cited as patrilineal, Tonga, Lamba are matrilineal and Lozi and Ila are bilateral.

Children, both legitimate and illegitimate are able to inherit from the father in the patrilineal and bilateral set up. However they are unable to inherit from the father in the matrilineal set up because the blood is traced through the mother and the children are considered as belonging to the mother. It is generally believed that where-as maternity is definite paternity is not thus children should only inherit from the mother and estates of their uncles(8).

With regard to testate succession in Zambia the English law applied. Therefore the rights of illegitimate children were determined according to English law.

The nature of customary law of succession, which either excludes the wife and children and the general tendency by the relatives to grab property caused a lot of injustice to the deceased's widow and children. This prompted Parliament to enact the Intestate Succession Act and the Wills and Administration of Testate Estates Act.

PRESENT POSITION

The Intestate Succession Act and the Wills and Administration Testate Estate Act of 1989 governs the administration of estates in Zambia. The *former applies where someone dies intestate while the latter applies where the deceased leaves a will.*

INTESTATE SUCCESSION ACT

This Act was passed in order to provide a uniform intestate succession law applicable throughout Zambia. It makes provision for the inheritance of the surviving spouse, children, dependants and other relatives of the deceased who dies without leaving a will. It provides guidelines on the administration of intestate estate(9). Section 5 provides that twenty per cent should devolve upon the surviving spouse, fifty per cent upon the children, twenty per cent upon parents and ten per cent upon the dependants. Section 3 defines "child" as

"a child born in or out of marriage, a child conceived but not yet born".

This means that an illegitimate child has equal inheritance rights as a legitimate child on intestacy.

WILLS AND ADMINISTRATION OF TESTATE SUCCESSION ACT

This Act governs the law relating to wills, making of adequate provision for dependants in a will and administration of estates of people who die leaving wills(10).

Section 3 of the Act provides that the word "child" includes a child born in or out of marriage and a child who is conceived but not yet born.

This means that an illegitimate child is eligible to inherit under a will.

However, where a will does not make reasonable provision for a dependant an application may be brought under Section 20 (i) of the Act. The applicant must show that the will does not make reasonable provision for his maintenance and hardship is thereby caused. The court has power to vary the will, making such reasonable provisions for the maintenance of the applicant. In doing so the court must consider the following :

1. Nature of property and other dependants of the deceased
2. The testator's reason for making such a will
3. Any part, present or future capital or income of the dependant from any source and his conduct in relation to the testator.

Section 3 defines dependant as a wife, husband, child or parent. Once an applicant shows that he qualifies to apply, he must further show that the will has failed to make reasonable financial provision for him.

In RE COVENTRY(11) it was held by the Court of Appeal that each case depended on its own facts. It is not sufficient to merely show that the applicant is in financial need, for this fact alone will not make it unreasonable that no financial provision has been made. The court, in determining whether no reasonable financial provision has been made by the will, should look objectively at the circumstances of the case. In doing so the court must consider (1) the claim (2) any financial resources and needs of the applicant at the time and in future (3) any obligation which the deceased had towards the applicant and other dependants (4) the size and nature of the estate and the conduct of the applicant.

This means that where a will does not make reasonable provision for an illegitimate child, an application may be made to a court to vary the will in order that reasonable provision may be made for his or her maintenance.

4.5 PROOF OF PATERNITY WHERE THE ALLEGED PUTATIVE FATHER IS DEAD

In most cases illegitimate children are only known to parents. This usually happens where the putative father is married to another woman and wishes to keep the extra marital affair a secret. The problem arises when he dies because the mother will have to prove paternity in his absence.

The normal rules of evidence are applicable. The mother may be required to prove paternity in the same way as she may be required to prove any fact in issue which requires corroboration. The only difference here is that the alleged putative father would not have an opportunity to either deny or admit paternity. Her testimony may be corroborated by independent evidence such as striking similarities between the child and the deceased, contents of birth record, Evidence of maintenance by deceased or statements of admission of paternity made to third parties such as relatives and friends of the deceased.

However, it has been suggested by some people that to avoid the possibility of children reaping where they did not sow, the unknown illegitimate children should not be allowed to inherit. This means that those illegitimate children whose mothers did not enter into maintenance agreements with the fathers and did not bother to institute affiliation proceedings should be estopped from inheriting. Inheritance should be restricted to legitimate children and those illegitimate children who are known by the family and have been maintained by their fathers before death(12).

As much as these arguments may be valid, it must be realised on the other hand that the illegitimate children are innocent and they should not be deprived of their inheritance rights merely because their existence was not revealed or their mothers did not bother to have them maintained while the fathers were alive(13).

It is suggested on the other hand that instead of completely depriving the unknown illegitimate children of their right to inherit from their fathers' estates, the standards of proof of paternity should be raised from balance of probability to proof beyond all reasonable doubt. This may help in making sure that only the deceased's children inherit and thus reduce the number of fraudulent claims.

FOOT NOTES

1. Parry M.L., Cohabitation (London : Sweet and Maxwell) 1981 at P100
2. 1873 L R 6 H L 265 at P286
3. The Times 17th November 1978 at P86
4. Muggett B.M., Parents and Children (London: Sweet and Maxwell) 1981 at P136
5. Cole V Cole 1898 INLR at P15
6. Interview with Mrs Nkhama, Senior Resident Magistrate, Lusaka
7. 1974 ZR 91
8. Himonga C, Property Disputes in Law and Practice, Women and the Law in Southern Africa (Harare : Zimbabwe Publishing House) 1987 at P57.
9. Preamble Act No.5 of 1989
0. Preamble Act No.6 of 1989
1. 1979 2 WLR 802
2. Interview with Dr. Kanganja, Principal, National Institute for Public Administration and Lecturer at UNZA
3. Interview with Mrs Phiri, Social Welfare Officer, Ndola, Mr Mvula, Lawyer Legal Aid, Lusaka. Mr Tembo, Senior Estate Examiner Administrator General's Office, Lusaka.

CHAPTER FIVE

PUBLIC PERCEPTION OF MAINTENANCE AND
INHERITANCE RIGHTS OF ILLEGATIMATE CHILDREN

5.1 MAINTENANCE

Although the law seems to be doing everything possible to provide means of maintaining illegitimate children, affiliation proceedings are not popular among single mothers. There are several reasons for this and the following are some of them :

1. They are shunned because of the embarrassment caused in the process of proving paternity. The alleged putative father or his counsel may ask very humiliating questions during cross examination. In the same vein some mothers would not like to subject the putative fathers to the similar effects no matter how irresponsible they may be. Generally affiliation proceedings are viewed as a way of parading before the public what was otherwise done in privacy.
2. Affiliation proceedings are instituted in the subordinate courts. These courts are associated more with criminal proceedings. Thus the atmosphere scares away potential complainants. Moreover proof in affiliation proceedings is rather technical. A lay woman, not represented would not know what corroboration is all about. Therefore a dismissal of the case on mere technicality may cut the father-child tie even though he is the actual father.

3. Some single mothers are ignorant of their right to institute affiliation proceedings. Due to public's negative attitude towards illegitimacy, they believe that maintenance is restricted to legitimate children.

4. Affiliation proceedings are instituted under the 1872 Bastard Laws Amendment Act. The use of the word "Bastard" discourages some mothers. Besides that, Section 20 (g) of the Subordinate Courts Act provides for a maximum of one thousand Kwacha per week. It is felt that this amount is not worth the trouble of instituting proceedings and let alone hiring a lawyer. It infact amounts to good money chasing bad money. Moreover, the amount is not worth telling the world that the child in issue was born out of wedlock.

5. According to African tradition, children are an asset. Therefore some mothers would rather do away with the father's maintenance so that he does not claim rights in future.

Generally mothers favour maintenance agreements to affiliation proceedings because of the aforegiven reasons(1).

Fathers of illegitimate children on the other hand view affiliation proceedings as a way of punishing them. This is so because despite being ordered to pay maintenance no rights accrue to them, although this may entitle them to have a say in case of adoption.

In case of married men affiliation proceedings are very embarrassing and may lead to breakage of marriages. For this reason, fathers too are in favour of maintenance agreements(2).

It has been generally noted that there is a negative attitude towards not only the issue of illegitimacy but also the rights accruing there-to. It is important that this attitude changes.

2 INHERITANCE

The idea that legitimate and illegitimate children should have the same inheritance rights has been most welcome by the people of Zambia.

However, the only fear expressed is that of abuse. It is generally feared that the provision may be subject to abuse and therefore, safe-guards must be put in place. This is to avoid injustice to the legitimate children who may only look up to their late fathers' estate for survival(3).

Secondly the provision may not be helpful in light of the usual practice of property grabbing by the relatives.

Thirdly there is a tendency by wives of husbands who leave behind illegitimate children to be over protective of their children's interests. This discourages the single mothers from fighting for their children's rights. They usually give up on the way(4).

5.3 IMPACT OF THE LAW

Due to problems associated with provisions that safe-guard the rights of illegitimate children, the law has not had the desired impact.

A survey carried out on affiliation proceedings at Ndola Magistrate Courts, for example, revealed that there were twenty cases of affiliation proceedings between January 1989 and January 1993, as compared to two hundred and five maintenance cases most of which came by way of appeal from Local Courts. This shows that the provisions are not being utilized fully considering the number of illegitimate children.

Provisions on inheritance are also not being utilized fully. This has been partly attributed to ignorance among single mothers. Survey showed that in most cases where the law relating to inheritance of illegitimate children was ~~evoked~~, the motive was not genuinely/^{to} provide for illegitimate children, but as a way of punishing the widow and her legitimate children. The following cases illustrate how the provisions are being utilized :

1. In the Estate of the LATE MR KALUNGWISHI(5), the sister was appointed administrator of her late brother's estate. The appointment was revoked at the instance of the widow on grounds that the Local Court had no jurisdiction in estates whose value exceeded fifty thousand Kwacha. The sister was annoyed and vowed to punish the widow. The matter was referred to the office of the Administrator General, Ndola. The Administrator General explained to the family the break down of percentages. Upon knowing that the three children

were entitled to fifty per cent and herself only to ten per cent, she went around Zambia collecting the alleged illegitimate children of the late brother. She managed to collect seven children from places as far as Solwezi, Kasama, Livingstone and Mongu. These children had never been heard of and the number of children came to ten. This meant that each child received five percent.

2. In the Estate of FRANCIS MWAMBA CHANGA(6) there was only one legitimate child. After assessment it was discovered that at the end of the day the widow was going to receive seventy percent and relatives of the late only thirty percent. The parents then introduced two illegitimate children and the fifty percent was shared among the three children.

However, there are a few genuine cases as well. In the Estate of COX SIKUMBA(7) the Administrator General was appointed administrator. He put an advertisement in the government gazette. The mother of an illegitimate child responded to the advertisement and produced the relevant documents to prove paternity. The objections by the widow could not stand.

From this it was discovered that whereas most claims by single mothers are genuine most of those brought by relatives of the deceased are suspect.

SUGGESTED SOLUTIONS

In order to promote full utilization of provisions that safe guard the maintenance and inheritance rights of illegitimate children, the following suggestions were put forward :

AFFILIATION PROCEEDINGS

1. Affiliation proceedings should be held in camera. They should be moved from Magistrate Courts to special tribunals preferably presided over by social welfare officers. This will encourage the would be complainants because the embarrassment will be lessened and tribunals are more suitable in handling of such cases than courts of law.
2. Corroboration in affiliation proceedings should not be as a matter of law but as a matter of practice. This will enable the presiding officer to adjudge a man the putative father so long as the mothers testimony is credible and he warns himself of the danger of acting on uncorroborated evidence.
3. There should be educational campaigns on the right to institute affiliation proceedings so as to enlighten the members of the public.
4. The "single" mother requirement and the time limit should be done away with, as this may bring undue hardships to the innocent children. A married woman should be allowed to institute proceedings and an action should be brought anytime.

5. The law should not provide for a maximum amount to be ordered as maintenance. Instead the amount should be left to the discretion of the presiding officer.

INHERITANCE

1. The law should be put in place to safe guard and prevent abuse of the provisions. Burden of proving paternity where the father is dead should be higher than where the father is alive and capable of defending himself.
2. Where the illegitimate children are more comfortable than the legitimate children. Percentages should differ according to needs.
3. There should be educational campaigns to enlighten the public about the inheritance rights of illegitimate children.

It is believed that these suggestions if put in place will improve the utilization of both the maintenance and inheritance rights of illegitimate children in Zambia(8).

FOOT NOTES

Interviews with single mothers

Interviews with men who have illegitimate children

Interview with Dr Kanganja, Principal, National Institute for Public Administration.

Interview with Mr Tembo, Senior Estate Examiner, Administrator General's Office.

Unreported case, Administrator General's Office, Ndola

Unreported case, Administrator General's Office, Lusaka

Ibid

Interviews

6.1 CONCLUSION

There does not seem to be any reasonable justification for discriminating between legitimate and illegitimate children. The immorality of parents should no longer be the basis for discriminating against illegitimate children in today's Zambia. Therefore everything possible should be done to remove laws of a discriminatory nature and all discriminatory tendencies. We should be able to readily accept all children in our society regardless of how they are born.

6.2 RECOMMENDATIONS FOR THE FUTURE

1. Zambia should enact its own maintenance statute and stop using the 1872 Bastard Laws Amendment Act of England. This is not only out dated but also foreign(1). This Act should provide for maintenance of both legitimate and illegitimate children. The fact that we use different Acts for maintenance of legitimate and illegitimate children emphasize the fact that the two belong to different camps(2).
2. The word "bastard" should not appear anywhere in the statute. It has been suggested that the phrase "illegitimate child" should be substituted with "love child" to lessen the stigma(3).
3. The status of illegitimacy should be abolished. Thus the presumption of legitimacy and illegitimacy should be substituted with the presumption of paternity affecting both legitimate and illegitimate

children. The relationship between a child and the father or mother should be determined irrespective of whether or not the parents were married(4).

4. Parents of both legitimate and illegitimate children should have same parental rights and obligations. Thus a father of an illegitimate child should be obliged to maintain it with or without proceedings instituted against him(5).

5. Although the Intestate Succession Act and Wills and Administration of Testate Estate Act have been in force for four years now, there are no rules of practice and procedure to be followed. Therefore there is need for the Minister of Legal Affairs to make such rules of practice and procedure so as to make the implementation of the two Acts effective(6).

Although the law has tried to remove the incapacities stemming from common law, it has not done much in changing people's attitude towards illegitimate children. Basically the law itself is partly to blame because it makes different provisions for legitimate and illegitimate children. It is hoped, therefore, that with the removal of this tendency, coupled with extensive educational campaigns, the law will help in changing the negative attitude towards illegitimate children.

FOOT NOTES

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Interview with Mr L Muleya, Lecturer University of Zambia

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