JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 10 of 1968

BEFORE: The Hon. President
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A.

EUPHEME FINLAYSON - PLAINTIFF/APPELLANT

V.

FAHRIN MATTHEWS - DEFENDANT/RESPONDENT

Mr. Adolph Edwards for Appellant
Mr. Horace Edwards, Q.C. and Mr. W.K. Chin See for Respondent.

9th, 10th, 11th November, 1970
and 6th May 1971

HENRIQUES, P.

This matter came before the Master by way of an originating summons under the Guardianship and Custody of Children Law, Law 69 of 1956, in which the mother of an illegitimate child, Eupheme Finlayson prayed an order of the Court -

A. That Paul Eccleston Matthews her child do remain in or under the control of the said Eupheme Finlayson during his minority and until further ordered with such access to the said Fahrin Matthews (his father) as may be deemed fit.

B. That the said Fahrin Matthews do pay the said Eupheme Finlayson the costs and expenses of and incidental to and occasioned by the birth of the said Paul Eccleston Matthews.

C. That the said Fahrin Matthews do pay to the said Eupheme Finlayson in or towards the maintenance of the said Paul Eccleston Matthews such weekly or other periodical sum for such period or periods as may be deemed reasonable.

Before the Master it was contended by the respondent in this court that the child being an illegitimate child of the mother, the application ought not to have been brought under the Guardianship and Custody of Children Law, Law 69 of 1956, that the child is filius nullius and custody resided in the mother, and that the order in relation to paragraph B of the originating summons should be sought under the Bastardy Law in the Resident Magistrates Court. The Summons should therefore be dismissed.

On the other hand for the appellant the argument was sought to be adduced that the Bastardy Law was one way of dealing with the matter, but not the only way and that the summons was properly founded. That the whole trend of judicial interpretation of legislation was to bring the rights of legitimate and illegitimate children closer together vide section 2 of Law 69 of 1956, in that that section defined child in such a way that clearly indicated that it included an illegitimate child. The Court had accordingly power to make orders in relation to that child.

The Court dismissed the summons holding that it had no jurisdiction to entertain the application sought. It was from this order of the learned Master that the present appeal arises.

Counsel for the appellant argued on the appeal that the legislation in Jamaica was not restricted to legitimate children as was the legislation in the United Kingdom dealing with the same matter, the Guardian of Infants Acts 1886 and 1925, and the Administration of Justice Act 1928, but included children of unmarried parents as well as legitimate children. Emphasis was placed on the definition of child in the local law, namely "a person under twenty-one years of age but does not include a person who is or has been married." Such a definition did not appear in the United Kingdom legislation, and standing by itself would appear to include both legitimate and illegitimate children. Illegitimate children were therefore on the same footing as legitimate children under the local statutes. It was pointed out that our law was derived from three different sources, the Guardianship of Infants Act 1886 49 and 50

Vic. C. 27 the Guardianship of Infants (Amendment) Act 1925 15 and 16 Geo. V. C.45 and the Custody of Children Act, 1891 54 and 55 Vic. C.3. He referred to the decision of Roxburgh J in Re C.T. and Re J.T. (an infant) 1956 3 A.E.R. p. 500 in which the learned judge held that the Court had no jurisdiction under the United Kingdom legislation which is similar to the provisions in section 7(1) of our law 69 of 1956, to entertain an application by a putative father for custody of his two illegitimate children as the term "father" within the meaning of the United Kingdom provisions meant 'de jure' father and did not include a putative father. In coming to that conclusion the learned Judge followed the decision in Galloway and Galloway 1956 A.C. 299 that the words "father and mother" in section 5 in the United Kingdom Act of 1886 which is the counterpart of our section 7 of law 69 of 1956 meant lawful father and lawful mother. At page 310 Viscount Simonds is reported as having said "It was 1857 (as it is today) a cardinal rule applicable to all written instruments,wills, deeds or Acts of Parliament, that "child" prima facie means lawful child and 'parent' lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as **filius nullius**. This prima facie meaning may in certain circumstances be displaced and a wider meaning given to the words....."

Roxburgh J then proceeded to carry out an analysis of the provisions of the kindred Acts and came to the conclusion that the Guardianship of Infants Acts were not intended to include illegitimate children.

Learned counsel for the appellant argued that that case was wrongly decided. For this purpose he relied on Halls v Mattal 6. W.I.R. p. 481 in which the Court of Appeal in British Guiana appear to have assumed that the Guardianship of Infants Act of 1886 applied to illegitimate children and permitted the mother of such children to apply to the Court for custody. This authority, however, to my mind, does not greatly assist as from a perusal of the judgment of the Court in Re C.T. (an infant) was not considered.

Learned counsel for the respondent submitted that looking at the Law as a whole proceedings were contemplated where there existed some contest as to the custody of the child. If that were so that the summons which prayed an order that the child remain in the custody of the mother was an abuse of the process of the court. He relied on the judgment of Roxburgh J in Re C.T. (an infant) and submitted that 'child' in Law 69 of 1956 except in section 4(2) did not mean illegitimate child. He pointed to the fact both the Guardianship and Custody of Children Law, 1956, and the Adoption of Children Law, 1956 came before Parliament the same year and the meaning given to father in the one law ought to be construed to be the same as the meaning given in the other, and since 1964 the Adoption of Children Law 1956 had been amended to include a definition of father "father in relation to an illegitimate child means the natural father". It followed that the term "father" in Law 69 of 1956 had no reference to the natural father of an illegitimate child. He argued that where a term or word had a particular meaning the particular term or word must be given the common law meaning. "Father" at common law meant the de jure father and must be given that same meaning unless the Law can be said either expressly or by necessary implication to have taken away that meaning. He referred to subsections (2), (3) and (4) of section 7 of Law 69 of 1956 and submitted that a correct reading of those sections, would lead to the conclusion that the term "father" in section 7 meant the de jure father. He then analysed various sections of the Law 69 of 1956 with a view to showing that the de jure father was contemplated.

The simple but extremely difficult question which arises in this appeal is whether an order for the custody of an illegitimate child may be made on the application of its mother under the provisions of subsection 1 of section 7 of the Guardianship and Custody of Children Law, Law 69 of 1956, and if so, whether an order for maintenance may be made under subsection 3 of the section against the natural father. Our Law 59 of 1956 is based on the United Kingdom Guardian of Infants Act 1886, the amendment to that Act in 1925, and the Custody of Children Act 1891, and in my view the decision in Re C.T. (an infant)

is directly in point. An exhaustive review of the Common Law position and the relevant statutes in that case led Roxburgh J. to the conclusion that the titles of father and mother belong only to those who have become so in the manner known to and approved by law. Towards the end of his judgment Roxburgh J. had this to say "Romer L.J. before he became a member of the Court of Appeal was the judge to whom appeals under the Guardianship of Infants Acts were assigned; in other words, he was my predecessor in the work I am now doing and I derive some comfort from the reflection that, although he did this work for a considerable number of years, it does not seem to have occurred to him that an illegitimate child might be the subject of proceedings under the Guardianship of Infants Acts. I do not wish to make too much of that kind of reflection and that is why I have left this part of my judgment to the last, but thought the point worth mentioning to lead up to my conclusion on this part of the matter.

I am told that a number of justices is now giving effect to the view taken by the justices in this case, namely, that they have an apparently unrestricted jurisdiction over both custody and maintenance in respect of illegitimate children, and that many orders have already been made on that basis..... The effect of this judgment will have an important and unhappy bearing on the orders which have been made by justices who have taken that view, but I feel it is a good thing that no further delay should ensue before the practice is stopped for this reason: it may well be and I am not in the least suggesting the contrary that justices should have jurisdiction over custody and maintenance in the case of illegitimate children, but, if it is desirable, it is quite clear to me that considerable modifications ought to be made in the Guardianship of Infants Act, 1886 and 1925, before the justices exercise that jurisdiction, and it is, of course, trite knowledge that such alterations cannot be made by judicial decision, and they are solely within the province of Parliament". The remedy to the problem which confronts the Court in this case lays exclusively in the hands of the Legislature.

I am fortified in the view I have formed from a close reading and consideration of the provisions of the section in question itself, section 7(1) of the Guardianship and Custody of Children Law, 1956. I am fully satisfied from such a study that its whole purpose and intent was to deal with legitimate children. I am therefore of the view that the learned Master came to a correct conclusion when he dismissed the summons for want of jurisdiction and I would accordingly dismiss this appeal with costs to the respondent.

I am aware, having read previously the judgments of my learned brethren, that they do not share my views. Though I am appreciative of the path of reasoning which have led them to the conclusion that a distinction can be validly drawn between the implications of the word "father" and that of "mother" in the same section, I regret that I am unable to accept such a proposition. In view of the conclusions at which they have arrived the appeal is allowed in relation to the issue of custody, and the order of the Master accordingly set aside, and the matter remitted to the Master to hear and determine the application for custody. The appellant will have half the costs of this appeal.

FOX, J.A.

The appellant, the unmarried mother of an illegitimate child born on 6th October, 1967, took out an originating summons under the Guardianship and Custody of Children Law, 1956 - Law 69 of 1956 against the respondent naming him the de facto natural father. The child was in the custody of the appellant. In the summons, application was made pursuant to the provisions of section 7 of the law, for an order that the child remain in the custody and control of the appellant during his minority with such access to the respondent as was deemed fit, and that the respondent pay the expenses of the birth and a periodic sum for maintenance. The summons came before the Master on 13th March, 1968, and was dismissed on the ground of want of jurisdiction. On appeal from the decision, it was contended that the legislation in Jamaica was not confined to legitimate children as was its counterpart in England, the Guardianship of Infants Acts, 1886, and 1925, and the Administration of Justice Act, 1928, but contemplated as well a child of unmarried parents. This was so as a consequence of the definition of "child" in our law to mean "a person under twenty-one years of age but does not include a person who is or has been married". This definition is absent in the English legislation, and since it was wide enough to embrace all children, legitimate and illegitimate, it was axiomatic, argued counsel for the appellant, that when reference was made to the father or mother of a child in the substantive provisions of our law, both de jure and de facto parents were intended. This logic is fascinating. It seems ludicrous to assert that a child ceases to be a person simply because of its birth out of wedlock. Can such a child be made to disappear into thin air simply by invoking the circumstance of his 'tainted birth'? Will he cease to breathe and to live, and to be able to acquire or undertake all the incidents of civic existence? The law says that a child means a person and goes on to state the rights and the obligations of the father and the mother of that person, must it not follow that the artificial restrictions imposed by the common law have been displaced, and that the prima facie

meaning of parent as "lawful parent" has given way to larger implications? The force of this reasoning is strengthened by the obvious desirability of bringing all children, whatever the circumstances of their birth, within the ambit of a law which professes to relate to their guardianship and custody and matters incidental thereto. Despite its attraction however, the reasoning is entirely fallacious. A 'child' is a 'person' but not every 'person' is a 'child'. 'Child' is included in the larger category of 'person' and means a 'person' in terms of the definition. But a 'person' unmarried and under 21 may be a 'child' or a 'non-child', and to ascertain the principle which distinguishes the one from the other, resort must be had to that cardinal rule of the common law which, turning a blind eye to the facts of life, brands an illegitimate child as a filius nullius and rules that when they are used in a written instrument, be it a will, a deed, or an Act of Parliament, the word 'child' prima facie means 'lawful child', and 'parent', 'lawful parent' unless the context in which the words appear extended this meaning to the de facto situation.

The answer to the problem in this appeal lies therefore not in the definition of the word child, but in the substantive provisions of the law itself. In every relevant respect, the provisions of our law are essentially the same as those in the English legislation. The English decisions are therefore in point. In Re C.T. and J.T. (infant) [1956] 3 All E.R. 500 Roxburgh J. held that the Court had no jurisdiction under provisions in the English Acts which are similar to those in section 7 (1) of our law, to entertain an application by a putative father for custody of his two illegitimate children because the term 'father' within the meaning of the English provisions meant a de jure father and did not include a putative father. The case did not actually decide that the mother of an illegitimate child was not entitled to apply for custody of or maintenance for the child under the English Acts, but that aspect of the matter was considered and the difficulties which the learned judge felt in this regard were indicated. The restrictions imposed in proceedings under the Bastardy Law for an affiliation order which a single woman who has a bastard child was

entitled to take, were examined in detail, and the circumstance that none of these restrictions applied in proceedings under the Guardianship of Infants Acts was observed. At p. 507 (ibid) the difficulties were summarized as follows:

> "Under the Bastardy Acts only a single woman, as defined either by the Acts or by judicial interpretation, can obtain an order for maintenance in respect of an illegitimate child - there is no limitation at all of that sort in the Guardianship of Infants Acts. Secondly, the application for an affiliation order and consequential maintenance has to be made during a period which is limited - there is no limitation in the Guardianship of Infants Acts. Thirdly, evidence of paternity has to be corroborated even in the face of admission - there is nothing of that sort in the Guardianship of Infants Acts. Lastly (and this, perhaps, is the least important) an appeal lies, not to the High Court as under the Guardianship of Infants Acts, but to quarter sessions. It is, therefore, almost impossible to believe that the Guardianship of Infants Acts were intended to embrace illegitimate children".

The last difficulty stated by Roxburgh J. does not occur in Jamaica where appeals from orders made under both laws lies to the Court of Appeal, but this does not affect the relevance and the weight of the other difficulties, and cannot detract from the validity of the conclusion stated at the end of the passage cited above. In the light of this statement of the position, I feel obliged to hold that the word 'father' in section 7(3) of our law must be construed as meaning legitimate father. The word does not extend to a putative father and proceedings under the law to compel such a father to maintain a child are therefore not competent.

Somewhat different considerations arise with respect to an application by an unmarried mother for custody of her illegitimate child. In Re A., S v A (1940) 164 L.T. 230 Bennett J. held that the word 'mother' in s. 5(2) of the English Act of 1925 which empowers the mother of an infant to appoint any person to be the guardian after her death (s. 4(2) of our law) included an unmarried mother. In his judgment, Roxburgh J. pointed out the very convincing reason for this decision which

was to be found in the legislative context in which the word 'mother' occurred, but went on to notice the difficulties in the way of construing the word 'father' in the analogous provisions of s. 5(1) (s. 4(1) of our law) to include de facto father. At p. 510 (ibid) the learned judge concluded:

> "Rather than be involved in difficulties of that sort, I feel compelled to hold that the prima facie meaning of the terms "mother" and "father" is not to be departed from unless a compelling reason can be found in the statute for doing so. It seems to me that there is such a compelling reason in the case of the mother in one particular regard, namely in s. 5(2) of the Guardianship of Infants Act, 1925, and, for my part, I see no escape from the decision of Bennett, J., in Re A. (7) but I find - although this is, perhaps, not strictly relevant - no compelling reason in the case of "mother" anywhere else in the Act."

I think that the obiter at the end of this conclusion states the mother's position too narrowly. At common law, an unmarried mother is prima facie entitled to the custody of her illegitimate child. This right may be enforced by habeas corpus proceedings. Barnado v McHugh [1891] A.C. 388 H.L. I can see no objection to construing the word mother in s. 7(1) of the law to include an unmarried mother. In this way she would be given an additional remedy against infringement of her common law right of custody. She could maintain the action against all persons including the person alleged to be the father, and would be entitled to such redress as was appropriate in the circumstances. The desirability of this alternative remedy being available to an unmarried mother, coupled with the absence of the kind of conflict such as would arise in proceedings for maintenance against a putative father, furnish a sufficiently satisfactory basis for departure from the prima facie meaning of the word 'mother' in s. 7(1).

I therefore hold that proceedings by an unmarried mother for the custody of her illegitimate child are competent under these provisions of the law. The outcome of such proceedings will of course depend upon the particular facts of each case.

SMITH, J.A.

The questions for determination in this appeal are: (a) whether, upon the application of the mother, an order for the custody of an illegitimate child may be made under ss. (1) of s. 7 of the Guardianship and Custody of Children Law, 1956, (Law 69 of 1956) and, if so, (b) whether an order for maintenance may be made under ss. (3) of the section against the natural father. Sub-sections (1) and (3) of s. 7 provide as follows:

> "(1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Law; and in every case may make such order respecting costs as it may think just."
>
> (3) Where the Court under subsection (1) of this section makes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father, the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodical sum as the Court, having regard to the means of the father, may think reasonable."

In In re C.T. (An Infant), (1956) 3 W.L.R. 826, the admitted natural father of two illegitimate children applied under s. 5 of the Guardianship of Infants Act, 1886, as amended, for an order granting him custody of the children. On appeal from a dismissal of the application by justices, Roxburgh,J. held that the word "father" in s. 5, as amended by s. 16 of the Administration of Justice Act, 1928, must be construed as meaning legitimate father and did not

extend to the natural father of an illegitimate child; and that neither the justices nor himself had jurisdiction to make the order sought. Roxburgh, J. followed the reasoning of Viscount Simonds in Galloway v Galloway, (1956) A.C. 299, 310, in holding that, prima facie, the words "father" and "mother" in s. 5, as amended, mean lawful father and lawful mother respectively.

In Galloway v Galloway (supra) Viscount Simonds said, at pp. 310, 311:

> "First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament that 'child' prima facie means lawful child and 'parent' lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as 'filius nullius'. This prima facie meaning may in certain circumstances be displaced and a wider meaning given to the words....."

Roxburgh, J. in In re C.T. (An Infant) (supra), held that, except in the case of the "mother" in ss. (2) of s. 5, the prima facie meanings of "father" and "mother" in s. 5, as amended, had not been displaced, there being nothing in the Act of 1886, or in the circumstances in which it was passed, to suggest an extension of meaning to include de facto or natural parents. The learned judge, during a detailed examination of the provisions of the Act of 1886 and its amendments, and of the Bastardy Acts, pointed to difficulties which would arise if the titles "father" and "mother" were given an extended meaning. He concluded, therefore, that it was almost impossible to believe that the Guardianship of Infants Acts were intended to embrace illegitimate children.

The provisions of s. 7(1) of Law 69 of 1956 are, in all material respects, the same as those of s. 5 of the Act of 1886 as amended. Learned counsel for the respondent, the alleged father of the illegitimate child, invited the Court to follow the decision in

re C.T. (An Infant) (supra) and to hold that "child" in Law 69 of 1956 does not include an illegitimate child. It was submitted on behalf of the appellant, the mother of the child, that In re C.T. (An Infant) was wrongly decided. In support of this submission reference was made to two passages in Halls v Mattal, (1964) 6 W.I.R. 481 (at pp. 484 & 486) in which the Full Court of Appeal of the Supreme Court of British Guiana appear to have assumed that the Act of 1886 (U.K.) applied to illegitimate children and permitted the mother of any such child to apply for, and empowered the court to award, custody. The Full Court seemed, however, to have been unaware of the decision in In re C.T. (An Infant) as no reference was made to it in their judgment. Learned counsel for the appellant has invited us to hold that Law 69 of 1956 applies to illegitimate children.

The cardinal rule referred to by Viscount Simonds in the passage in Galloway v Galloway quoted above applies equally in Jamaica as it is a rule of the common law. "Child" in our statutes prima facie means lawful child. This may be demonstrated by reference to two statutes in which that word appears. In the Fatal Accidents Law (Cap. 125), which came into force in 1845, it was enacted in s. 4 that every action brought by virtue of s. 3 "shall be for the benefit of the wife, husband, parent, and <u>child</u> of the person whose death shall have been so caused." The legislature, obviously recognizing the limited meaning of "child" in this section, in 1947 amended the Law by adding a provision (see s. 2(2)) that for the purposes of the Law "a person shall be deemed to be the parent or child of the deceased person notwithstanding that he was only related to him illegitimately." Similarly, in the Intestates' Estates and Property Charges Law (Cap.166) the word "child" appears in Part I of the Law which deals with the distribution of the estates of intestates (see s. 5). "Child" there clearly does not include an illegitimate child as Part II of the Law is intituled "Illegitimacy and Succession" and enables an illegitimate child to succeed to his mother's estate and a mother to succeed to her illegitimate child's estate.

In the construction of statutes, there is a presumption against changes in the common law. "It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in or follows by necessary implication from, the language of the statute in question." (see Maxwell on Interpretation of Statutes - 12th edn. p. 116). The question is whether there is anything in the language of Law 69 of 1956 which, either expressly or by necessary implication, indicates that it was intended that the prima facie meaning of "child" in that Law should be extended to include an illegitimate child. This question may be examined by looking first at the definition of "child" in the statute and then at the words "father", "mother" and "parent" as used in relation to "child", as Roxburgh, J. did in In re C.T. (An Infant) (supra).

The Act of 1886 uses the word "infant" where "child" appears in Law 69 of 1956. "Infant" has a common law definition while "child" is defined in Law 69 of 1956 to mean "a person under twenty-one years of age but does not include a person who is or has been married." At first glance this definition appears wide enough to include <u>all</u> persons under twenty-one years of age. This would, of course, include an illegitimate child. A closer look, however, reveals that if this were intended one would have expected the words "any person" to be used instead of "a person." The definition appears to be doing no more than equating the age of "child" in the Law to that of an infant at common law without affecting the prima facie meaning of the word. In the Adoption of Children Law, 1956 (Law 75 of 1956) the word "child" is defined in the same terms as it is in Law 69 of 1956. Both laws were companion measures and were passed during the same session of the legislature, one week apart. By clear implication, "child" in the later law includes an illegitimate child. Section 16(1) of that law refers to an adoption order made "in respect of a child who is illegitimate," and the definition of "relative" also refers to such a child. One would be inclined to think that the word would have identical meanings in both laws. It appears, however, that the later law cannot properly be used to interpret the earlier for two reasons.

Firstly, because, apart from cases where the later law purports to declare the meaning of a word or phrase in an earlier law, an ambiguity must appear in the earlier law when it is considered by itself before the later law can be looked at (see Maxwell on Interpretation of Statutes - 12th edn. pp. 69, 70). I do not think it can be said that Law 69 of 1956 is ambiguous in any way which is relevant to the matters under consideration. Secondly, in the particular area of statutory construction under consideration it appears that in principle it is the language of the statute itself, and no other, that should be looked at to discover whether the legislature intended to make any change in the existing law. So, by itself, no indication of an extended meaning appears from the definition of "child".

Roxburgh, J. gave cogent reasons in In re C.T. (An Infant) (supra) for holding that the prima facie meaning of "father" in the Act of 1886 and in the Guardianship of Infants Act, 1925 had not been displaced. The same reasoning may be applied to "father" in Law 69 of 1956. There is certainly nothing in that law to show an intention to extend the meaning to include the father of an illegitimate child. I am prepared to follow Roxburgh, J. and to hold that "father" in Law 69 of 1956 means the father of a legitimate child. But, in my view, different considerations apply to the term "mother". Roxburgh, J., though admitting that it was not strictly necessary for his decision, expressed the view that there was no compelling reason for departing from the prima facie meaning of "mother" anywhere in the Acts of 1886 and 1925, except in ss. (2) of s. 5 of the Act of 1925 (which corresponds to ss. (2) of s. 4 of Law 69 of 1956). He referred to the decision of Bennet, J. in In re A., S. v. A. (1940) 164 L.T.230 in which he held that the mother of an illegitimate infant had the right to appoint a guardian of the infant under ss. (2) of s.5 of the Act of 1925. Bennet, J's primary reason for so holding was that in the schedule to the Act of 1925, which related to consents to the marriage of an infant, reference was made to the guardian of an illegitimate child appointed by the mother. But Bennet, J. gave another reason. He said, in his short judgment: "Apart, however, from the schedule it

appears to me to be sufficiently clear that the expression "mother of an infant" occurring in s. 5 ss.(2) of the Act includes the mother of any infant, whether it be legitimate or not."

Mothers and fathers of illegitimate children are not usually regarded by the law in the same light. Though the common law described an illegitimate child as 'filius nullius' and, literally, this meant that he was the child of no one, the law regarded such a child as having no legal father but not as having no legal mother. In In re M., An Infant, (1955) 2 Q.B. 479, Denning, L.J. said, at p. 488: ".....the law of England has from time immemorial looked upon a bastard as the child of nobody, that is to say, as the child of no known body except its mother. The father is too uncertain a figure for the law to take any cognizance of him except that it will make him pay for the child's maintenance if it can find out who he is. The law recognizes no rights in him in regard to the child, whereas the mother has several rights..... .....The truth is that the law does not recognize the natural father at all."

Because the natural father is not recognized, it is necessary in various statutes, by definition or otherwise, to say so expressly when it is intended that the term "father" should include the natural father. This is not so in the case of "mother". Though there is authority that, like "child"; "father" and "parent", "mother" prima facie means lawful mother, one does not usually find "mother" being defined to include natural mother. For instance, in the Adoption Act, 1950, which was under consideration in In re M., An Infant (supra) and which embraced illegitimate children, the term "father" was defined to include a natural father but "mother" was not defined. Yet there was no doubt that "mother" in the Act referred to the mother of both legitimate and illegitimate children. In the amendment to the Fatal Accidents Law (Cap. 125) to which reference has already been made, it is provided that: "..... in deducing any relationship which under the provisions of this Law is included within the meaning of the expression 'parent' and 'child' any illegitimate person shall be treated as being, or as having been, the legitimate offspring of his mother and

reputed father." There is no question here of "reputed" or "natural" mother. It is of interest to observe here that in spite of the prima facie meaning of "parent", a mother is, without definition, regarded as the parent of her illegitimate child for the purposes of the Adoption Act, 1950 (U.K.) while the natural father is not. This is evident from reading the arguments and judgments in In re M, An Infant (supra). At p. 491 of the report of that case in (1955) 2 Q.B. Birkett, L.J. quotes the following passage from Clarke Hall and Morrison on Children (4th edn.) p. 433: "Primarily 'parent' means a legitimate father or mother and does not (apart from statute) include the natural father of an illegitimate child..... The mother of an illegitimate child is its parent and for the purposes of the Adoption Act she is its only parent." In my view, the reason for the recognition given the mother is that there is no uncertainty about a mother's identity. It follows from what I have endeavoured to indicate that "mother" in a statute is capable of meaning the mother of an illegitimate child if the context in which it is used permits it.

In my opinion, it will not offend against any principle or rule of construction or any binding authority if, in construing the provisions of Law 69 of 1956, "mother" is given its ordinary meaning where that meaning is not restricted by the context in which it occurs. This accords with the view of Bennett, J. in In re A, S. v A. (supra), which view was not criticized either in In re M, An Infant (supra) or in In re C.T. (An Infant) (supra), in both of which reference was made to his decision. The provisions which Bennett, J. construed are identical in terms with those of s. 4(2) of Law 69 of 1956. There is no reason here to restrict the meaning of "mother". Accordingly, if it were necessary, I would hold that this provision empowers a mother to appoint a guardian for her illegitimate child by deed or will.

What of ss. (1) and (3) of s. 7 which are under consideration in this appeal? Is there anything in the context of ss. (1) to restrict the meaning of "mother"? I do not think there is. The words "father" and "parents" occur in the subsection and in this context they bear their prima facie meaning of lawful father and lawful parents respectively.

The presence of these words would not, however, affect the efficacy of the provisions of the subsection on a mother's application for custody of her illegitimate child. A mother may seek custody of such a child from some person other than the child's natural father, and this is not uncommon in this Country. If she did, the reference to "father" would not arise. If she sought custody from the natural father he would be in no better position legally than a stranger. The Court could not hear him in the capacity of father or parent and could make no order in his favour in either capacity. There would, however, be nothing to prevent the Court hearing him, as it would any stranger, on the general question of the welfare of the child. The mother's conduct as the child's parent would, as the subsection provides, also be relevant. It is to be observed that none of the difficulties to which Roxburgh, J. referred in In re C.T. (an Infant) would arise on this interpretation of the provision. And the decision in In re A, S v A (supra) shows that there is nothing wrong in principle with the law having a limited application to illegitimate children.

What of ss. (3) of s. 7? This empowers the Court to make an order for maintenance against the child's father. This is the sole purpose of the subsection. Any order for maintenance must be made against the father. But "father" here means lawful father. This limits the application of the subsection to legitimate children and so restricts the meaning of "mother". No order may, therefore, be made under this provision for maintenance of an illegitimate child.

In my judgment, the answers to the questions posed at the commencement of this judgment are: (a) Yes, an order for custody of an illegitimate child may be made under ss. (1) of s. 7 of Law 69 of 1956 upon the application of the child's mother; (b) No, an order for maintenance may not be made under ss. (3) against the natural father of the child. The Master, therefore, had jurisdiction to make an order for custody but not for maintenance. I would allow the appeal in part and remit the matter to the Master to hear the application for custody if the appellant pursues it.