

Case Note

THE STATUTORY PRESUMPTION OF LEGITIMACY

WX v WW
[2009] 3 SLR(R) 573

The statutory presumption of legitimacy under s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) allows for “conclusive proof” of legitimacy to be established with relative ease. However, reliable scientific evidence of actual biological paternity continues to be formally denied its proper role in rebutting the statutory presumption of legitimacy under the Act. In the recent decision of *WX v WW* [2009] 2 SLR(R) 573, the Singapore High Court in upholding a child maintenance order granted by the District Court has exemplified judicial innovation in getting around the evidential restriction under s 114. Although this led to a just result given the circumstances of the case, *WX v WW* starkly illustrates the need for legislative reform of s 114 of the Evidence Act.

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I. Background facts and holdings

1 The facts of *WX v WW*¹ are as follows. In 2006, H had proposed and married the plaintiff after discovering and believing that the plaintiff was pregnant with his child. However, H’s suspicion grew when it became apparent from the blood group of the child that H was not her biological father. It subsequently transpired that prior to H’s and the plaintiff’s marriage, the plaintiff had been secretly dating and had constant sexual relations with another man, the defendant. A negative DNA test further confirmed that H was not the biological father of the child. An action for child maintenance was originally brought by the

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1 [2009] 3 SLR(R) 573.

plaintiff against the defendant at the District Court after the plaintiff's marriage with her husband, H, was nullified in a separate matrimonial proceeding. The District Judge circumstantially found as a fact that the defendant was the biological father of the child and thus ordered the defendant to pay child maintenance under s 69(2) of the Women's Charter.² The defendant appealed against the decision of the District Court and sought to invalidate the finding that he is the biological father of the child by arguing that s 114 of the Evidence Act³ applies and presumes as conclusive proof that the child is the legitimate child of H who was unable to adduce evidence of "no access" to rebut the said presumption. Section 114 of the Evidence Act reads:

The fact that any person was born during the continuance of a valid marriage between his mother and any man ... shall be conclusive proof⁴ that he is the legitimate son of that man, *unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.* [emphasis and footnote added]

2 On appeal at the High Court,⁵ Lee Sieu Kin J characterised the main issue as whether s 114 of the Evidence Act⁶ relates to the biological paternity of the child in question. His Honour, in upholding the maintenance order, dismissed the appeal and made three critical points that form the focus of this case note.

3 First, his Honour's reasoning at [10]–[13] of his judgment⁷ was summarised and reported in the headnotes as saying that given the absence of any express allusion to biological issue in the wording of s 114 of the Evidence Act,⁸ legitimacy under the provision is "nothing more than a position or status" and that the provision "did not deem that a legitimate child of a person was also his biological issue". Indeed, his Honour was convinced that "the intention in s 114 of the Act is the conferment of legitimacy as a matter of policy rather than biological reality".⁹ This conveys his Honour's view that because paternity as

2 Cap 353, 2009 Rev Ed.

3 Cap 97, 1997 Rev Ed.

4 Section 4(3) of the Evidence Act (Cap 97, 1997 Rev Ed) provides: "When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it." See further the explanation of the Indian equivalent of s 4(3) in M C Sarkar, S C Sarkar & Prabhas C Sarkar, *Sarkar's Law of Evidence* vol 1 (New Delhi: LexisNexis Butterworths Wadhwa Nagpur, 16th Ed, 2009) at p 106: "These cases [of conclusive proof] generally occur when it is against the policy of Government or the interests of society, that a matter should be further open to dispute."

5 *WX v WW* [2009] 3 SLR(R) 573.

6 Cap 97, 1997 Rev Ed.

7 *WX v WW* [2009] 3 SLR(R) 573.

8 Cap 97, 1997 Rev Ed.

9 *WX v WW* [2009] 3 SLR(R) 573 at [12].

a biological fact could be dissociated from the concept of legitimacy under the Evidence Act, the court was not bound to disregard H's scientific evidence comprising negative paternity DNA test results even though such evidence does not directly establish "no access" as required by s 114 of the Evidence Act. It bears noting that *WX v WW* was subsequently affirmed in *AAE v AAF*¹⁰ where Belinda Ang J, presiding in the High Court, held:

As an aside, I should mention the recent case of *WX v WW* [2009] 3 SLR(R) 573. In that case, Lee Seiu Kin J reasoned that the presumption of legitimacy in s 114 is confined to the status of the child alone; paternity of itself – whether the child is an issue of the husband – is a different matter and falls outside the provision. The distinction was made to get around the evidential restriction in s 114.

4 Secondly, his Honour appears to have taken the view that the *moral propriety* of a litigant's use of s 114 of the Evidence Act¹¹ affects the *applicability* of the provision itself. His Honour held:¹²

[T]he [defendant] is attempting to use a presumption established by the judges of the common law [which by his Honour's observation at [7] lends historical origins to the presumption in s 114] for the protection of children *to deprive the Child of the right vested in her under s 69(2) of the [Women's] Charter. It is a position that no court of justice would accede to lightly.* [emphasis added]

5 Similarly, his Honour reiterated the same point:¹³

But the [defendant] is seeking to derive a collateral application to the rule, *which would in effect turn a rule established for the purpose of protecting¹⁴ a child in one set of circumstances to deny a child in another set of circumstances of protection accorded to him under the Charter.* In my view the [defendant's] position is not supported by the words in s 114 nor by any consideration of the policy and historical origin of the rule. [emphasis and footnote added]

6 Thirdly, his Honour took the view that, in any event, the relevance or otherwise of legitimacy to the area of law that formed the basis of the legal action directly determines the applicability of s 114 of the Evidence Act^{15,16}

10 [2009] 3 SLR(R) 827 at [25].

11 Cap 97, 1997 Rev Ed.

12 *WX v WW* [2009] 3 SLR(R) 573 at [9].

13 *WX v WW* [2009] 3 SLR(R) 573 at [14].

14 Namely, to "avoid bastardising the children, and the social stigma that attached to [illegitimacy]": see *AD v AE (minors: custody, care, control and access)* [2005] 2 SLR(R) 180 at [8], cited in *WX v WW* [2009] 3 SLR(R) 573 at [7].

15 Cap 97, 1997 Rev Ed.

16 *WX v WW* [2009] 3 SLR(R) 573 at [15]–[17].

[In any event] I would hold that [s 114 of the Evidence Act] *does not apply* in respect of s 69(2) of the Charter for the reasons that follow ... [After setting out s 68 of the Women's Charter which provides that a parent has a duty to maintain his or her children whether, *inter alia*, 'they are legitimate or illegitimate', his Honour proceeded] ... This provision establishes a legal duty on the part of a parent to contribute to the maintenance of his children ... whether they are his legitimate or illegitimate children. [emphasis added]

7 These three points made in the course of Lee Sieu Kin J's judgment in *WX v WW*¹⁷ are indeed understandable in light of the need to protect the welfare of the child *vis-à-vis* the defendant who was effectively seeking to disclaim his primary parental responsibilities owed to the child.¹⁸ With respect, however, the interpretation of s 114 of the Evidence Act¹⁹ may be questionable. The following explains.

II. Biological paternity not dissociable from the concept of legitimacy under s 114 of the Evidence Act

8 Legitimacy is defined in *Black's Law Dictionary* as: (1) the status of a person who is born *within a lawful marriage* or who acquires that status by later action of the parents; and (2) *legal* kinship between a child and its parent or parents.²⁰ Historically, the idea of legitimacy was the precondition to full support entitlement and "*illegitimate* paternity" [emphasis added] had only limited legal consequences.²¹

9 The use of the italicised words above implicitly suggests that at least three possible propositions could be made of the concept of legitimacy:

- (a) that legitimacy can be conceptually distinguished from biological paternity, *ie*, paternity may exist where legitimacy is

17 [2009] 3 SLR(R) 573.

18 Indeed, one may further argue that, *a fortiori*, the child's welfare should be protected by the granting of a maintenance order where the circumstances are such that it is impractical for a claim to be pursued against any potential candidate other than the biological father. One example might be where H, who despite not being the biological father of the child is (say) liable for maintenance as a *non-parent* under s 70 of the Women's Charter (Cap 353, 2009 Rev Ed) because he has accepted the child as a member of his family, could no longer be found within the jurisdiction. In such a situation, the child would be tragically helpless if s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) were to be accepted by the court as a technical basis for denying a maintenance order sought against the defendant who can be shown to be the actual biological father of the child.

19 Cap 97, 1997 Rev Ed.

20 *Black's Law Dictionary* (St Paul, MN: West, 9th Ed, 2009) at p 984.

21 *Black's Law Dictionary* (St Paul, MN: West, 9th Ed, 2009) at p 984.

non-existent (such as in the situation of a child born out of wedlock);

(b) that legitimacy is a *legal* kinship while paternity is really a biological fact which can be thought to be a *factual* kinship; and

(c) that it is possible to think of *legitimate* paternity just as one could think of *illegitimate* paternity.

10 In light of these observations, the drawing of a distinction between legitimacy and paternity in *WX v WW*²² appears to be sound on the surface. However, there may be problems with this if we delve deeper.

11 No doubt paternity can exist where legitimacy is non-existent, but the reverse does not equally hold true – legitimacy simply cannot be *found* to exist when paternity is non-existent at all. At common law, before one can *find* that X is a legitimate child of Y, one must first find that X and Y satisfy the requirement of paternity. Such requirement can be regarded as a primary requirement of legitimacy because any talk of legitimacy without having first established paternity would be meaningless. Facts demonstrating that X was born or conceived during the continuance of a valid marriage between Y and X's mother are, on the other hand, better seen as constituting the secondary requirement of legitimacy – the satisfaction of which would clothe an otherwise mere *factual* kinship (paternity) with the status of a *legal* kinship. Together, the primary and secondary requirements form the general basis for determining legitimacy at common law. As Professor Leong Wai Kum explains in her seminal book, *Elements of Family Law in Singapore*:²³

Under the common law substantive rule of legitimate status, a child is the legitimate child of his or her parents only if the child is born or conceived during the existence of a valid marriage between them.

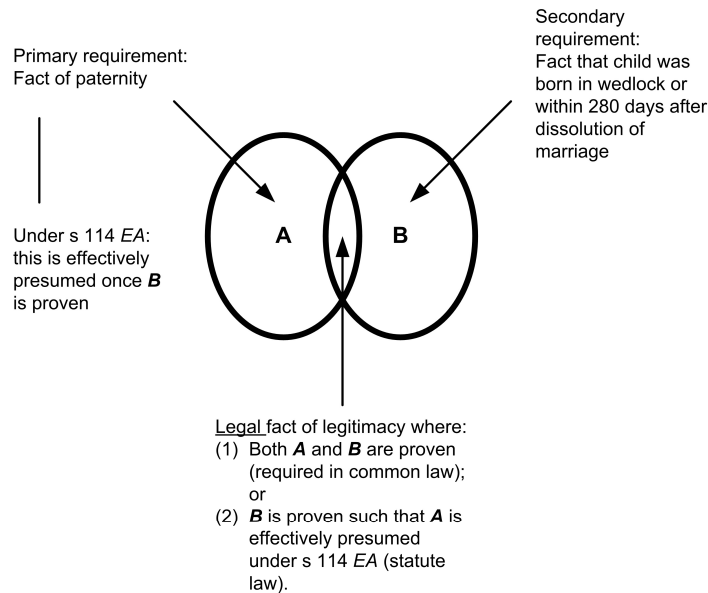
12 However, the way these two requirements operate to determine legitimacy is materially altered under the statutory framework in Singapore. Under the Evidence Act,²⁴ s 114 does not require a court to *find* legitimacy but permits the court to *presume* legitimacy instead. Thus, when one *presumes* that X is a legitimate child of Y, one is not bound to first find that paternity as a primary requirement is satisfied; this primary requirement of legitimacy is effectively presumed to be fulfilled until proven otherwise. And precisely because s 114 permits such a presumption to arise only *after* facts that would otherwise

22 [2009] 3 SLR(R) 573.

23 Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at p 376.

24 Cap 97, 1997 Rev Ed.

constitute the secondary requirement of legitimacy are successfully proven to exist, what is essentially left for dispute under every triggered statutory presumption is for all practical purposes really the question of *factual* kinship (paternity) the rebuttal of which can only be made by evidence of “no access” at the relevant time. The diagram below summarises the foregoing:



13 Given this understanding of the presumption of legitimacy under s 114 of the Evidence Act,²⁵ the view that biological paternity and legitimacy are mutually independent concepts cannot be right. As such, based on this construction, the holding in *WX v WW*²⁶ that legitimacy under s 114 is “nothing more than a position or status” and that s 114 “did not deem that a legitimate child of a person was also his biological issue”²⁷ would appear to be incorrect.

III. Applicability of s 114 of the Evidence Act cannot be determined by unwritten rules

14 With respect, neither the *moral propriety* of a litigant’s use of s 114 of the Evidence Act,²⁸ nor the relevance or otherwise of legitimacy to the area of law that formed the basis of a legal action, should

25 Cap 97, 1997 Rev Ed.

26 [2009] 3 SLR(R) 573 at [10]–[13].

27 See para 3 of this article.

28 Cap 97, 1997 Rev Ed.

determine the *applicability* of s 114. This is because of s 2(2) of the Evidence Act which states:

All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

15 No doubt a purposive reading of ss 68 and 69(2) of the Women's Charter²⁹ was adopted in *WX v WW*.³⁰ For instance, Lee Sieu Kin J considered:

Considering s 69(2) of the Charter in the context of the duty in s 68 on a parent to maintain his children, be they legitimate or illegitimate, it would be rather surprising if Parliament had intended that the rights intended to be vested in an illegitimate child *vis-à-vis* his biological father does not extend to the situation where his mother was legally married to another man at the time of his birth. Were that to be the case, even if the mother had divorced her husband or he had died, the child still would not enjoy the protection under s 68 and s 69 *vis-à-vis* his biological father. It is difficult to see how Parliament, in promulgating these provisions more than half a century after s 114 of the Act was enacted, could have intended that this duty be relieved in the case of the biological father of a child whose mother happened to be married to another man at the time of birth.

16 However, it is questionable, in light of the express restriction found in s 2(2) of the Evidence Act,³¹ whether such a purposive approach could withstand legal scrutiny given the view that the Evidence Act "is a code and therefore is to be regarded as a self-contained source of [evidence] law".³² *Judicial interpretation* of a statutory provision falling outside the Evidence Act cannot – by way of purporting to create a new *rule of evidence* – nullify the evidential restriction found in s 114, if the statutory provision being interpreted is not a directive on the rules of evidence in the first place.³³

29 Cap 353, 2009 Rev Ed.

30 [2009] 3 SLR(R) 573 at [17].

31 Cap 97, 1997 Rev Ed.

32 Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (Singapore: LexisNexis, 2nd Ed, 2003) at p 17. For further reading, see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[129] (but note that the court of three judges took the view that the Evidence Act (Cap 97, 1997 Rev Ed), though being a codifying Act, is not *entirely* exhaustive). See also *Lee Chez Kee v PP* [2008] 3 SLR(R) 447 at [106] and [116].

33 *À propos*, one might also wish to consider whether a judicial interpretation of a statutory provision qualifies as a "written law" as contemplated by s 2(2) of the Evidence Act (Cap 97, 1997 Rev Ed) at all. In the interest of space, however, it is best for such question to be dealt with another time. But suffice it to see generally, Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (Singapore: LexisNexis, 2nd Ed, 2003) at pp 16–23.

See also Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* at p 22: "One might argue that a principle which could significantly impinge upon the
(*cont'd on the next page*)

17 The wording in ss 68 and 69(2) of the Women's Charter³⁴ does not set these sections out as directives additional to the rules of evidence found in the Evidence Act.³⁵ All that is said in these provisions is that the duty of a parent to maintain a child exists regardless of legitimacy. As such, s 114 of the Evidence Act³⁶ rightly still applies, albeit its application would not in theory pose any legal obstacle to the existence of a parent's duty to maintain his child under the Women's Charter. It is submitted that the fact that an argument could be raised that s 114 could nevertheless technically preclude the court from making any contrary independent finding on whether the defendant is a biological "parent"³⁷ for the purposes of ss 68 and 69(2) of the Women's Charter does not *ipso facto* give sufficient reason to justify the transformation of these provisions into a written rule of evidence that s 2(2) of the Evidence Act recognises. Otherwise, it is submitted, the integrity of the Evidence Act as a self-containing code on the law of evidence would be significantly weakened.

IV. Conclusion

18 *WX v WW*³⁸ starkly illustrates the awkwardness of interposing an anachronistic statutory presumption of legitimacy over the traditional common law understanding of legitimacy.³⁹ As things stand, it would seem that the courts are not able to dispense material justice without at the same time appearing to engage in some exercise of awkward "law-bending".

[existing statutory framework under the *Evidence Act*] should, at the very least, be formulated as a statutory provision". For further reading, see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [116]–[129]; *Lee Chez Kee v PP* [2008] 3 SLR(R) 447 at [106] and [116].

34 Cap 353, 2009 Rev Ed.

35 Cap 97, 1997 Rev Ed.

36 Cap 97, 1997 Rev Ed.

37 The preclusion, so it might be argued, derives from the fact that s 114 of the Evidence Act (Cap 97, 1997 Rev Ed) gives rise to "conclusive proof" of legitimacy which, as analysed earlier, is not mutually independent of biological paternity: see paras 8–13 of this article.

38 [2009] 3 SLR(R) 573.

39 *Cf* Indian decisions where the Indian courts have on several occasions refused to allow the use of blood tests and DNA tests in cases governed by s 112 of the Indian Evidence Act which is *in pari materia* with s 114 of Singapore's Evidence Act (Cap 97, 1997 Rev Ed). See Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Law of Evidence* (Nagpur, India: Wadhwa and Co, 22nd Ed, 2006) at pp 1183–1184. In England, however, blood tests and DNA tests may be permitted in cases of disputed paternity provided it is in the best interests of the child to do so. See M C Sarkar, S C Sarkar & Prabhas C Sarkar, *Sarkar's Law of Evidence* vol 2 (New Delhi: LexisNexis Butterworths Wadhwa Nagpur, 16th Ed, 2009) pp 1748 and 1764.

19 It therefore seems that optimal reform can only be achieved through legislative effort as suggested in *AD v AE (minors: custody, care, control and access)*,⁴⁰ decided before *WX v WW*.⁴¹ There, Choo Han Teck J opined:

Although some changes to this section might be necessary to avoid more serious problems than the one before me, it is still useful to have a provision that presumes paternity, provided that it is not, as presently so, an irrebuttable or conclusive presumption.

20 For the sake of completeness, it hence bears significance to repeat the suggested reform voiced by Professor Leong Wai Kum in this regard:⁴²

[O]ne, that the adjective 'conclusive' be deleted or substituted with 'prima facie' and, two, the limitation to evidence of 'no access' be omitted so that the court can hear all relevant evidence offered in rebuttal of the presumption. With the character of the presumption [under s 114 of the Evidence Act] thus changed from being largely irrebuttable to being rebuttable with any convincing evidence, the presumption will continue to serve its role well even with the modern tests of paternity that are available.

21 Indeed, it would appear that it is high time that such reform be undertaken to modernise s 114 of the Evidence Act⁴³ so as to meet the modern technological realities society is presented with today and to eliminate the technical difficulties the courts encounter under the current statutory framework on legitimacy.

40 [2005] 2 SLR(R) 180 at [8].

41 [2009] 3 SLR(R) 573.

42 See Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2007) at p 286. For an alternative suggestion, see Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Law of Evidence* (Nagpur; India: Wadhwa and Co, 22nd Ed, 2006) at p 1184 where the writers suggested the following proviso to be added to s 112 of the Indian Evidence Act (which is *in pari materia* with s 114 of Singapore's Evidence Act (Cap 97, 1997 Rev Ed)): "Provided that this will not preclude evidence of blood samples or bodily specimens to be taken to show that a person is or is not excluded from being the father of another person."

43 Cap 97, 1997 Rev Ed.