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TWO CONTRASTING APPROACHES IN THE INTERPRETATION OF OUTDATED STATUTORY PROVISIONS

WX v. WW[1]

AAG v. Estate of AAH, deceased[2]

GOH YIHAN*

I. INTRODUCTION

Some statutes in operation today were passed a long time ago. Inevitably, through the passage of time, social norms at the time of enactment may now be unrecognisable. The legislative intent at the time of enactment may also seem outdated in more modern times. Judges interpreting specific provisions of these statutes may therefore encounter problems in ensuring a 'just' result in an instant case. Two recent cases show contrasting approaches towards the interpretation of outdated statutory provisions. The first approach is seen in the Singapore High Court case of *WX v. WW*. That case concerned the interpretation of section 114 of the *Evidence Act*,[3] a decidedly ancient statutory provision. In its desire to achieve what it considered a just and commonsensical result,[4] the court adopted an interpretation that arguably departed from the original legislative intent, but reached the 'correct' result. The second approach was adopted by the Singapore Court of Appeal in *AAG v. Estate of AAH, deceased*. In that case, the Court of Appeal had to interpret sections 2 and 3(1) of the *Inheritance (Family Provision) Act*,[5] which was enacted some 45 years ago.[6] The Court of Appeal disregarded social developments since the enactment of the *IFPA* and decided that the original legislative intent present at the time of enactment was determinative of the correct interpretation of the provisions concerned. However, the result was

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[1] *WX v. WW* [2009] 3 S.L.R. 573 (H.C.) [*WX*].

[2] *AAG v. Estate of AAH, deceased* [2010] 1 S.L.R. 769 (C.A.) [*AAG*].

[3] *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.) [*EA*].

[4] *WX*, *supra* note 1 at para. 6.

[5] *Inheritance* (*Family Provision*) *Act* (Cap. 138, 1985 Rev. Ed. Sing.) [*IFPA*].

[6] Sing., *Parliamentary Debates*, vol. 25, col. 77 at 78 (21 April 1966) (Mr. Yong Nyuk Lin).

'regretfully' reached.[7] Between a correct and commonsensical result and a result regretfully reached lies the difficulty of balancing present justice, future consistency and avoiding complications in other areas of law generated by an outdated statutory provision. This note attempts to provide some views on how these concerns are best balanced.

II. *WX v. WW*

A. *The Facts and Decision*

WX was an appeal heard by the High Court against the decision of the District Court. The District Court had decided that the appellant was liable to pay maintenance for the respondent's daughter[8] pursuant to section 69(2) of the *Women's Charter*.[9] The main issue before both courts was whether the appellant was the father of the child, which in turn was relevant in determining whether the appellant ought to pay maintenance for the child. According to the respondent, she had sexual relationships with two men between 2001 and May 2005, one of whom was the appellant. In June 2005, the respondent discovered that she was pregnant. The other man—referred to by the courts as "H"—thought that the child was his and married the respondent. The child was born in January 2006. However, it became apparent to H that the child could not be his biological daughter owing to her blood group. H then had a DNA test done and scientifically confirmed that he was not the biological father of the child. H commenced nullity proceedings that eventually resulted in the nullification of his marriage with the respondent.[10] The respondent thereafter claimed for maintenance for the child against the appellant. The respondent succeeded before the District Court. The court believed the respondent that she only ever had sexual relations with the appellant and H. Since the DNA test report showed that H was not the child's father, the court concluded that the appellant must be the father of the child.[11] The appellant appealed to the High Court.

B. *Proceedings before the High Court*

Before the High Court, the appellant argued that section 114 of the *EA* raised a conclusive presumption that the child is the legitimate daughter of H since she was born when the marriage between the respondent and H was still subsisting. In this respect, section 114 of the *EA* provides as follows:

> **Birth during marriage conclusive proof of legitimacy**
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> 114. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate

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[7] *AAG*, *supra* note 2 at para. 44.

[8] For convenience, she will be referred to as "the child" unless otherwise stated.

[9] *The Women's Charter* (Cap. 353, 2009 Rev. Ed. Sing.) [the *Charter*].

[10] Presumably under section 106(e) of the *Charter*.

[11] *WW v. WX* [2008] SGDC 93 at paras. 8 and 13.

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.

As such, the appellant argued that he could not be the child's father and was not liable to pay maintenance, notwithstanding the DNA test report which showed that H was not the biological father of the child. Faced with the DNA test report, the court understandably thought that the appellant's argument "offend[ed] both justice and commonsense"[12] and that upholding the appellant's position would mean that "the law would hold that H is the father of the child even though the science has shown otherwise".[13] The court therefore found the appellant to be the biological father of the child and upheld the lower court's decision ordering him to maintain the child. This is an eminently reasonable decision. Indeed, a reasonable layperson would most definitely agree with the court's sense of justice and fairness. However, it may be of value to examine the court's reasoning a bit more closely. After an examination of the historical origins of section 114 of the *EA*,[14] the court decided that section 114 of the *EA* was concerned only with the issue of legitimacy and not paternity.[15] The court gave two reasons for this conclusion. First, section 114 of the *EA* does not expressly provide for a presumption of paternity in the same way it provides for a presumption of legitimacy.[16] Secondly, the presumption of legitimacy in section 114 of the *EA* arises even in circumstances where "some person other than the husband is *likely* to be the biological father".[17] Since section 114 of the *EA* was concerned with the issue of legitimacy and the protection of a child as such, the court thought that it would be wrong to interpret section 114 to deny protection to a child in terms of maintenance due to him or her by the biological father.[18] For these reasons, the court concluded that section 114 of the *EA* only concerned the conferment of legitimacy "in the circumstances set out in the provision and not to rebut or invalidate evidence that a man is the biological father of a child".[19]

As a secondary ground for its decision, the court pointed out that sections 68 and 69 of the *Charter* establish a legal duty on the part of the parent to contribute to the maintenance of his children whether they are his legitimate children or not.[20] This meant that because the DNA test report showed the appellant to be the biological father of the child, he was liable for her maintenance under those provisions. Whether the child was the appellant's legitimate or illegitimate child did not matter. While the court said that this conclusion was independent of its interpretation of section 114 of

[12] *WX*, *supra* note 1 at para. 6.

[13] *Ibid*.

[14] *Ibid.* at paras. 7–9.

[15] *Ibid*. at para. 11. See also *AAE v. AAF* [2009] 3 S.L.R. 827 (H.C.) [*AAE v. AAF*] at para. 25, where the High Court understood the court in *WX* to have "reasoned that the presumption of legitimacy in s. 114 [of the *EA*] 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". Interestingly, she noted that "[t]he distinction was made to *get around* the evidential restriction in s. 114 [of the *EA*]" (emphasis added).

[16] *Ibid*.

[17] *Ibid*. at para. 12 (emphasis added). An example of such a circumstance would be when the mother remarries after the dissolution of her first marriage and her child is born shortly into her second marriage. In this case, the child would be presumed to be the legitimate child of the mother's second husband.

[18] *Ibid*. at para. 14.

[19] *Ibid*.

[20] *Ibid*. at para. 15.

the *EA*,[21] it is respectfully submitted that this is not the case. A step in the reasoning must be that paternity *can* be separated from legitimacy in section 114 of the *EA*. If not, the presumption that the child is the legitimate daughter of H (which the court did not discount) raises the corresponding presumption that H is the biological father of the child, in which case there would be no paternity relationship between the appellant and the child *in law*, notwithstanding the *scientific* conclusion reached in the DNA test report.[22]

Finally, the court opined that it was 'difficult' to see how Parliament, in enacting sections 68 and 69 of the *Charter* more than half a century after section 114 of the *EA* was enacted, could have intended to relieve the duty to provide maintenance under the *Charter vis-à-vis* the biological father when the mother happened to be married to another man at the time of birth.[23] Again, while the court did not say so, this is actually a third reason in support of its reading of section 114 of the *EA*: it must be possible to separate the issue of paternity from that of legitimacy in section 114 of the *EA* because failure to do so would mean the unacceptable consequence that the scientifically proven biological father has no duty to maintain a child who was born during the mother's valid marriage to another man.[24] The desirability of this consequence derives an interpretation of section 114 of the *EA* that separates paternity from legitimacy.

III. *AAG v. Estate of AAH, deceased*

A. *The Facts and Decision*

AAG likewise concerned the interpretation of a relatively old statutory provision, enacted just a year after Singapore's independence. In this case, the appellant sought, on behalf of her two illegitimate daughters, maintenance from the estate of the deceased, the respondent, under the *IFPA*. The High Court had dismissed her application. On appeal, the sole issue was whether an illegitimate child could claim for support under the *IFPA*.

B. *Proceedings before the Court of Appeal*

The relevant provisions were section 3(1) read with section 2 of the *IFPA*. Section 3(1) allows, amongst others, a wife to apply for maintenance for certain dependants, including a son and daughter.[25] Section 2 of the *IFPA* defines "son" and "daughter" for the purposes of the *IFPA* but does not expressly exclude an illegitimate child from claiming maintenance under the *IFPA*. Notwithstanding this, the Court of Appeal unanimously dismissed the appeal and held that the respondent need not provide any

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[21] *Ibid*. "Even if I were wrong in my interpretation of the scope of s. 114 of the [*EA*], I would hold that it does not apply in respect of s. 69(2) of the Charter…".

[22] The starting point is section 114 of the *EA*, not section 68 of the *Charter*. In other words, a *legal* conclusion that the appellant is the biological father of the child cannot be reached without interpreting section 114 of the *EA*.

[23] *WX, supra* note 1 at para. 17.

[24] The child would be presumed to be the legitimate child of that man under section 114 of the *EA*.

[25] Sections 3(1)(b), (c) and (d) of the *IFPA*.

maintenance for the appellant's daughters. The court emphasised that the *IFPA* was enacted to introduce into Singapore the provisions of the U.K. *Inheritance (Family Provision) Act 1938*.[26] The established interpretation of the *IFPA* (U.K.) by the English courts was that illegitimate children were not entitled to maintenance under it. This interpretation was relevant because, during the Second Reading of the *IFPA* (in its Bill form) in the Singapore Parliament, the sponsoring Minister had said that "[t]he provisions relating to family provision appear to have worked well in England and it is proposed to introduce them into Singapore".[27] That was legislative intention and the court held that it was obliged to give effect to such intention.[28]

In reaching this decision, the court was alive to the potential disruption to other areas of law had a contrary interpretation been reached. In particular, the court thought that to permit an illegitimate child to claim for maintenance against his or her deceased parent's estate would be to indirectly allow that child to claim for a share in the intestate parent's estate,[29] contrary to the provisions of the *Intestate Succession Act*.[30] In the end, the court urged Parliament to seriously consider making the necessary reforms to enable an illegitimate child to claim for maintenance under the *IFPA*.

IV. Rethinking *WX v. WW*

Before we discuss which of the two interpretive approaches is preferable, a more immediate problem needs to be addressed. This concerns the reasoning of the High Court in *WX*. It is indisputable that the High Court took considerable effort to avoid the unfairness which section 114 of the *EA* would have caused if applied in *WX*. Its effort to judicially avoid the undesirable consequences of section 114 of the *EA* rested on a single premise: it is possible to separate the issue of paternity from that of legitimacy in section 114 of the *EA*. It is only because of this possibility that the scientific proof of the appellant's paternity (*i.e.*, the DNA test report) could be considered by the court. It is respectfully submitted that this conclusion should be reconsidered. Section 114 of the *EA* presumes *both* legitimacy and paternity *and* provides that the only manner of rebutting this presumption is by way of 'no access'. As such, the DNA test report would be of no relevance because it does not go towards showing 'no access'.

A. *The True Nature of the Presumption in Section 114 of the EA*

1. *The presumption of legitimacy is premised upon an implicit presumption of paternity*

The reason for the presumption of legitimacy is that of possibility of 'access' between husband and wife. In section 114 of the *EA*, legitimacy is presumed because there is a valid marriage between the mother and her husband. The further basis of this presumption is that because there is a valid marriage, there

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[26] *Inheritance (Family Provision) Act 1938* (U.K.), 1938, c. 45 [*IFPA* (U.K.)].
[27] Sing., *Parliamentary Debates*, vol. 25, col. 77 at 78 (21 April 1966) (Mr. Yong Nyuk Lin).
[28] *WX, supra* note 1 at para. 40.
[29] *Ibid*. at para. 38.
[30] Cap. 146, 1985 Rev. Ed. Sing.

would be opportunities for the child to have been conceived by both parties during the marriage. The child is a child of the marriage and legitimate. Therefore, implicit in that is *also* the presumption of paternity, *i.e.*, that the child is *both* the legitimate and biological child of the husband. 'No access' does not defeat legitimacy on its own; it defeats legitimacy because it shows there was no opportunity for the child to have been conceived, such that the child is not the biological offspring of the father. This means that the child is also not the legitimate child.[31]

It is also not desirable to separate the concept of paternity from legitimacy save for one limited circumstance.[32] Whereas paternity is a biological fact, legitimacy is a legal status which has to build upon paternity. If legitimacy is a status without a criterion of conferment, then it becomes very difficult to ascertain when a child is legitimate. The common denominator should always be paternity, whether presumed or real.[33] One cannot be the legitimate child of one man but the biological child of another man. It is only through a court order of adoption that the law confers legitimacy upon the relationship between the child and the adoptive parents regardless of paternity.[34]

Moreover, the judicial and academic characterisation of the presumption under section 114 of the *EA* has been one of 'paternity'. For example, in *AD v. AE*,[35] the Singapore High Court characterised section 114 as "a provision that presumes paternity".[36] Elsewhere, it has been stated that the rationale of section 112 of the *Indian Evidence Act*[37] (which is identical to section 114 of the *EA*) seems to be that it is undesirable to enquire into the *paternity* of a child whose parents have access to each other.[38] The underlying premise, as already submitted, is the presumption

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[31] In fact, even the definition of "legitimacy" cited by the High Court in *WX* admits of the logical nexus between paternity and legitimacy:

> Legitimacy is a status: it is the condition of belonging to a class in society the members of which are regarded as *having been begotten in lawful matrimony by men* whom the law regards as their fathers (emphasis added).

See *WX*, *supra* note 1 at para. 11, citing David Hay, ed., *Words and Phrases Legally Defined*, 4th ed. (London: LexisNexis, 2007) 38.

[32] This concerns adoption which is inapplicable to the facts of *WX*.

[33] In section 114 of the *EA*, the line between a presumption and fact is at a vanishing point because it is difficult to rebut the presumption with the legal consequence that it is regarded as legally factual. Thus, legitimacy and paternity cannot be separated for reasons of logic. One can only be a legitimate and biological child of another (born within wedlock) and an illegitimate but biological child of another (born out of wedlock).

[34] It is not clear whether parents may be allowed to circumvent the status of illegitimacy of their relationship with their child by adopting their own child: see Leong Wai Kum, *Elements of Family Law in Singapore*, 1st ed. (Singapore: LexisNexis, 2007) 402–403. In this regard we need to note that adoption confers legitimacy on the relationship by a separate route altogether from the norm that builds upon biological parenthood.

[35] *AD v. AE (minors: custody, care, control and access)* [2005] 2 S.L.R. 180 (H.C.) [*AD v. AE*].

[36] *Ibid.* at para. 8. The learned judge also spoke of the "s. 114 presumption of paternity" in the same paragraph.

[37] *Indian Evidence Act 1872*, No. 1 of 1872 [*Indian Evidence Act*].

[38] See *Palani v. Sethu* A.I.R. 1924 Mad 677; see also *Palsingh v. Jagir* A.I.R. 1926 Lah 529(2). See also Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Law of Evidence*, 22nd ed. (New Delhi: Wadhwa and Company, 2006) [*Ranchhoddas & Thakore*] 1173.

of paternity.[39] It is therefore submitted that section 114 of the *EA* should not be interpreted in a manner which would separate paternity from legitimacy. The presumption of legitimacy *presupposes* paternity, and so a presumption of paternity likewise arises from section 114 of the *EA* if its requirements are met. Obviously, the perceived need to interpret otherwise on the facts of *WX* in order to do justice is keenly appreciated. However, it may be necessary to accept this outdated evidential rule. The legitimate room for manouevering around its problems is unfortunately rather small.

2. *The irrelevance of factual artificiality arising from Section 114 of the EA*

The High Court in *WX* made the further (and logical) point that the presumption of legitimacy in section 114 of the *EA* arises even in circumstances where some person other than the husband is *likely* to be the biological father. Accordingly, the court felt that the conferment of legitimacy is a matter of policy rather than biological reality, and can be safely ignored when biological reality plausibly shows otherwise.[40] However, does the likelihood of a likely plausibility exclude the application of the presumption in section 114 of the *EA*? It is suggested that it does not. The entire basis for a presumption is to shut out the possibility of such likelihood and make a presumption one way or the other. If the manner of rebuttal does not allow for the scientific evidence to be adduced, then there is *in law* no other likelihood, especially if the presumption is a *conclusive* one, as section 114 of the *EA* is. In fact, the paradigm situation where the presumption in section 114 of the *EA* is challenged raises precisely the likelihood of an equally plausible alternative explanation as to the paternity of the child. In many cases, the mother would have been in an intimate relationship with A before marrying B, a short time after which her child is born. The question inevitably is whether the child should be presumed as B's legitimate (and biological) child even though it seems equally (and sometimes more) plausible that A is the biological father. In the absence of proof of 'no access' between the mother and B, the courts have inevitably stayed true to the language of section 114 of the *EA*[41] to hold the child to be the legitimate and biological child of B. Thus in *Ponnuswamy Reddiar v. Vasantha*,[42] the woman left her husband ten days after marriage and lived with the appellant. Seven months later, her child was born. The appellant was not presumed to be the father of the child. Likewise, in the absence of proof of non-access, even though the wife was living apart from her husband and leading an unchaste life, her child would still be deemed to be the legitimate *and* biological child of her validly married husband.[43] These examples reinforce the point that the

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[39] Likewise, Associate Professor Debbie Ong has also written that:

> The effect of [section 114 of the *EA*] is not only to protect the child's legitimate status, it also creates an almost irrebuttable *presumption of paternity* since it establishes that the child is "the son of that man".

See Debbie Ong, "Proof of Paternity and Access to Non-Biological Child" (2003) 15 Sing. Ac. L.J. 399 at para. 3. See also Leong Wai Kum, "Legal Implications of Paternity Testing" in Terry Kaan & Edison T. Liu, eds., *Life Sciences: Law and Ethics—Recent Developments in Singapore* (Singapore: Singapore Academy of Law and Bioethics Advisory Committee, 2006) 162–170.

[40] *WX*, *supra* note 1 at para. 12 (emphasis added).

[41] Or its equivalents elsewhere.

[42] (1967) 1 M.L.J. 102 (High Court of Judicature at Madras).

[43] *Krishnappa v. Venkatappa* A.I.R. 1943 Mad 632.

likelihood of an alternative explanation[44] cannot rebut the presumption in section 114 of the *EA*.

3. *The effect of parliament's non-updating of Section 114 of the EA*

Undoubtedly, section 114 of the *EA* is urgently in need of reform. But can legislative reform of a related provision lead to the inference that section 114 of the *EA* has likewise been updated? The High Court in *WX*, in contrast with the Court of Appeal in *AAG*, thought that this was possible. The High Court reasoned that Parliament could not have intended to relieve the duty to provide maintenance under the *Charter vis-à-vis* the biological father when the mother happened to be married to another man at the time of birth. This is especially since Parliament enacted sections 68 and 69 of the *Charter after* section 114 of the *EA* had been enacted.[45]

While the High Court's implicit statement that section 114 of the *EA* is long overdue for updating is readily shared, is it possible to say one statute has been updated by the reform of another? Where this is expressly provided for, it is obviously possible. But difficulties arise where the implication is indirect or vague. Thus, while the court is absolutely right to say that sections 68 and 69 of the *Charter* were enacted *after* the enactment of section 114 of the *EA*, this may not be the most accurate way of ascertaining the legislative intention *vis-à-vis* section 114. It is anyone's guess what Parliament intended with respect to section 114 of the *EA* when that provision was likely never in its contemplation when the *Charter* was debated and passed into law. The better position may be that of the Court of Appeal in *AAG*, which is to adopt a restrictive reading of the effect which the enactment of one statutory provision has on another.[46] That approach has relevance in *WX*. Although the last direct amendment of the *EA* was undertaken in 2003 with the passage of the *Evidence (Amendment) Act 2003*,[47] it is difficult to say that Parliament intended for the presumption in section 114 of the *EA* to 'apply over' sections 68 and 69 of the *Charter* since it amended the *EA* without amending section 114 *after* enacting sections 68 and 69 of the *Charter*.

B. *How Preserving Section 114 of the EA Maintains a Child's Right to Maintenance*

There is a further concern. If, as suggested, section 114 of the *EA* is interpreted to presume *both* legitimacy and paternity, does that reduce the irrelevance of legitimacy in section 68 of the *Charter*? This is a possibility since it might be argued that if section 114 of the *EA* presumes (almost conclusively) that the legitimate child of a man must also be his biological child, there is no purpose left for the reference to

[44] Except for 'no access'.
[45] *WX*, *supra* note 1 at para. 17.
[46] *AAG*, *supra* note 2 at para. 27.
[47] No. 17 of 2003. Indeed, indirect amendments to the *EA* were effected as recently as 2007 with the *Penal Code (Amendment) Act 2007* (No. 51 of 2007).

illegitimacy in section 68 of the *Charter*.[48] To deal with this concern, it is important to realise that section 114 of the *EA* applies only when the child is born during a valid marriage or within 280 days after the dissolution of such marriage provided the mother does not remarry in that time. Thus, a child can still be the illegitimate but biological issue of a man or woman if the couple is not validly married. The reference to 'illegitimacy' under section 68 of the *Charter* protects children in such a situation. As for a child who is (almost) conclusively presumed to be the legitimate child of a man who has been scientifically shown not to be his biological father, it is submitted that section 114 of the *EA* does no harm to the purpose behind section 68 of the *Charter*. The primary purpose of section 68 of the *Charter* is to ensure that there is *someone* to maintain the child. As far as possible, it tries to find the 'right' person to lay this responsibility upon, but it is largely neutral as to the conclusiveness of this criterion. This is why section 68 of the *Charter* is not concerned with the custody or legitimacy of the child *vis-à-vis* the parent. Interpreting section 114 of the *EA* read with section 68 of the *Charter* as pinning the responsibility of maintenance on the scientifically proved non-biological father of the child still protects the child's right to maintenance. It may not seem 'right' for the scientifically proved biological father to escape his responsibility, but in *law* this person is not the father of the child unless the presumption in section 114 of the *EA* can be rebutted. In some cases, the scientifically proved non-biological father may not leave the marriage as H has in *WX*; section 114 of the *EA* in fact *reinforces* the child's right to maintenance from someone who is his or her 'substantive father' in this scenario.

C. *The Impermissibility of Considering DNA Evidence*

If it is accepted that the presumption of legitimacy in section 114 of the *EA* also raises a presumption of paternity, it must then be considered whether it was correct to admit the DNA test report in *WX* to, in effect, rebut this presumption of paternity. According to section 114 of the *EA*, proof of 'no access' is the only prescribed manner to rebut the presumption of legitimacy. In the District Court decision of *MB v. MC*,[49] the court, following academic materials,[50] stated that 'no access' has two meanings. First, it means the physical separation of the parties at the possible time of the child's conception. Secondly, it also means the absence of sexual contact between the mother and her husband during the time in which the child was conceived.[51]

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[48] For convenience, section 68 of the *Charter* provides as follows:

> **Duty of parents to maintain children**
> 68. Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, and whether they are legitimate or illegitimate, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

[49] [2005] SGDC 181 [*MB v. MC*].

[50] See Leong Wai Kum, *Principles of Family Law in Singapore* (Singapore: Butterworths Asia, 1997) 604 and Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *Ratanlal & Dhirajlal's The Law of Evidence*, 21st ed. (New Delhi: Wadhwa and Company, 2004) 951, 955 and 956.

[51] See also the Indian decisions of *Krishnappa v. Venkatappa* A.I.R. 1943 Mad 632; *Hanumantha Rao v. Ramachandrayya* A.I.R. 1944 Mad 376 and *Vira Reddy v. Kistamma* A.I.R. 1969 Mad 235. See further

The preponderance of legal opinion is that DNA evidence is not proof of 'no access'.[52] Indian decisions quite explicitly dismiss the possibility of DNA evidence being admissible to rebut the presumption of legitimacy raised by section 112 of the *Indian Evidence Act*. For example, in the Indian Supreme Court case of *Smt Kamti Devi and Anr v. Poshi Ram*,[53] it was held that:[54]

> We may remember that Section 112 of the [Indian] Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleic Acid (DNA) as well as Ribonucleic Acid (UNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. *But even that is not enough to escape from the collusiveness of Section 112 of the [Indian Evidence] Act, e.g., if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable*. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

Similarly, when referring to the permissibility of blood tests to determine paternity in the shadow of section 112 of the *Indian Evidence Act*, the Calcutta High Court said in *Tushar Roy v. Sukla Roy*:[55]

> Section 112 [of the Indian Evidence Act] is clear enough that once the husband is shown to have had access to the wife at any time when the conception could have taken place, the scope of adducing rebuttal evidence becomes non-available. The contending party cannot [be] permitted to say that he will rebut the conclusive presumption of law regarding paternity by proving directly by blood test that the husband is not the biological father of the child which will virtually be an abrogation of the existing provision of Section 112.
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> . . .
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> Having regard to the Indian legal and social scenario I have no hesitation in my mind that the time is not yet ripe for a meaningful judicial activism so as to throw away over-board the judicial interpretation which Section 112 of the [Indian] Evidence Act has consistently received so long and to take recourse to any over-jealous interpretation by causing extreme violence to the language of the said section so as to virtually abrogate the same. I therefore hold that neither the language of Section 112 of the [Indian] Evidence Act nor the interpretation

the Singapore decisions of *Ong Jane Rebecca v. Lim Lie Hoa (also known as Lim Le Hoa and Lily Arief Husni) and Others* [2003] SGHC 126 at para. 18 and *Re Khoo Thean Tek's Settlements* [1929] S.S.L.R. 50.

[52] See *MB v. MC*, *supra* note 49 at para. 10 and *AD v. AE*, *supra* note 35 at para. 8.

[53] A.I.R. 2001 S.C. 2226.

[54] *Ibid.* at para. 11 (emphasis added). See also *Shri Banarsi Dass v. Mrs Teeku Dutta* (2005) 4 S.C.C. 449 at para. 15. See further the discussion in Ranchhoddas & Thakore, *supra* note 38 at 1183-1185 and Sudipto Sarkar & V.R. Manohar, *Sarkar's Law of Evidence*, 16th ed. (New Delhi: Wadhwa and Company, 2007) 1747–1748, although *cf.* 1764.

[55] [1993] Cri. L.J. 1659 at paras. 4 and 15.

> it has consistently received throughout, nor even the consideration of welfare of the children in disputed cases of paternity in general, demands or permits blood test as exploratory or investigative experiment for determining paternity.

All of these authorities[56] suggest that it is impermissible for DNA evidence to be used to rebut the presumption of legitimacy (and paternity) raised by section 114 of the *EA*. Accordingly, in so far as the Singapore High Court in *WX* effectively used the DNA test report to conclude that the appellant is the biological father of the child, it is respectfully suggested that that conclusion might need to be reconsidered. And for all the reasons discussed above, it is further suggested that it might be better to leave section 114 of the *EA* as it has always been interpreted.

V. The Better Approach: Interpreting an Outdated Provision Purposively with Regard to its Original Intent

The High Court's interpretive approach in *WX* can be contrasted with the Court of Appeal's approach in *AAG*. The approach in *AAG* focused primarily on the original intent at the time of enactment of the statute. Such an approach meant that the Court of Appeal was alive to the possibility of disruption caused to other areas of law through an incorrect interpretation in one case. Indeed, *WX* can further be used to illustrate how an outdated statutory provision (*viz.*, section 114 of the *EA*) ostensibly concerning a 'discrete' area of law (here, family law) can have unexpected effects in other 'overarching' areas of law. In this respect then, the interpretive approach in *AAG* is to be preferred to that in *WX*.

A. *Ignoring a Conclusive Presumption of Law*

The first ripple from *WX* concerns evidential rules. In *AAE v. AAF*,[57] when faced with a similar DNA test report which showed that the husband was not the biological father of the child concerned, the High Court stated that because both parties accepted this scientific conclusion, there was no need to consider section 114 of the *EA*.[58] Therefore, although the child concerned was born some five months into a valid marriage,[59] the parties could agree (and the court could accept) that the child was

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[56] See also *Ng Chian Perng (sued by her mother and next friend Wong Nyet Yoon) v. Ng Ho Peng* [1998] 2 M.L.J. 686 (High Court, Kuala Lumpur). In that case, the appellant sued for maintenance of her child from the respondent. She alleged that she had a sexual relationship with the respondent during the time her child was conceived. However, she remained validly married to her husband whom she was separated from because the husband had refused to sign the joint petition for divorce. The appellant's application for maintenance was dismissed on appeal to the Kuala Lumpur High Court. It was held that section 112 of the *Malaysian Evidence Act 1950* (Act 56) (which is identical with section 114 of the *EA*) applied to presume the child to be the legitimate child of the appellant's husband. The court also upheld the magistrate's decision not to address the respondent's failure to undergo a DNA test; the implication must be that the court regarded DNA testing to be an impermissible method of rebutting the presumption raised by section 112 of the *Malaysian Evidence Act 1950*.

[57] *AAE v. AAF*, *supra* note 15.

[58] *Ibid.* at para. 25.

[59] The parties were married on 22 February 1994 and the child was born on 25 July 1994: see *ibid.* at paras. 1 and 25. This would have triggered the presumption of legitimacy and paternity in section 114 of the *EA*.

nonetheless *not* the legitimate and biological child of the husband.[60] While the issue of the child's paternity in *AAE v. AAF* was not vital to the resolution of the case,[61] this does suggest that it is possible for parties (and the court) to ignore presumptions of law embodied in statutes.

1. *Can the courts ignore a legal presumption?*

It is respectfully submitted that courts cannot ignore legal presumptions statutorily enshrined in the *EA*. As Professor Pinsler notes, in certain situations presumptions are conclusive, in which case they are irrebuttable and *must* be applied by the court without qualification. Even if there is a qualification, the court *is required* to apply the presumption unless it is disproved.[62] This is especially true when applied to section 114 of the *EA*, which provides for a 'conclusive presumption'. Conclusive proof is defined by section 4(3) of the *EA* as follows:

> **4.**—(3) 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.

Because section 114 of the *EA* also contains a rebuttable part, section 4(2) of the *EA* is also relevant:

> **4.**—(2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.

The use of the mandatory word "shall" in sections 4(2) and 4(3) of the *EA* means that the court cannot ignore presumptions embodied in provisions of the *EA*, such as that in section 114. Indeed, when Sir James Stephen wrote his introduction to the *Indian Evidence Act*, he surmised that "[p]resumptions were inferences which the judges were *directed* to draw from certain states of facts in certain cases".[63] In relation to 'conclusive presumptions', he also wrote that while these are rare, when they occur they provide that certain modes of proof *shall* not be liable to contradiction.[64] Likewise, when discussing the application of presumptions in the *Misuse of Drugs Act*,[65] the Court of Appeal in *Tan Kiam Peng v. Public Prosecutor*[66] held that "the courts *must* observe these considerations of policy enacted by the Legislature by applying the law objectively to the facts at hand".[67] All of these show that it is not permissible for the courts to ignore presumptions of law raised in the *EA* if they are not rebutted and especially if they are deemed to be 'conclusive'. Section 114 of the

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[60] *AAE v. AAF*, *supra* note 15 at para. 25: The wife "accepted the DNA report and its conclusion that the [h]usband is not the [c]hild's biological father" and did not refute "the [h]usband's assertion in his affidavit that [a third party] is the [c]hild's biological father".

[61] Although see *ibid.* at para. 31.

[62] Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process*, 2nd ed. (Singapore: LexisNexis, 2003) 251.

[63] James Fitzjames Stephen, *The Indian Evidence Act (1 of 1872): With an Introduction on the Principles of Judicial Evidence* (Calcutta: Thacker, Spink & Co., 1872) 132 (emphasis added).

[64] *Ibid*.

[65] Cap. 185, 2008 Rev. Ed. Sing.

[66] [2008] 1 S.L.R. 1 (C.A.) [*Tan Kiam Peng*].

[67] *Ibid.* at para. 75 (emphasis added).

EA is one such 'conclusive presumption', but its inherent problems no doubt give rise to a keenly felt need to ignore it when possible.

2. *Can the parties agree to ignore a presumption of law?*

If the courts cannot ignore a presumption of law, it must follow that parties cannot agree between themselves to do the same. Parties may agree to waive some procedural requirements, but they cannot do the same for an evidential requirement. This is because rules of evidence have a direct effect on the court's substantive decision-making process, whereas procedural rules exist mainly to aid the parties.[68]

B. *Staying True to Legislative Intent*

The second ripple from *WX* is arguably more significant. It concerns how the courts interpret statutes and whether it is permissible for them to effectively 'update' a statute that has not been legislatively updated to keep up with modern progress.

1. *The principles of statutory interpretation in Singapore*

The relevant principles of statutory interpretation in Singapore have been reaffirmed by the Court of Appeal in *AAG*[69] and so only a brief summary is necessary for present purposes. The dominant interpretive approach used by the Singapore courts is the purposive approach as mandated by section 9A(1) of the *Interpretation Act*.[70] Indeed, in the High Court decision of *Public Prosecutor v. Low Kok Heng*,[71] V.K. Rajah J.A. stated that any discussion on the construction of statutes in Singapore takes place against the backdrop of that section.[72] More specifically, Rajah J.A. in *Low Kok Heng* also thought that statutory provisions should not, in the name of applying the purposive approach, be interpreted in a manner that goes against all possible and reasonable interpretations of the express actual wording of the provision.[73] In essence, the court is bound by the text as enacted.[74] Perhaps the best support for Rajah J.A.'s views was stated by Andrew Phang J. (as he then was) in *Nation Fittings (M) Sdn Bhd v. Oystertec plc*,[75] in which the learned judge said

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[68] "The Law of Evidence occupies a unique position in the field of substantive and procedural laws": *Ranchhoddas & Thakore*, *supra* note 38 at "Preface".

[69] *AAG*, *supra* note 2 at para. 7. See also Goh Yihan, "Statutory Interpretation in Singapore: 15 Years on from Legislative Reform" (2009) 21 Sing. Ac. L.J. 97 at paras. 11–27 and Goh Yihan, "A Comparative Account of Statutory Interpretation in Singapore" (2008) 29 Stat. L. Rev. 195 for a comparison between the Singapore and Australian provisions regarding statutory interpretation.

[70] Cap. 1, 2002 Rev. Ed. Sing. [*Interpretation Act*].

[71] [2007] 4 S.L.R. 183 (H.C.) [*Low Kok Heng*].

[72] *Ibid.* at para. 39.

[73] *Ibid.* at para. 52. See also *Tan Un Tian v. Public Prosecutor* [1994] 3 S.L.R. 33 (H.C.) at para. 45 and *Comfort Management Pte Ltd v. Public Prosecutor* [2003] 2 S.L.R. 67 (H.C.) at para. 18, in which the High Court stated that if the statutory word is capable of one meaning, the courts should not give it an alternative meaning, for to do so would be to perform a legislative function: "A line must still be drawn between purposive interpretation and law-making."

[74] *Ibid.* at para. 53.

[75] [2006] 1 S.L.R. 712 (H.C.).

that the court's purposive interpretation should be "consistent with, and should not either add to or take away from, or stretch unreasonably, the literal language of the statutory provision concerned".[76] In other words, the language is the framework, within which the legislative purpose must expressly or implicitly manifest, failing which the latter cannot be given effect to.[77]

2. *How far can courts adopt an 'updating interpretation' to statutes?*[78]

How then should courts interpret a statute which is 'outdated'?[79] The Court of Appeal in *AAG* stated that "[i]t is a settled principle that a statutory provision should be construed in a manner which will take into account new situations which may arise and which were not within contemplation at the time of its enactment".[80] The question is how far this statement takes us. The key to resolving this issue is to be clear of the purpose behind section 9A of the *Interpretation Act*. As the name of this Act suggests, section 9A involves the judicial *interpretation* of a given statutory provision. This is important for, as Aharon Barak puts it,[81] there is a difference between interpretive and non-interpretive doctrines.[82] Barak states that the authority to alter a text is one which belongs to its author, *i.e.*, Parliament, but not to the judiciary. The act of interpretation is the giving of a legal text a meaning its language (explicitly or implicitly) can bear and does not involve the express rewriting of the language.[83] Interpretation ends at the point at which language ends.[84] The constitutional framework and the separation of powers restrict interpreters from stretching the meaning of statutory provisions.[85] While there is a legislative mandate to *interpret* the statutory provision in light of the legislative purpose, section 9A(1) also enjoins the court to interpret the *written law* (or a provision thereof). This implies the boundaries of the

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[76] *Ibid*. at para. 27. Andrew Phang J.A. repeated these views in *Tan Kiam Peng*, *supra* note 66 at para. 59.

[77] But *cf. Constitutional Reference No 1 of 1995* [1995] 2 S.L.R. 201 at 205 (C.T.). See further Goh Yihan, "Statutory Interpretation in Singapore: 15 Years on from Legislative Reform" (2009) 21 Sing. Ac. L.J. 97 at paras. 13–14.

[78] See Goh Yihan, *ibid*. at paras. 28–31.

[79] The issue of when a statute is 'outdated' obviously poses additional difficulties.

[80] *AAG*, *supra* note 2 at para. 30.

[81] Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005).

[82] *Ibid.* at 14–15.

[83] *Ibid.* at 18.

[84] *Ibid.* at 15.

[85] *Ibid.* at 20. This was also alluded to by Rajah J.A. in *Low Kok Heng* when he said (at para. 52):

> Courts must be cautious to observe the limitations on their power and to confine themselves to administering the law. "Purposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgment as to where the boundary of construction ends and legislation begins" (*per* McHugh J.A. in *Kingston v. Keprose Pty Ltd* (1987) 11 N.S.W.L.R. 404 at 423). Section 9A of the *Interpretation Act* should not be viewed as a means or licence by which judges adopt new roles as legislators; the separation of powers between the judicial branch and the legislative branch of government must be respected and preserved.

See also Justice E.W. Thomas, "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 V.U.W.L.R. 5.

statutory language. The Court of Appeal in *AAG* was well aware of these limitations when it said:[86]

> If the correct interpretation of the [*IFPA*], as at the time of its enactment, was that it could not be invoked by an illegitimate child, then it is not for the courts to extend its scope by judicial interpretation. However, if, due to changing social mores, it is thought that the Act should now be made available to an illegitimate child, then that would be a matter within the province of Parliament to take the appropriate measure to amend the law.

While language is open to varying degrees of interpretation,[87] this does not mean that it is infinitely malleable and can take on any meaning.[88]

Fortunately, as was earlier mentioned, the cases of *WX* and *AAG* do *not* raise the problem of a court deviating from the legislative intent behind a statute. The courts in both cases were well aware of the principles of statutory interpretation outlined above and applied the legislative intent. The only question is *what* the relevant legislative intent was, and to what extent the court can take into account any 'updates' to the original legislative intent. In this respect, an 'updating interpretation' is probably permissible if the updating is simply to include within a wide category (for example, a manner of communication) specific modes which were not in existence at the time the legislation was introduced.[89] This much was acknowledged by the Court of Appeal in *AAG*.[90] The language is not stretched because the concern was with the broader category generally, not modes of it specifically. But it is a different thing if the 'updating' gives rise to the impression of rewriting the legislation.[91]

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[86] *AAG*, *supra* note 2 at para. 31.

[87] *Barak*, *supra* note 81 at 23–24.

[88] *Ibid.* Relevantly, in *Lee Chez Kee v. Public Prosecutor* [2008] 3 S.L.R. 447 (C.A.), the Court of Appeal endorsed (at para. 116) what was said in *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R. 239 (H.C.) that "the 'facilitative' characterisation of the *EA* could not extend the ambit of the *EA* to cover common law developments which were inconsistent with it".

[89] For example in *SM Integrated Transware Pte Ltd v. Schenker Singapore (Pte) Ltd* [2005] 2 S.L.R. 651 (H.C.) at para. 78. See also Francis A.R. Bennion, *Bennion on Statutory Interpretation*, 5th ed. (United Kingdom: LexisNexis Butterworths, 2008) [*Bennion*] 889:

> An updating construction of an enactment may be defined as a construction which takes account of relevant changes which have occurred since the enactment was originally framed *but does not alter the meaning of its wording in ways which do not fall within the principles originally envisaged by that wording*" (emphasis added).

Indeed, even though the learned author states that considerations of developments in technology can be used by the courts to modify the statutory language (a proposition not entirely universally accepted: see generally Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1998)), he does qualify this statement by saying that "[i]f however changed technology produces something which is altogether beyond the scope of the original enactment, the court will not treat it as covered" (*Bennion* at 905).

[90] *AAG*, *supra* note 2 at para. 30.

[91] Applied to *WX*, scientific truth may not be legal truth. There are examples of scientific developments not adopted into the law by Parliament (where statutes are concerned) or the Judiciary, such as lie detection tests. Parliament has arguably also seen it fit not to reopen criminal cases validly decided by the courts notwithstanding DNA evidence showing the innocence of the convicted. In law, the convicted remains guilty notwithstanding the scientific exoneration. This is another example of scientific truth not being equated with legal truth: see Goh Yihan, "The Jurisdiction of the Singapore Court of Appeal to Reopen

VI. Conclusion

The approach in *WX* was undoubtedly motivated by a keen sense to do justice in an instant case. The result reached is one which the reasonable person would find difficult to disagree with. However, it may be necessary to consider the wider implications of the *approach* taken in that case. It is readily acknowledged that *WX* was not an easy case to decide. There was understandably a desire to reach an outcome that was 'substantively just'. But perhaps the concept of justice extends beyond the case at hand.[92] All things considered, legislative reform of section 114 of the *EA*—the source of all the trouble—is the best way to minimise the trouble here.[93] But for now, when faced with an outdated statutory provision, the Court of Appeal's approach in *AAG*, while reaching a 'regretful' result, is the preferable one to take.

Criminal Cases" (2008) Sing. J.L.S. 395. See also Tan Cheng Han, "The Legal Implications of Artificial Insemination by Donor" (1991) Sing. J.L.S. 466 at 468–469.

[92] The point is made forcefully by Andrew Phang J. (as he then was) in *Hong Guet Eng v. Wu Wai Hong (liquidator of Xiang Man Lou Food Court Pte Ltd)* [2006] 2 S.L.R. 458 (H.C.) [*Hong Guet Eng*], when he said (at paras. 47–48):

> Justice is—and ought to be—administered in accordance with the prevailing law. There may be some scope for manoeuvre if the prevailing law is unclear or ambiguous, and might result in substantive injustice. But there are limits to such flexibility. Where, as in the present proceedings, the law is clear, the court has no choice but to apply it.
>
> If to achieve justice in a given case would open the floodgates to chaos and (ironically) consequent injustice in *other* cases, the path the court must take is clear. In any event, as I have already pointed out, this is by no means a clear-cut instance of a hard case. In other words, it is by no means clear that injustice would clearly have resulted to the plaintiff in the instant proceedings.

See also *United Overseas Bank Ltd v. Ng Huat Foundations Pte Ltd* [2005] 2 S.L.R. 425 (H.C.) at para. 8 (emphasis in original).

[93] In this respect, Professor Leong Wai Kum has suggested some possible improvements to the section and it suffices to refer to her related writings. See Leong Wai Kum, "Legal Implications of Paternity Testing" in Terry Kaan & Edison T. Liu, eds., *Life Sciences: Law and Ethics—Recent Developments in Singapore* (Singapore: Singapore Academy of Law and Bioethics Advisory Committee, 2006) 169–170. See also generally Kenneth Wee K.S., "The Law of Legitimacy in Singapore" (1976) 18 Mal. L. Rev. 1. Indeed, the local courts have not been shy to suggest legislative reform when the occasion calls for it: see, for example, *Hong Guet Eng*, *ibid.* at paras. 29–36 and 49.