MAINE PROBATE LAW REVISION COMMISSION

SUPPLEMENTAL REPORT
TO THE
JOINT STANDING COMMITTEE ON THE JUDICIARY
May 1979

Maine Probate Law Revision Commission

May 22, 1979

The Honorable Sam Collins, Senate Chairman
The Honorable Barry Hobbins, House Chairman
Joint Standing Committee on the Judiciary
State House
Augusta, Maine 04333

Gentlemen:

In the Commission's Report to the Legislature, we asked leave to give further consideration to a question concerning the need for general legitimation provisions in L.D. 1. It is my pleasure to transmit to you the Commission's Supplemental Report concerning that question.

As more fully explained in that attached Report, the Commission has voted to recommend that Section 27-A of L.D. 1 be amended by deleting the presently proposed language and replacing it with the following language:

> §220. Rights of children born out of wedlock
>
> A child born out of wedlock is the child of his natural parents and is entitled to the same legal rights as a child born in lawful wedlock, except as otherwise expressly provided by statute.

With best regards,

Very truly yours,

John B. Roberts

John B. Roberts, Chairman

MAINE PROBATE LAW REVISION COMMISSION

SUPPLEMENTAL REPORT

TO THE

JOINT STANDING COMMITTEE ON THE JUDICIARY

May 1979

Providing For Legitimation

I. Introduction

As pointed out in the Commission's Report to the Legislature (page 47), a lack of time prevented the Commission's full consideration of the most appropriate way to handle Maine's present provisions for establishing legitimation of a child born out of wedlock in cases where such legitimation might be important for purposes other than determining the right of inheritance. The Commission has now had an opportunity to study the present state of the law concerning methods of general legitimation and concerning possible distinctions between the treatment of legitimate and illegitimate children.

The present Section 1003 of Title 18 purportedly (by its language) deals with the legitimation of children born out of wedlock, but only as an incidental off-shoot of that section's provisions for determining the conditions under which such a child will inherit from his or her mother or father. Since the section of the proposed Maine Probate Code (§2-109) that would replace the present Maine provision deals only with inheritance rights, the question arose as to whether the provisions providing

generally for "legitimation" of children born out of wedlock should be carried over in a new Section 220 of Title 19 (as initially contained in Section 27-A of L.D. 1).

Our subsequent study of the present status of Maine law in this area indicates (1) that the general legitimation provisions of Section 1003 do not, under the most recent judicial constructions, apply beyond the area of inheritance rights, and (2) that there appear to be no present legal distinctions between legitimate and illegitimate children in Maine law, except in a few places where the effect of such distinctions is independently spelled out.

As a result of these conclusions, it would seem unnecessary to carry over the general legitimation language of Section 1003, as now contained in Section 27-A of L.D. 1. In order to clarify the present lack of any general legal consequences attached to the status of illegitimacy, it may also be desirable to substitute for the presently proposed new Section 220 of Title 19, a provision for equal treatment of children born both in and out of wedlock except as specially provided for in other parts of the Maine statutes.

II. The Present Status of Maine Law on Legitimation

Section 1003 of Title 18 provides that a child born out of wedlock is "the heir of his mother," that he is "the heir and legitimate child of his parents who intermarry," and that he is "the heir and legitimate child of his or her father" if the father

adopted the child into his family or acknowledged his paternity in writing before a justice of the peace or notary public.

Despite the presence of the language "and legitimate child" in Section 1003, this section has been construed by the Maine Law Court to apply only to the determination of rights of inheritance, and not to be a general legitimation statute. The Court in Buzzell v. Buzzell, 235 A.2d 828, at 830 (Me. 1967), said:

> That statute which appears as part of a Title dealing with "Decedents Estates and Fiduciary Relations" is an inheritance statute and has always been so understood and interpreted. . . . . Other statutes may deal with other rights and interests of illegitimate children. As was noted in Wellington v. Corinna (1908) 104 Me. 252, 262, 71 A. 889, "In this state there are distinct and separate statutes concerning illegitimate children, one relating to their pauper settlement and another relating to their rights of inheritance." 22 M.R.S.A. Sec. 4451(3) deals with the legitimation of children with respect to pauper settlement. 19 M.R.S.A. Sec. 251 et seq. deal with the initiation and prosecution of a filiation proceeding and thus deal with still another aspect of the rights and obligations owed to illegitimate children. The right of the minor child to inherit is not in issue in the instant case and 18 M.R.S.A. Sec. 1003 has no application.

This construction of the limited applicability of Section 1003 by the Buzzell court in 1967 is consistent with a long line of cases involving that section. In re Joyce's Estate, 158 Me. 304, 183 A.2d 513 (1962); Whorff v. Johnson, 143 Me. 198, 58 A.2d 553 (1948); In re Crowell's Estate, 124 Me. 71, 126 Atl. 178 (1924); Lyon v. Lyon, 88 Me. 395, 34 Atl. 180 (1896). It is apparently still the authoritative construction of the statute

despite the fact that the earlier cases, relied upon by the Buzzell and Joyce decisions, dealt with the section prior to the addition in 1950 of the language "and legitimate child." P.L., c. 254 (1951).

In light of this apparently authoritative judicial construction of Section 1003, limiting its application solely to determinations of inheritance rights of children born out of wedlock, there are no present general legitimation provisions to preserve in Section 1003: the effects of being born out of wedlock are to be dealt with as specifically provided for in the statutes relating to whatever particular rights are involved. Where no special provisions exist, children are apparently treated equally under present Maine law whether born in lawful wedlock or not.

III. The Present Status of Legitimacy Under Maine Law

The common law concept of legitimacy was that of a child born, in the eyes of the law, without parents -- filius nullius -- a child of no one, although there were at common law certain obligations of maintenance by the father or mother. Legitimation at common law could be achieved only by special Act of Parliament. See 1 Blackstone's Commentaries pages 446-447.

Certain language in the current Maine statutes, including Section 1003 of Title 18, uses the terms "legitimate" and "illegitimate" in a way that is hard to fit in with this common law concept of illegitimacy or bastardy, which depended on viewing the status of the child in relation to both parents together.

In Section 1003, for example, where the parents do not intermarry, but where the father does acknowledge the child or adopt him into his family, the child is said to be the "legitimate child of his or her father." If this were to be construed as legitimating the child for general purposes (rather than merely for inheritance from the father, as construed in the Buzzell case), it would seem to leave the child still illegitimate as to the mother. When this statute is construed, as in Buzzell, to apply only to inheritance from the father the language makes sense. If it is construed to apply to a general concept of legitimacy, it does not make sense: How can a child be legitimate and illegitimate at the same time?

A similar situation arises in Sections 633 and 634 of Title 19, where the statute provides that children born during a marriage that is subsequently annulled on the basis of nonage, mental illness, idiocy or prior marriage, are "the legitimate issue of the parent capable of contracting marriage." No consequences are spelled out for the distinction between legitimate and illegitimate children of such annulled marriages. It would appear that these sections merely use "legitimate" to describe the legal view of the children as having been born during wedlock, or else as preserving a verbal classification (legitimate-illegitimate) which has little or no practical legal consequence of its own.

Any attempt to provide for a general legitimation statute also raises another problem in addition to the part-legitimate-part-illegitimate classification referred to above: the division of the power to achieve legitimation as between the mother and the father. For example, if the Maine Law Court had indeed construed Section 1003 as a general legitimation statute, where the parents do not intermarry the only means for legitimation lie solely within the control of the father. The mother would have no power to legitimate her children born out of wedlock, other than by intermarriage with the children's father. Aside from the questionable rationality or fairness of such a rule, such a gender-based classification would probably be unconstitutional. See, e.g., Reed v. Reed, 404 U.S. 71 (1971); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977).

All of these problems, coupled with the fact that present Maine law leaves the consequences of legitimacy to be provided for by particular statutes dealing with particular situations (as expressed in the previous quotation from the Buzzell case), indicate that any general legitimation statute is unnecessary. In fact, to provide a means for general "legitimation" as a legal status might be misleading by implying that there are legal consequences of a general nature that flow from that classification -- a view that is contrary to the statement of Maine's present legal situation as stated in Buzzell.

IV. Consequences of Illegitimacy in Present Maine Law

An attempt to thoroughly survey the present Maine law concerning the legal effects of illegitimacy reveals that the concept apparently serves no function outside the area of inheritance rights and some differences in the kind of consent required in cases of adoption. The inheritance rights are, of course, covered by Section 1003 itself, and would be covered by the replacement of that section by Section 2-109(2) of the proposed Maine Probate Code. The provisions of Sections 532 and 532-C, dealing with requirements of consent by the putative father of a child in an adoption proceeding do not raise any problems of different treatment of legitimate and illegitimate children other than the different treatment that is specifically provided in those sections themselves -- the kind of specific provision referred to in the Buzzell case. In other words, the operation of these distinctions does not rest on a general classification of legitimate or illegitimate that would be affected by the absence of general legitimation provisions -- an absence which, under Buzzell, already currently exists.

IV. Recommendations

In light of the above discussion and research, the proposed new section 220 of Title 19 (contained in Section 27-A of L.D. 1) should be deleted from the bill. In order to clarify in one section what the present status and consequences of

illegitimacy are, it may also be desirable to substitute a different new Section 220 of Title 19, as follows:

> A child born out of wedlock is the child of his natural parents and is entitled to the same legal rights as a child born in lawful wedlock, except as otherwise expressly provided by statute.

Such a provision would codify what appears to be the Maine law and thus make express what has been stated by the Maine Law Court. It would also allow individual consideration of any differences that might be desirable, although such differences in treatment would no doubt have to focus on different problems of proof as to paternity or dependency, or some other rationally related factor other than mere illegitimacy itself in order to be constitutional. See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977); Matthews v. Lucas, 427 U.S. 495 (1976); Stanley v. Illinois, 405 U.S. 645 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).