STATES OF JERSEY

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SUCCESSION RIGHTS FOR CHILDREN BORN OUT OF WEDLOCK

Lodged au Greffe on 12th August 2003
by the Legislation Committee

STATES GREFFE

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(a) that the Wills and Successions (Jersey) Law 1993 should be amended so as to permit any person domiciled in Jersey to dispose of moveable estate as that person thinks fit subject to paragraph (b) below;

(b) that the Royal Court should have a jurisdiction to make such order as it thinks fit in the administration of moveable estate of a person who has died domiciled in Jersey so as to provide a proper sum out of that estate for the maintenance and support of that person's dependents;

(c) that succession to moveable estate on intestacy should devolve in such a way that ensures all children of the deceased have he same rights whether they be born inside or outside wedlock;

(d) that new provision should be made for executors and administrators dealing with the administration of the estate of the deceased in good faith.

LEGISLATION COMMITTEE

REPORT

This report and proposition follows 2 consultative papers issued by the previous Legislation Committee – R.C.32/99 presented to the States on 14th September 1999 under the heading *"Succession Rights for Children born out of Wedlock"* and R.C.3/2001 presented to the States on 2nd January 2001 under the heading *"Succession Rights"*.

Copies of the 2 reports are annexed to this report for ease of reference.

In R.C.3/2001, the Legislation Committee indicated that it was minded to bring forward legislation in accordance with the terms of the proposition which is with this report to be put before the States Assembly. The Committee invited submissions to be made during the early part of 2001. The Committee was pleased to receive a number of submissions, from the Jersey Law Commission, Relate, the Family Law Sub-Committee of the Jersey Law Society, the Registrar of Probate (in relation to technical matters), individual lawyers and members of the public. The overwhelming response was to endorse the Committee's proposals as set out in R.C.3/2001.

Before proceeding to give the Law Draftsman a brief to take forward the preparation of appropriate legislation, the Committee considers that the States Assembly ought to have the opportunity of an in principle debate. Accordingly it brings this proposition. The rationale for bringing the proposals is set out in the discussion at paragraphs 8 to 17 of R.C.3/2001 and it would seem otiose to repeat the argument in this report.

ANNEX 1

SUCCESSION RIGHTS FOR CHILDREN BORN OUT OF WEDLOCK

Presented to the States on 14th September 1999
by the Legislation Committee

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SUCCESSION RIGHTS FOR CHILDREN BORN OUT OF WEDLOCK

1. Historical background

1.1 The status of the illegitimate child in Jersey law was encapsulated in the blunt statement that such a child was "*un étranger à sa famille*" – literally 'alien to his family'. This alienation was virtually absolute in depriving the child of any right of inheritance including, in the early *Coûtume*, the rendering of an illegitimate child incapable of receiving any legacy of movables if it extended beyond maintenance.

1.2 Illegitimate children fared no better under the common law of England and Wales. According to Professor H.K. Bevan –

> *"Like most systems of jurisprudence English law …. based the legal relationship between the parent and the child not simply upon the fact of parenthood but upon the concept of legitimacy, to be determined by reference to the existence of a valid marriage of the parents. The feudal doctrine which insisted that the parents of a child must be lawfully married at the time of his birth or conception in order to entitle him to inherit an estate in land led to the principle that it was only in respect of such a child that legal rights and duties attached to parents. Otherwise, he was legally filius nullius and his exclusion seems to have been complete, until the Poor Law began to impose a duty on the parent to maintain him. Even thereafter parental rights were still denied, until finally, late in the nineteenth century, the mother's legal right to custody was acknowledged".*

1.3 The law of France developed somewhat differently, as explained by Amos and Walton –

> *"In the old French law the accepted theory was that illegitimate or 'natural' children belonged neither to the family of their father nor to that of their mother: bâtards ne succèdent point. The only persons to whom they might succeed were their own legitimate children. By contrast, under the sway of egalitarian sentiment, the law of the revolutionary period gave them the same rights of succession as legitimate children. The Code [Civil] adopted a middle course. It gave them a right in competition with legitimate children to a third of the share of a legitimate child, but at the same time declared that they were not heirs but irregular successors. …. [R]ights were given [to] them by a law of 1896, which also declared them to be heirs. These rights var[ied] according to the heirs with whom they happen[ed] to be in competition."*

1.4 This régime brought about three possible combinations –

The first was that, in competition with legitimate descendants of the deceased, a natural child took half of the share to which he would have been entitled, had he been legitimate.

The second was that, in competition with ascendants (whether privileged or not) or privileged collaterals, the natural child received three-quarters of the succession.

The third was that, in competition with ordinary collaterals, or the surviving spouse, he took the whole succession, but subject in the latter case to the usufruct of the surviving spouse over half the succession.

These rights were only conferred on natural children who were not the issue of an adultery or incest and had been formally acknowledged by the deceased as his offspring.

2. Existing Jersey Law

2.1 Jersey law has made only a small inroad into the underlying customary law which deems an illegitimate child to be an *un étranger à sa famille*. Article 11 of the Legitimacy (Jersey) Law 1973 has the effect that –

(a) an illegitimate child or, if he is dead, his issue, have the same rights in the estate of the mother,

whether she dies testate or intestate, as he/they would have had if he had been legitimate;

(b) the mother of an illegitimate child who dies wholly or partly intestate has the same rights in the estate as she would have had if the child had been legitimate and she had been the sole surviving parent;

(c) this right is limited to the mother, and is dependent upon her surviving the child so that, for example, a sibling of an illegitimate deceased cannot make only claim.

3. The Convention

3.1 The broad aim of the European Convention on the Legal Status of Children born out of Wedlock is to improve the status of such children so that, as far as possible, legally and socially they are not disadvantaged as against legitimate children. The United Kingdom signed up to the Convention in 1975 subject to certain reservations. This signature did not extend to Jersey. Jersey decided in 1979 that it did not wish the Convention extended to the Island for the time being. One of the issues for consideration by the Legislation Committee is whether that decision should now be changed. It will be clear from the present state of Jersey law as described above that, should Jersey wish to sign up to the Convention in full, there would have to be fundamental changes to the Island's law of succession.

4. Options for reform

4.1 The Legislation Committee has considered the following options –

1. To make no change to the existing provisions in Article 11 of the Legitimacy (Jersey) Law 1973.

2. To expand Article 11 of the 1973 Law to embrace (a) succession between father and illegitimate child as well as between mother and illegitimate child or (b) direct succession to any degree (e.g. grandparents).

3. To amend customary law generally to extend the rights of the illegitimate child to inherit from the estates of his wider family as though he were legitimate.

4.2 The Committee, whilst accepting that the illegitimate child should not be socially disadvantaged and mindful of the need to protect the rights of the child, is cognizant of the far reaching implications of seeking to amend the customary law generally to extend the rights of the illegitimate child to inherit as though he were legitimate. Before reaching a concluded opinion, the Committee wishes to elicit a wide range of views from all interested parties. The purpose of this Paper is to try to identify the implications of the options above.

5. Option 1

5.1 Option 1 [that of no change] is self-explanatory and requires no comment except to observe that it would amount to a virtual renunciation of the aims of the Convention in so far as the Convention relates to rights of inheritance.

6. Option 2(a)

6.1 Option 2(a) [that of expanding Article 11 of the 1973 Law to embrace succession between father and illegitimate child as well as between mother and illegitimate child] would be a partial step, albeit a substantial step, towards implementation of the aims of the Convention.

6.2 At present an illegitimate child has no right to inherit any part of the immovable or movable property of his natural father on an intestacy, nor does he enjoy the reserved rights of *légitime* which legitimate children have to the movable property of their father. The rights of legitimate children are now contained in Articles 6 and 7 of the Wills and Successions (Jersey) Law 1993 ("the 1993 Law"). Subject to the

reserved rights of the widow and any legitimate children, as set out in the 1993 Law, a father is free to leave his moveable or immovable property to an illegitimate child by Will.

Effective implementation of Option 2(a) in England in 1969

6.3 In England, section 9 of the Legitimacy Act 1929, under which an illegitimate child and his issue were entitled to succeed on the intestacy of his mother if she left no legitimate issue (and the mother of an illegitimate child was entitled to succeed on his intestacy as if she were the only surviving parent) was superseded by section 14 of the Family Law Reform Act 1969 which implemented the equivalent of option 2(a), namely expanding Article 11 of the Legitimacy (Jersey) Law 1973 to embrace succession between father and illegitimate child as well as between mother and illegitimate child (and vice versa). Its aim was that an illegitimate child should be entitled to share in the intestacy of **both** his parents on an equal footing with their legitimate children and that **both** parents of an illegitimate child should be equally entitled to share in his intestacy. No distinction was drawn between illegitimate children who had been 'recognised' by their natural parents and others; it was a matter for proof in each case that the claimant was the child of the intestate.

6.4 The reform did not do away with the distinction between legitimate and illegitimate birth for purposes of intestate succession: the principle was that an illegitimate child's relationship with each of his natural parents was equated with that of a legitimate child, but this recognition did not extend to permit participation by an illegitimate person in the estate of ancestors more remote than parents (for example grandparents) or in the estate of collaterals (for example brothers and sisters or half brothers or sisters). Nor did it permit participation by any such person in the estate of an illegitimate intestate if he died without any surviving issue. The following examples illustrate how the reform worked in practice –

(a) Z died intestate leaving a legitimate daughter, an illegitimate son who had been treated by him as his son, and an illegitimate son whom he had never seen and of whose existence he was not aware. All three children were entitled equally, subject to proof of the relationship.

(b) Z, an illegitimate child, died intestate without having married and without children. His mother predeceased him, but his father survived. The father succeeded to the whole of his estate, whether or not he had recognised or supported Z at any time.

(c) Z died intestate survived by a legitimate son S. His illegitimate daughter D predeceased him leaving three legitimate children. S took one half of his estate, the rest was divided between the children of D.

(d) Z died intestate leaving a legitimate daughter D. His legitimate son, S, had predeceased him, leaving an illegitimate daughter B, whom Z had taken into his house and maintained as a member of his family. D was entitled to the whole estate to the exclusion of B.

(e) A and B were the products of an illicit union between X and Y who both died. X was the legitimate child of G who survived. A died intestate without having married. He had been for many years a permanent invalid supported by his "grandfather" G and his "brother" B. Neither of them could succeed to his estate. G is a grandfather whereas B is a collateral relative.

Questions of evidence

6.5 The extension of succession rights to and from natural father/child raised questions of evidence to prove a relationship which of course did not arise where the right of succession was confined to mother and child. Section 14 of the 1969 Act threw the burden of proof of a relationship onto any person claiming to be entitled to succeed as the father of an illegitimate child. His claim had to be made out on a balance of probabilities. This is still the case today.

Protection of executors etc.

6.6 The 1969 Act also enabled trustees and personal representatives to distribute property without having to ascertain that no illegitimate child, or person who claimed through such a child, was or might be entitled to an interest in the property. However this special protection was removed by the Family Law Reform Act 1987. There does remain however protection for trustees and personal representatives in section 27 of the Trustee Act 1925. They may advertise for claims and are then exempt from liability to all claimants except those of whom they had notice (including constructive notice). Consideration will have to be given in Jersey to the position of executors and administrators in this respect if the rights of succession of illegitimate persons are extended.

Presumption about the meaning of 'child' etc.

6.7 The 1969 Act also created a presumption that in dispositions of property, references to children and other relatives included references to, and to persons related through, illegitimate children. This reversed the common law rule of construction relating to wills, settlements etc. under which the description 'child', 'son', 'daughter', 'issue' and similar words were to be taken *prima facie* to mean '*legitimate* child' etc.

6.8 In the Royal Court case of *In the matter of a settlement* [1996 JLR page 226] the deceased made a settlement of which amongst others his illegitimate son and daughter were beneficiaries, as were their "children and remoter issue whether now in existence or hereafter to be born during the trust period". It was argued that the daughter's illegitimate children were precluded from being beneficiaries of the settlement. However the settlor's widow and son gave evidence that the settlor had always intended all his grandchildren to benefit, whether legitimate or not, and would have made express provision to that effect had he thought it necessary. The Court held that it was proper to construe the settlement widely to include the illegitimate children of the settlor's daughter. The Court relied partly on French authorities (*Pothier* and *Dalloz*) and it seems that there was perhaps greater scope for the Royal Court to look behind the wording of the disposition and ascertain what was the actual intention of the testator/settlor. However there remains in Jersey customary law a presumption albeit rebuttable that any reference to 'child' 'son' 'daughter' 'issue' etc. is a reference only to legitimate offspring. The only distinction arguably between Jersey customary law and the original English common law is that it is easier in Jersey to rebut the presumption by extrinsic evidence.

Option 2(b)

6.9 It would be possible to go beyond what was originally done in the United Kingdom by providing that an illegitimate child can share fully in any direct succession. Thus he could share in the succession of the parents of his father or mother and they could similarly share in the estate of any illegitimate child who died intestate where the parents had pre-deceased the illegitimate child and the grandparents. Such an option would resolve the anomaly indicated in example (d) in paragraph 6.4 above.

7. Arguments in favour of Option 2(a) or (b)

Non-discrimination

7.1 Why should a natural child/grandchild be disadvantaged when he is no sense 'blameworthy'? Indeed he/she may have been devoted to the father whilst the father's legitimate offspring might have shunned him. Yet it is only the latter who have reserved rights under the 1993 Law.

The position of principal heir no longer excludes co-heirs

7.2 Now that the status of the eldest legitimate son has been reduced by the 1993 Law to one of equality with his legitimate brothers and sisters, the possibility has been removed of an illegitimate child in a succession of immovables ousting the legitimate offspring by asserting the old preferential rights of principal heir.

Changes in lifestyle

7.3 Many men and women now choose to live together without marrying and to have children as part of a long-standing commitment to each other. The family thereby produced is no less a family than where the parents have chosen to marry. It is unfair that the children of such a union should be in a less advantageous position than children of a marriage. Thus a couple may have lived together for 50 years and brought up their children in every respect as a family. Under the present Law, if the father dies without making a Will, his children cannot inherit from him upon intestacy. Similarly if he chooses to leave all his estate to one or more of his illegitimate children and to exclude the others, they have no right to claim any reserved portion under the 1993 Law. The father may of course achieve the objective of fairness by making a Will but, if he does not, the children are disadvantaged as compared with their legitimate counterparts.

8. Arguments Against Option 2

The institution of the family

8.1 Inevitably any extension of succession rights of children of non-marital union will make some inroad into the institution of marriage and the traditionally recognised family unit. The task of the legislator is to weigh the undoubted benefits of the traditional family unit against the unfairness of discriminating against persons who are not themselves blameworthy.

Difficulties of evidence

8.2 A widening of succession rights to the paternal side in a non-marital relationship inevitably increases the possibility of disputed claims to kinship. This is unavoidable if the goal of non discrimination is to be achieved. Developments in blood testing and genetic fingerprinting have made it easier to establish paternity in most cases.

Possible consequences

8.3 There would be increased scope for disputes and distress following the death of a father. The father may have produced an illegitimate child in his youth. He may be unaware of this because it was a casual relationship or because the mother chose to make her way on her own without continued contact with the father. On the father's death, by which time he may have been married for many years and produced a family, the mother might well decide to inform the illegitimate child of his or her father which might then result in a claim being made on the estate of the father for the illegitimate child's share. The illegitimate child might equally have been conceived during an affair which occurred during the marriage but which was unknown to the wife or legitimate family. Clearly the bringing of such a claim is likely to cause considerable emotional distress as well as have financial consequences for the legitimate family.

9. Option 3

9.1 Essentially the comments in the preceding paragraphs apply with similar force to the option of extending succession rights of offspring of non-marital relationships to collateral successions [i.e. successions where there are no surviving children, grandchildren, grandparents etc. and the estate devolves 'collaterally' to brother and/or sisters, uncles and/or aunts and/or their children or, if there are no uncles and/or aunts (or any children of theirs) to first cousins (and their children) and so on].

Effective implementation of Option 3 in England in 1987

9.2 The policy underlying the Family Law Reform Act 1987 was that 'to the greatest extent possible the legal position of a child born to unmarried parents should be the same as that of one born to married parents' (*per* Lord Chancellor, *Hansard*, H.L. Vol, 482, col. 647). The Act is a product of two Law Commission Reports (Nos. 118 and 157), published respectively in 1982 and 1986. The recommendations of the first report were the object of considerable criticism, not least from women's rights organisations. The recommendations of the second report took account of these criticisms and of the Scottish approach to the problem in the Law Reform (Parent and Child) (Scotland) Act 1986. The English Law

Commission's second report saw 'significant advantages' in the Scottish approach and also believed that, in so far as was possible, there should be 'consistency' between the two legal systems on 'such an important subject'.

9.3 The 1987 Act did not abolish the status of illegitimacy. Its aim was to remove "so far as possible …. any avoidable discrimination against, or stigma attaching to, children born outside wedlock" (*per* Lord Chancellor, *Hansard*, H.L. Vol. 482, col. 647). The Act followed the world trend towards the elimination of discrimination against those born out of wedlock. There had already been reform in New Zealand [Status of Children Act 1969, s.3(1) declaring that "for all purposes of the law of New Zealand 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"], Australia, Switzerland, Netherlands, Germany, France. Further, in the U.S.A., there had been many decisions striking down legislation which treated illegitimate children differently from others as inconsistent with the constitutional guarantee of equal protection.

9.4 The Act lays down the general principle that, in the absence of a contrary intention, a relationship between two persons is to be construed without regard to whether either of them, or any person through whom the relationship is deduced, is or is not legitimate. This principle is applied to the provisions of the Act and applies to all enactments and instruments after 1987.

9.5 The Act also deals with rights of succession to property on intestacy. Illegitimacy is not to be taken into consideration in determining –

(i) the rights of succession of an illegitimate person;

(ii) rights of succession to the estate of an illegitimate person; and

(iii) rights of succession traced through an illegitimate relationship.

For the purposes of obtaining a grant of probate or administration there is a rebuttable presumption that the deceased left no surviving illegitimate relatives, or relatives whose relationship is traced through an illegitimate person.

9.6 The concluding paragraph in the general note on the 1987 Act in Sweet and Maxwell Current Law Statutes Annotated reads as follows:–

> "*Marital status thus remains relevant and the status of illegitimacy has not been abolished. The Scottish Law Commission observed (Scot. Law Com. No. 82, para. 9.3) that 'it would be a matter for argument whether it was any longer justifiable to refer to a legal status of illegitimacy …. whether minor differences in the rules applying to different classes of persons justify the ascription of a distinct status is a matter for commentators rather than legislators'. But differences do remain. Although the Act discriminates between fathers rather than children, the terminology 'legitimate' and 'illegitimate' has not been extirpated. The original Law Commission proposal…. would have done this by distinguishing the 'marital' and 'non-marital' child. The value of this would have been to do away with the word 'illegitimate' with the connotation that this has of illegality and unlawfulness. But 'a rose by any other name….'. Marital status is not irrelevant: nor is legitimacy …."*.

10. Effective implementation of Option 3 in France in 1972

10.1 The modern position in France is set out by Professor Brice Dickson –

> "*…. practically all the legal disadvantages attached to being illegitimate have now been removed from the statute book. A statute of 1972 established the principle that illegitimate children should in general have the same rights and duties as those who are legitimate, this now being enshrined in Article 334 of the Code Civil: 'L'enfant naturel a en général les mêmes droits et les mêmes*

devoirs que l'enfant légitime dans ses rapports avec ses père et mère'. A father's relationship with, and responsibility towards, an illegitimate child can be established either by his voluntary recognition of paternity in the form of an acte authentique (an authenticated document usually drawn up by a notaire) (Articles 335-339) or by the judgment of a court (Articles 340-341) …. A child who cannot prove his or her paternity …. [may] claim maintenance against a man who has had sexual relations with the child's mother during the period when the child might have been conceived (Article 342). As in English law, it is possible for an illegitimate child to be legitimated, either through the marriage of his or her parents or through a court order (par autorité de justice). The latter has been possible only since 1972 and is remarkable because it means that a child can now be legitimate even though his or her parents remain unmarried to each other. The 1972 statute also extended legitimation by marriage to children born of adulterous relationships (enfants adultérins), a group which had previously suffered discrimination because of the alleged affront to the first marriage which a subsequent marriage would imply".

11. Considerations for Jersey in respect of Option 3

Consistency with other jurisdictions

11.1 As we have already seen, the majority of western democracies appear to have enacted legislation which goes towards the almost total elimination of discrimination against those born out of wedlock. The English Law Commission's Second Report expressed the view that, in so far as possible, there should be 'consistency' between English and Scots law on 'such an important subject'. It does not follow that Jersey ought to feel constrained to adopt similar legislation, but it is a relevant consideration that there is today far greater interaction of relationships across different jurisdictions and national boundaries. If Jersey law is significantly at variance with most other countries, the scope for conflict of law questions to arise becomes greater and so does the associated risk of complex litigation (e.g. the Royal Court case *In re a settlement* referred to above would have been unnecessary and the cost of litigation spared had there already been reform).

General considerations

11.2 There is a clear difference between the relationship of parent and natural child and the relationship of that child to brothers and sisters or to cousins and remoter relatives of the parent. It is less likely that the brother or a cousin of a deceased parent of an illegitimate child will know of the existence of the child. This may influence whether or not that brother or cousin makes a will at all because he may be aware only of a legitimate relative to whom the property would (so he thinks) devolve. On the other hand there could be situations in which an illegitimate person has cared and provided for the brother or cousin of his mother or father whilst a legitimate half-brother has taken no interest at all.

11.3 Again, given that the preferential status of the principal heir has now been extinguished by the 1993 Law, if a non-marital relative were admitted to a succession, he/she would be admitted on an equal footing with the marital relatives, none of whom could be excluded altogether as a result.

11.4 It is also important to recall that in a collateral succession (assuming there is no surviving spouse) the deceased has had complete freedom to make a will, both in relation to immovable and movable estate, disposing of everything he owns as he/she thinks fit. There are no reserved rights for collateral heirs which can override the provisions of a will. It follows that anybody who may have misgivings about his/her property devolving upon non-marital relatives has freedom to exclude them altogether. Therefore the frequency with which the question of entitlement of non-marital relatives arises will almost certainly be much less than in cases of the parent/child/grandchild relationship where (as we have seen) certain rights are reserved irrespective of what may be stipulated in the will.

11.6 Otherwise the issues raised are similar to those summarised in relation to Option 2 above.

12. Special considerations relating to the European Convention on Human Rights

12.1 Article 14 of the European Convention on Human Rights provides that –

> "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*" [Emphasis added.]

12.2 It must at once be understood that the freedom from discrimination which Article 14 seeks to guarantee relates only to the enjoyment of the rights and freedoms 'set forth in this Convention'. In other words, Article 14 does not create its own separate right for a person not to be discriminated against and nor does the Convention expressly confer an entitlement upon any person (legitimate or otherwise) to inherit property. Article 14 has, so to speak, to be'coupled' with the enforcement of a right or freedom which the Convention otherwise seeks to guarantee.

12.3 However, legal systems which in the past have placed illegitimate relatives at a disadvantage have been scrutinized in several cases under the following provisions –

(i) Article 1 of Protocol 1 to the Convention which enshrines the right to the peaceful enjoyment of one's possessions;

(ii) Article 3 of the Convention itself which provides that no one shall be subjected (amongst other things) to degrading treatment;

(iii) Article 8 of the Convention which (amongst other things) provides that everyone has the right to respect for his family life.

Article 1 of the Protocol – peaceful enjoyment of possessions

12.4 It was held by the European Court in the case of *Marckx v. Belgium* (1979) 2 E.H.R.R. page 350 at paragraph 50 that –

> *"... Article 1 of Protocol 1 ... applies only to a person's existing possessions and …… does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions ... Since Article 1 of the Protocol proves to be inapplicable, Article 14 of the Convention cannot be combined with it on the point now being considered."*

12.5 The later case of *Inze v. Austria* (1987) 10 E.H.R.R. 394 concerned a regional Law of Austria which was called into question because it discriminated against illegitimate children in the inheritance of farms. The regional Law concerned was not unlike the Jersey law of *partage* under which the eldest legitimate son had preferential rights to the main property. The Court [at paragraph 41 of its judgment] said –

> "*For the purpose of Article 14 [of the Convention], a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.*
>
> *The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law; the scope of this margin will vary according to circumstances, the subject matter and its background.*
>
> *In this respect, the Court recalls that the Convention is a living instrument, to be interpreted in the light of present day conditions. The question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the member States of the Council of Europe. This is shown by the 1975 European Convention on the Legal Status of Children born out of Wedlock, which is presently in force in respect of nine member States of the Council of Europe. It was ratified by the Republic of Austria on 28th May 1980 ... Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention."*

12.6 The Austrian Government argued asserted that the birth criterion reflected the convictions of the rural population and the social and economic condition of farmers and that illegitimate children, unlike legitimate children, were usually not brought up on their parents' farm and did not have close links with it and, finally, that one had to bear in mind the special treatment reserved to the surviving spouse who was normally entitled to stay on the farm and be maintained by the principal heir.

12.7 The European Court reached the following conclusion –

> *"Like the Commission, the Court is not persuaded by the Government's arguments. Most of them are based on general and abstract considerations – concerning such matters as the deceased's intentions, the place where illegitimate children are brought up and the surviving spouse's relations with his or her legitimate children – which may sometimes not reflect the real situation. For instance, Mr. Inze was brought up and had worked on the farm in question until the age of 23. Those considerations cannot justify a rule of this kind.*
>
> *Whilst it is true that the applicant's mother could have made a will in his favour, this does not alter the fact that, in the instant case, he was deprived by law of the possibility of taking over the farm on her death intestate.*
>
> *The Court also considers that the argument relating to the convictions of the rural population merely reflects the traditional outlook. The Government itself has recognised the ongoing developments in rural society and has accordingly prepared a Bill which takes them into account...*

... The Court ... concludes that there was a breach of Article 14 of the Convention, taken together with Article 1 of Protocol 1."

12.8 However, in the *Inze* case, the applicant had already acquired by inheritance a right to a share of his deceased mother's estate, including the farm, subject to a distribution of the assets in accordance with the relevant Austrian Law. Although he was the eldest son, he could not however rank as principal heir because he was illegitimate. But given he had a vested right, the Court held that Article 14 had been breached when read in conjunction with Article 1 of Protocol 1.

12.9 Technically, therefore, the *Inze* case is probably not authority for the proposition that an illegitimate child can rely on Article 14 of the Convention together with Article 1 of Protocol 1 on the basis only that he is excluded from a *potential* right of succession.

Article 3 of the Convention – degrading treatment

12.10 Article 3 of the Convention provides that –

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment." [Emphasis added.]

12.11 Mention has already been made of the case of *Marckx v. Belgium* in which it was held that legislation discriminating against illegitimate children and their parents was not degrading treatment contrary to Article 3. However, as already noted, the Convention 'is a living instrument' and it is possible in the future that discrimination against children born out of wedlock, which concerns personal characteristics, will be held to be degrading, contrary to Article 3. [See Professor D.H. Harris 'Law of the European Convention on Human Rights' 1995 Edition at page 83.]

Article 8 of the Convention – respect for family life

12.12 Article 8 of the Convention provides that –

"1. Everyone has the right to respect for his private and family life, his home and his correspondence. [Emphasis added.]

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

12.13 In the case of *Marckx* (referred to above) it was held that the State had a positive obligation to provide a system of domestic law which safeguarded the illegitimate child's integration into its family. By requiring further steps beyond mere registration at birth to establish maternal affiliation, Belgium had failed to respect the family life of the child and the mother. Furthermore the Court held [at para. 59] that –

"[The Applicant]…was the victim of a breach of Article 14, taken in conjunction with Article 8, by reason both of the restrictions on her capacity to receive property from her mother and of her total lack of inheritance rights on intestacy over the estates of her near relatives on her mother's side."

12.14 Article 8 was considered further in the case of *Vermeire v. Belgium* (1991) 15 E.H.R.R. page 488 at page 498. Paragraph 44 of the judgment reads as follows–

"In the Court's view, family life, within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren. Respect for a family

life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally.

> *The Commission recalls that 'matters of intestate succession – and of disposition – between near relatives prove to be intimately connected with family life. Family life does not include only social, moral or cultural relations, for example in the sphere of children's education; it also comprises interests of a material kind.'* [This was a quote from *Marckx*]. *It is true, as the Court has pointed out, that Article 8 does not require that a child should have a claim on the estates of his parents or indeed of other near relatives: 'in the matter of patrimonial rights also, Article 8 in principle leaves to the Contracting States the choice of the means calculated to allow everyone to lead a normal family life.....'*
>
> *It is the distinction drawn ..... between 'illegitimate' and 'legitimate' children which raises a problem under Article 8 in conjunction with Article 14 of the Convention. It was still possible for a distinction between 'illegitimate' and 'legitimate' family to be regarded as permissible and normal in a number of European countries at the time when the Convention was drawn up. However, the Court recalls that the Convention must be interpreted in the light of present-day conditions. In this case it should be noted that the domestic law of most member states of the Council of Europe has evolved and is still evolving, along with the relevant international instruments, towards full juridical recognition of the principle of equality between 'legitimate' and 'illegitimate' descent. In recent decades, many European countries have adopted new legislation overturning the traditional system of law of descent and establishing almost complete equality between 'legitimate' and 'illegitimate' children*."

Legislation Committee conclusion on questions raised by the Convention

12.15 The Legislation Committee has taken particular note of that part of the *Inze* judgment (referred to in para 12.5 above) in which the European Court recalled that –

> "*..... the Convention is a living instrument, to be interpreted in the light of present day conditions ..... [and the] .... question of equality between children born in and children born out of wedlock as regards their civil rights is today given importance in the Member States of the Council of Europe*".

12.16 The Committee also notes the conclusion in the case of *Vermeire* (para 12.14 above) that family life, within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, and that respect for a family life implies an obligation for the State to act in a manner calculated to allow these ties to develop normally.

12.17 Thus it appears that any difference of treatment is unfairly discriminatory if, in the words of the European Court, it "has no objective and reasonable justification, that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aims sought to be realised' ".

12.18 The Legislation Committee starts from the premise that any discrimination against illegitimate children requires objective and substantial justification. To put it another way, there must be clear and strong reasons if the Island is to justify retaining discrimination as between legitimate and illegitimate relatives as a feature of the Jersey law of succession. The domestic law of most Member States of the Council of Europe has evolved and is still evolving towards full juridical recognition of the principle of equality between legitimate and illegitimate descent.

12.19 These considerations weigh heavily in favour of the adoption by the States of Option 3, namely, the widening of all succession rights on a non discriminatory basis.

13. Overall conclusion

At present the Legislation Committee is minded to proceed on the basis of Option 3 and generally to extend the rights of the illegitimate child to inherit from the estates of his/her wider family as though he/she were legitimate, but, before reaching a concluded view, the Committee wishes to consult as widely as possible. Submissions are therefore invited from as many sections of the community as possible as to whether Option 1, 2(a), 2(b) or 3 is to be preferred.

ANNEX 2

SUCCESSION RIGHTS

Presented to the States on 2nd January 2001
by the Legislation Committee

STATES OF JERSEY

STATES GREFFE

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SUCCESSION RIGHTS

Preliminary

1. In its consultative document R.C.32/99, entitled *"Succession Rights for Children born out of Wedlock"* presented to the States on 14th September 1999, the Legislation Committee, having noted that the status of the illegitimate child in Jersey law was encapsulated in the blunt statement that such a child was *"un étranger à sa famille"* – literally *"alien to his family"* – and that existing law had made only a small inroad into this underlying customary law principle, proposed that consideration be given to extending the rights of the illegitimate child to inherit from the estates of his/her wider family as though he/she were legitimate. In reaching that proposal, the Legislation Committee had regard to the European Convention on the Legal Status of Children born out of Wedlock, to which the United Kingdom signed up in 1975 subject to certain reservations, but to which Jersey has not signed up; and also to the European Convention on Human Rights which will become part of the domestic law of Jersey when the Human Rights (Jersey) Law 2000 comes into operation. By R.C.32/99, the Committee invited submissions from as many sections of the community as possible as to which of the various options canvassed in that report would best be followed.

2. The Legislation Committee was pleased to receive some very thoughtful submissions from a number of different people, and has been troubled by the possibility that the adoption of option 3 as set out in R.C.32/99, namely the widening of all succession rights on a non-discriminatory basis, might have undesirable practical consequences in cases where the existence of the illegitimate child was unknown to the legitimate family of the deceased prior to the date of his death. The Committee continues nonetheless to maintain strongly the proposition that any discrimination against illegitimate children requires objective and substantial justification. After anxious consideration, the Legislation Committee has resolved that as these two propositions come potentially if not actually into conflict as a result of the succession rights conferred by law, the better course is to adopt a two-pronged approach by both removing the discrimination against illegitimate children and also removing the fixed proportion of the movable estate (or "*légitime*") to which the surviving spouse and the legitimate children are entitled at present under the Law. It is for that reason that this report is being prepared for the States for further for further consultation.

Historical background

3. Until the Wills and Succession (Jersey) Law 1993, the customary law of the Island in essence provided that –

   (i) A man leaving a widow and legitimate children was required to leave by Will one-third of his movable estate to his widow and one-third to his children in equal shares. The Law afforded him the right to leave one-third of his movable estate wheresoever he liked (*le tiers disponible*).

   (ii) A man leaving a widow and no legitimate children was obliged to leave one-half of his movable estate to his widow.

   (iii) A man leaving no widow but legitimate children was obliged to leave two-thirds of his movable estate among his children in equal shares.

   (iv) A woman leaving a widower and children was obliged to leave two-thirds of her movable estate to her children, whether legitimate or illegitimate, in equal shares. She was not obliged to leave any part of her estate to her husband.

4. It is noteworthy that the illegitimate child only has rights in the estate of his/her deceased mother, and that this right was created by the Legitimacy (Jersey) Law 1973.

5. These historic provisions were changed by the Wills and Succession (Jersey) Law 1993, which created some further protection for the surviving spouse and in particular removed the gender discriminatory

provisions of the customary law. Nonetheless, the 1993 Law left in place the basic structure for the division of personal estate such that the surviving spouse and the children, legitimate in the case of the deceased father and both legitimate and illegitimate in the case of the deceased mother, would have fixed shares out of the estate.

R.C.32/99 – Consultative process

6. One of those who made submissions to the Legislation Committee following the publication of R.C.32/99 drew attention to certain consequences which would have flowed from the Committee's preferred option of extending the rights of the illegitimate child to inherit from the estate as though he/she were legitimate. This type of example was given –

> *'A' dies aged 75 survived by his wife, 'B'. They have been married for over 50 years but did not have any children. 'C' is the executor of the estate which is sworn for probate at a value of £300,000. 'A''s Will leaves everything to his wife. 'D' is an illegitimate son born to 'A' 45 years ago. He claims his légitime and he receives £100,000 from the estate."*

7. On the other hand, one may propose the following factual circumstances which would give rise to a quite different type of hardship –

> *"'D' dies a widower leaving two children, 'E' and 'F'. 'E' is his legitimate son, from whom he is estranged, and whom he has not seen for the last 30 years. 'F' is an illegitimate son who gave up the opportunity of promotion with his employer in order to remain in Jersey and care for his father during his last five years of a debilitating illness. 'D' has not made a Will, and the entire estate devolves upon his legitimate son, 'E'."*

Discussion

8. The Legislation Committee recognises that both these examples are at opposing ends of the spectrum. In the first case, the widow suffers not only the potential financial hardship of finding that the nest egg which she thought had been put aside for old age was no longer available, but also the emotional trauma of discovering after her husband's death that during the course of their marriage he had had a liaison with another woman about which the widow had hitherto been quite ignorant. It is too late for recrimination or questions, but happy memories may be destroyed. In the second case, the unfairness of the treatment of the two sons speaks for itself. The difficult question is to assess how examples of hardship at opposing ends of the spectrum can be resolved and avoided.

9. The Legislation Committee recognises that there will be many who would be sorry to see amended those traditional rules of Jersey law which require a fixed or reserved portion of the estate of a deceased to go to his/her family. However, the Legislation Committee is conscious of the need to ensure that laws in existence meet the current requirements of the society which they are intended to serve. Historically there are probably two distinct reasons for the *légitime* –

   (i) There is a need to ensure that the estate is available to meet the needs of the dependants of the deceased.

   (ii) There is a view that it is *"right"* for the estate to pass to the family of the deceased. This is a judgmental view, based presumably on what is perceived to be the correct morality of the situation. It may historically have emanated from the traditional view that a person is not the owner of property but merely the custodian of it during his lifetime. On this view, it may be thought unsurprising that limitations be placed on a person's right to dispose of estate on death, because it was not really his estate to dispose of in any event, and, marriage being ordained by God for the procreation of children and for the mutual society, health and comfort that one spouse ought to have in another, it is natural that the estate should pass on through the legitimate family.

10. For whatever rationale, the Law of Succession has previously been developed by a series of rules which

determine how property belonging to those who live in a state of marriage which the law recognises, should be divided on death. In days gone by, the law was not concerned with illegitimate children because they were the product of people living outside the state which the law recognised, and either it was considered immoral, or conceptually absurd, or both, for the law to prescribe matters for those who wish to live outside it. Some may have regarded the law in that form to be consistent with the biblical maxim that the sins of the fathers shall be visited upon the children. Even in centuries gone by, and especially so today, it was a harsh result; it was never the fault of the child that he/she was illegitimate, and yet it was on the child that the penalty of disqualification from inheritance rights was imposed.

11. Today the changes in the structure of society suggest to the Legislation Committee that quite apart from the theoretical unacceptability of maintaining any form of discrimination between legitimate and illegitimate children, there is every practical reason not to do so. While the majority of the population appear still to favour marriage, a significant percentage prefer to cohabit and bring up a family in that state, rather than follow the traditional approach.

12. There is a further practical reason for wishing to contemplate change. The European Convention on Human Rights provides at Article 14 that the rights set out in the Convention shall be secured without discrimination *inter alia* on the grounds of birth or other status. The European Court has considered this Convention right on a number of occasions in relation to the inheritance rights of an illegitimate child to the estate of the child's mother and to the estate of the child's paternal grandparents. However none of the cases referred to in the Legislation Committee's previous report, R.C.32/99, are cases which refer to the right of the illegitimate child to share in the father's estate where paternity has not previously been established or accepted. The link between the non-discrimination Article (Article 14) and the succession claims has generally been regarded as being Article 8 – which confers the right to respect for a person's private and family life. It may well be that in the future, determining whether the illegitimate child was or was not part of the family of his/her deceased natural father will be a key factor in determining the correct approach to the application of the Convention right. Any argument of that nature, which is an absolutely foreseeable argument, will add to the trauma and natural grief experienced by all those close to the deceased.

13. The Legislation Committee also recognises with regret that a significant proportion of marriages end up in divorce. Equally a significant proportion of marriages take place between those who have previously been married to others, and may have existing children from a first marriage. The Law of Succession which provides a fixed share in the movable estate can sometimes produce very difficult problems in practice. Where for example both spouses have previously been married to others, and have children from a first marriage, the surviving spouse, by virtue of the *légitime* acquires one-third of the deceased's estate, and by virtue of the *légitime* applying to the estate of the surviving spouse, at least two-thirds of that share will devolve upon the stepchildren of the spouse who had died first to the prejudice of that spouse's own children. This type of problem is thought to be quite common.

14. The old Law of Succession may well have been designed for regulating the division of property within the family but that does assume that there was only one family. The Legislation Committee takes the view that it is a false assumption to expect, as a matter of fact, that illegitimate children will necessarily be treated as part of the same family as legitimate children, particularly where they are illegitimate children of the father rather than the mother. It may happen from time to time, but the likelihood is that particularly in the case of a father's illegitimate children, the result will be that there are two families rather than one. The Legislation Committee considers that exactly the same problems can arise in the case of the families of divorcees, though of course they do not invariably arise. On this basis, the rules which have been provided by the law over the centuries for the division of the estate amongst one family should not necessarily be regarded as the right rules for the division of the estate amongst more than one family.

15. Nonetheless the Legislation Committee recognises that it is important that the law gives adequate protection for dependants of a deceased. There is both a public and a private interest in making proper provision. The private interest is quite obvious; and in a sense the public interest is no less obvious in that, if there are dependants of the deceased who are not adequately provided for by Will or on intestacy, then the likelihood is that the state would be obliged to intervene to alleviate any financial hardship which was

being suffered.

16. There is presently a fundamental distinction between the approach in England and Wales on the one hand under which the Court is vested with a discretion to make provision for the family and dependants of the deceased, and the Jersey/Continental approach on the other hand under which the law automatically provides for a given share of the estate to devolve upon family members and/or spouses. The law of Jersey is of course closer to that of France, from which it is derived, than it is to that of England and Wales; but it is perhaps noteworthy that different yardsticks continue to apply even in European Union countries to the assessment of the rights of illegitimate children. In some countries, the deceased must have acknowledged paternity; in some countries, the offspring born through adultery within a marriage do not obtain the same share as the children born in marriage would have received.

17. Having given the matter anxious consideration, the Legislation Committee has come round to the view that the English approach, being less rigid, makes for greater fairness for spouses and dependent children, whether illegitimate or legitimate, who can claim that they deserve an inheritance. Indeed, such a regime enables common law partners and indeed any dependent persons to be able to claim for protection out of the estate of the deceased.

Overall conclusion

18. At present the Legislation Committee is therefore minded to proceed in the following manner –

(i) To bring a proposition before the States to repeal the Laws of Succession so as to allow any person to dispose of movable estate by Will as he/she sees fit, subject to paragraph (ii) below.

(ii) To create a jurisdiction in the Royal Court to make such Order as it thinks fit in the administration of the movable estate as provides a proper sum out of the estate for the maintenance and support of the dependants of the deceased.

(iii) To provide a new Law for succession to movable estate on intestacy the result of which will be to confer a share on the surviving spouse and another share on all the children of the deceased whether legitimate or illegitimate in equal shares.

(iv) To provide protection for executors and administrators dealing with the administration of the estate of the deceased in good faith.

19. In making these proposals, the Committee recognises that it is only seven or eight years since the Wills and Successions (Jersey) Law 1993 was passed, which preserves the fixed share of succession to the movable estate of a deceased. Nonetheless the Committee's view is that once one accepts the principle that there should be no discrimination between legitimate and illegitimate children, there is no wisdom in preserving old succession rights, which are based upon a wholly different historical and social premise.

20. Submissions are therefore invited, to be received by 15th March 2001, on the Legislation Committee's proposals as set out above.

18th December 2000.