The Law Commission

(LAW COM. No. 172)

FAMILY LAW
REVIEW OF CHILD LAW
GUARDIANSHIP AND CUSTODY

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed 25 July 1988*

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HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of reforming the law.

The Commissioners are—

The Honourable Mr Justice Beldam, *Chairman*
Mr Trevor M Aldridge
Mr Brian J Davenport, QC
Professor Julian Farrand
Professor Brenda Hoggett

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REVIEW OF CHILD LAW

GUARDIANSHIP AND CUSTODY

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THE LAW COMMISSION

Item XIX of the Second Programme

FAMILY LAW

REVIEW OF CHILD LAW

GUARDIANSHIP AND CUSTODY

To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain

PART I

INTRODUCTION

Scope of this Report

1.1 This Report deals with the rules of common law and statute under which responsibility for bringing up or looking after a child is allocated to particular individuals, usually his parents. The main principles of the law are reasonably clear and well accepted. The details, however, are complicated, confusing and unclear. The result is undoubtedly unintelligible to ordinary people, including the families involved, and on occasions may prevent them or the courts from finding the best solution for their children.

1.2 We decided, therefore, in 1984 to review this whole area with the aim of making it clearer, simpler and, we hope, fairer for families and children alike. We have published four Working Papers for consultation, dealing with Guardianship,[1] Custody,[2] Care, Supervision and Interim Orders in Custody Proceedings,[3] and Wards of Court.[4] We also undertook a small study of the practices of courts and solicitors, and published the results as a supplement to our Working Paper on Custody.[5] This confirmed the view that the law was confusing and unintelligible. We received a large response to our Working Papers,[6] all of it in favour of reform and generally along the lines which we had provisionally proposed.

1.3 Our review of the private law affecting individuals has taken place alongside the Government's review of the public law governing the child care responsibilities of local authorities. There too the law is complicated, confusing and unclear. In places it is also unjust. In 1984 the Government set up an interdepartmental working party to review child care law. The working party's report was published for consultation in 1985[7] and the Government announced the main features of its proposals for reform in 1987.[8] The aim of both reviews has been to simplify and clarify the law and to provide a fairer system for children and their families. It is important, therefore, that the private and public law should be consistent with one another and the relationship between them also clear and fair.

1.4 However, this Report will be concerned only with the statutory powers of the courts to deal with the care and upbringing of children. We have decided to postpone making any substantial recommendations for the reform of the courts' inherent powers in wardship proceedings. The response to our Working Paper on Wards of Court indicated considerable support for some reform, but only once the statutory procedures in both private and public law had themselves been reformed. Our aim has therefore been to incorporate the most valuable features of wardship into our recommendations for a new statutory system. As with the review of child care law, this should reduce the need to resort to wardship proceedings save in the most unusual and complex cases. It will also enable the true scope for a residual power for the courts to assume guardianship over certain children to be determined.

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[1](1985) Working Paper No. 91.
[2](1986) Working Paper No. 96.
[3](1987) Working Paper No. 100.
[4](1987) Working Paper No. 101.
[5]J. A. Priest and J. C. Whybrow, *Custody Law in Practice in the Divorce and Domestic Courts* (1986).
[6]A list of those who responded appears as Appendix 2; the proposals were also discussed at several meetings and conferences at which a wide range of professional interests were represented.
[7]Review of Child Care Law, Report to ministers of an interdepartmental working party (1985). Professor Hoggett was a member of the working party, which was supported by a joint team of DHSS officials and lawyers from the family law team at the Law Commission.
[8]The Law on Child Care and Family Services (1987), Cm. 62; further proposals may emerge as a result of the Report of the Inquiry into Child Abuse in Cleveland (1988) Cm. 412.

The scope of legislation

1.5 Before turning to the substance of our proposals, the question arises of the form and scope of any legislation to give effect to them. Our work on child law comes under item XIX of our second programme of law reform,[9] which required us to undertake a comprehensive review of family law with a view to its systematic reform and eventual codification. We said at the outset that our aim was to bring as much of the law as possible into a single comprehensive code.[10] This was almost unanimously favoured on consultation. There remains the question, however, of precisely what such a code should cover.

1.6 Our own review has been concerned with broadly the following statutory provisions:[11]

(i) the Guardianship of Minors Acts 1971 and 1973, which deal with the powers and authority of parents, the appointment and removal of guardians and applications by parents[12] for custody, access or financial provision for their children;

(ii) Part II of the Children Act 1975, which deals with applications by qualified non-parents for custodianship, and sections 85 to 87, which contain an "explanation" of certain general concepts such as "parental rights and duties" and "legal custody";

(iii) sections 41 to 44 of the Matrimonial Causes Act 1973, which require courts hearing divorce and other matrimonial causes to consider and approve the arrangements made for the children and give wide powers to deal with their custody, care and upbringing;

(iv) Part I of the Domestic Proceedings and Magistrates' Courts Act 1978, which includes similar provision for the children where a spouse applies for financial provision under that Act;[13]

(v) Part II of the Family Law Reform Act 1987, which amended the Guardianship of Minors Act 1971 and improved the parental status of unmarried fathers and the financial provision available for their children.[14]

1.7 Our Working Paper on Custody canvassed three possible approaches.[15] The first would simply combine the provisions of the Guardianship of Minors Acts 1971 and 1973 and the Children Act 1975, which are unrelated to any other proceedings. The provisions in the Matrimonial Causes Act 1973 and the Domestic Proceedings and Magistrates' Courts Act 1978 would be amended to achieve as much consistency as possible. The second would collect all the courts' powers to deal with custody and access into one place, but would leave in the matrimonial legislation the duty to consider the children and the power to make financial orders for them when such orders may also be made for the adults. The third would incorporate all the courts' powers relating to children, dealing not only with custody and access but also with financial provision for them.

1.8 Despite the obvious attractions of having all the courts' powers relating to children in one place, we believe that the simplest and most convenient solution is the second. Family law is now largely a law of remedies, not rights. The circumstances of families vary so much that it is not possible to lay down in advance what the outcome of any dispute will be. Instead, a wide variety of applications may be made for various forms of relief, whether divorce, financial provision, protection from violence or adjustment of the occupation of the matrimonial home. Most orders about children are made in the course of divorce or other matrimonial proceedings. That will clearly continue. It is therefore convenient for the statutes dealing principally with the affairs of adults to contain those of the provisions relating to children which cannot readily be separated from those relating to the adults. Thus where the court will be ordering financial provision or property adjustment for adults as well as children it is simpler if its powers are contained in one statute, for if children alone are involved their welfare can be the first and paramount consideration but if adults are also concerned the children's welfare is the first but not the paramount consideration.[16] Where the courts' powers deal only with children, on the other hand, as with orders relating to custody or access, they may conveniently be collected in one statute. The link between these

[9](1968) Law Com. No. 14.

[10](1985) Working Paper No. 91, para. 1.3; (1986) Working Paper No. 96, para. 1.2.

[11]We are, of course, only concerned with the law in England and Wales; we understand that the Scottish Law Commission may shortly be undertaking a review similar to our own.

[12]In very limited circumstances grandparents are also given the right to apply for access.

[13]ss. 8 to 15, part of 19, 21, part of 25, 34 and 35.

[14]We are particularly concerned with ss. 2(1)(c)–(e), (2), 3–6, 9–16; we shall refer to the amendments made to the 1971 Act as they arise; as yet, however, none of Part II of the 1987 Act has been brought into force.

[15](1986) Working Paper No. 96, para. 7.46.

[16]Matrimonial Causes Act 1973, s. 25(1); Domestic Proceedings and Magistrates' Courts Act 1978, s. 3(1); see *Suter* v. *Suter and Jones* [1987] Fam. 111.

other proceedings and the orders may be preserved in two ways. First, in certain matrimonial proceedings[17] the court has a duty to consider using its powers relating to the children, and this duty can be retained in the legislation dealing with those proceedings. Secondly, in the new legislation which we propose, it can be made clear that the courts' powers may be exercised in the course of other proceedings.

1.9 If all the courts' powers to deal with the custody and upbringing of childen are in one statute, anomalies and inconsistencies arising from piecemeal statutory developments can be avoided. The provisions should then be readily accessible and clear to courts and legal and other practitioners who have to use them. They may even become more intelligible to the families involved. A recent study of divorce court welfare work has suggested that there could also be some psychological advantage for both parents and children in drawing a clear distinction between child law and matrimonial law:

> Only if some headway can be made in distinguishing the role of parent from that of spouse is there a chance that the divisions between adults will become less essential to personal survival. The views of children might then be invoked with considerable effect to mobilize the resources of a partnership between two parents.[18]

1.10 However, these aims can only be fully achieved if both private and public law are included. The provisions under which children may be compulsorily committed to (or retained in) local authority care are open to all the same criticisms as the private law.[19] Child care law is so complicated partly because children may be committed to care, or placed under supervision, not only in proceedings initiated for that purpose by local authorities, but also in proceedings initiated by private individuals in family law. The Government has accepted the recommendation of the Review of Child Care Law that the grounds for and effects of compulsory committals to care in all civil proceedings[20] should be the same.[21] Similarly, the Government proposes that it should be possible to make custody orders in favour of individuals in proceedings initiated by local authorities applying for care.[22] Consistency, clarity and simplicity in the courts' powers could best be achieved by a single set of statutory provisions dealing with them all. Those provisions could then be combined with others dealing with the responsibilities of local authorities to provide services for families and children, including the provision of care to which the courts' powers must inevitably refer.

1.11 Because we believe that the case for a combined approach along these lines is so strong, we have departed from our normal practice in presenting our reports. Normally, these contain a complete Bill to give effect to the recommendations in the Report. In this case, the Bill appended[23] is incomplete and intended merely as an illustration of what could be achieved if the combined approach were adopted. Parts I and II give effect to the recommendations of this Report on the private law relating to the upbringing of children and Part III shows how the Government's proposals for the public law relating to the courts' powers to make care and supervision orders might be provided for. If this approach were to be followed, further provision would be needed to deal with emergency protection[24] and the whole range of social services to families with children. For this reason, therefore, it is not practicable to include all the minor and consequential provisions which would be required. The object, however, is to demonstrate how a complete code of the courts' powers could be achieved and, it is hoped, the advantages of doing so. We share your view that the coincidence of recent events, including the two reviews, represents "an historic opportunity to reform the English law into a single rationalised system as it applies to the care and upbringing of children".[25]

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[17]At present in the Matrimonial Causes Act 1973, s. 41; Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(1).

[18]C. Clulow and C. Vincent, *In the Child's Best Interests? Divorce Court Welfare and the Search for a Settlement* (1987), p. 211.

[19]Review of Child Care Law, (1985) para. 2.4.

[20]*Ibid.*, paras. 3.31 and 3.32, excluding wardship in which a residual criterion may be needed for genuinely exceptional unforeseen circumstances.

[21]The Law on Child Care and Family Services (1987), Cm. 62, para. 36.

[22]Ibid., para. 63.

[23]See Appendix 1.

[24]In the light not only of the Government's proposals referred to but also of those in recent inquiries into particular cases of child abuse.

[25]"The Child and The Law: A View across the Tweed", Child and Co. lecture, 27th April 1988.

Structure of this Report

1.12 Our Working Papers on Guardianship and Custody contained a detailed critique of the confusion, complexity, gaps and anomalies in the present law.[26] Given the unanimous support for reform which consultation revealed, it would be superfluous to repeat those criticisms here. The options for reform were also canvassed at length and these will be mentioned throughout this Report as they arise. The Working Paper on Custody ended with an outline of a possible new scheme which would form the basis of the proposed statutory code.[27] Again, a large majority supported the main features of this. We therefore propose to explain the new scheme step-by-step in this Report. For the most part this will also mirror the provisions in the annexed Bill.

[26](1985) Working Paper No. 91, Part III; (1986) Working Paper No. 96, Part II.
[27](1986) Working Paper No. 96, Part VII.

PART II

PARENTAL RESPONSIBILITY

2.1 A fundamental principle which guided both the Review of Child Care Law and the Government's response to it was that the primary responsibility for the upbringing of children rests with their parents. The State should be ready to help them to discharge that responsibility and should intervene compulsorily only where the child is placed at unacceptable risk.[1] Although these views were expressed in the context of local authority care and social services, we consider that they are equally valid in the context of the private law. The present law, however, does not adequately recognise that parenthood is a matter of responsibility rather than rights, while at the same time it may encourage the State (which includes the courts) to intervene unnecessarily in the discharge of those responsibilities. In this Part, therefore, we shall consider the definition and allocation of parental responsibilities before turning in later Parts to the courts' powers to intervene.

Parenthood and guardianship

2.2 Our present law has no coherent legal concept of parenthood as such. Historically, guardianship came first.[2] It developed as a means of safeguarding a family's property and later became an instrument for maintaining the authority of the father over his legitimate minor children. Hence he was recognised as their "natural" guardian. While he was alive the mother had no claims as natural guardian and was originally in no better position than a stranger. Nineteenth century legislation gave her limited rights to apply to the courts for custody and access and, in 1886, made her automatically guardian after the father's death.[3] The Guardianship of Infants Act 1925 provided that the father should be guardian on the mother's death.[4] It also gave the mother "like powers" to those of the father to apply to the court in any matter affecting the child[5] but deliberately stopped short of making her a joint guardian during his life-time. The Guardianship Act 1973 now states that the mother's rights and authority are the same as the law allows the father,[6] but nowhere does statute equate her position to the natural guardianship of the father, which has never been expressly abolished.

2.3 In our Working Paper on Guardianship we suggested that these archaic and confusing rules, under which parents who for all practical purposes have the same rights and authority are sometimes guardians and sometimes not, should be abolished.[7] Instead, parenthood should become the primary concept. Any necessary distinctions between parents and guardians who act *in loco parentis* could then clearly be drawn and any lingering doubts about the status of mothers could be removed.[8] Consultation revealed no disagreement with these proposals and we recommend accordingly.

Parental responsibility

2.4 Scattered through the statute book at present are such terms as "parental rights and duties"[9] or the "powers and duties",[10] or the "rights and authority"[11] of a parent. However, in our first Report on Illegitimacy we expressed the view that "to talk of parental 'rights' is not only inaccurate as a matter of juristic analysis but also a misleading use of ordinary language."[12] The House of Lords, in *Gillick* v. *West Norfolk and Wisbech Area Health Authority*,[13] has held that the powers which parents have to control or make decisions for their children are simply the necessary concomitant of their parental duties. To refer to the concept of "right" in the relationship between parent and child is therefore likely to produce

[1]Review of Child Care Law (1985), Part II; The Law on Child Care and Family Services (1987), Cm. 62, para. 5.
[2]See (1985) Working Paper No. 91, Part II.
[3]Guardianship of Infants Act 1886, s. 2; see now Guardianship of Minors Act 1971, s. 3(1).
[4]s. 4(2); see now 1971 Act, s. 3(2); the object of this apparently superfluous provision was to provide that he should act jointly with any guardian appointed by the mother and to give the court power to appoint such a guardian if she had not done so; the 1886 Act had already done the same where the mother was the survivor.
[5]s. 2; the equivalent provision in the 1971 Act was rendered unnecessary by s. 1(1) of the Guardianship Act 1973 and thus repealed.
[6]s. 1(1).
[7](1985) Working Paper No. 91, para. 3.6.
[8]*Ibid.*, para. 3.4; the *County Court Practice 1988*, for example, at p.273, is still suggesting that "The father, as natural guardian, has the right to be next friend of his minor children in an action in which they are plaintiffs: *Woolf* v. *Pemberton* (1877) 6 Ch. D.19."
[9]Children Act 1975, s. 85(1); Adoption Act 1976, s. 12(1) and (2); Child Care Act 1980, s. 3(1).
[10]Child Care Act 1980, s. 10(2).
[11]Guardianship Act 1973, s. 1(1).
[12](1982) Law Com. No. 118, para. 4.18.
[13][1986] A.C. 112.

confusion, as that case itself demonstrated.[14] As against third parties, parents clearly have a prior claim to look after or have contact with their child but, as the House of Lords has recently pointed out in *Re K.D. (A Minor) (Ward: Termination of Access)*,[15] that claim will always be displaced if the interests of the child indicate to the contrary. The parental claim can be recognised in the rules governing the allocation of parental responsibilities,[16] but the content of their status would be more accurately reflected if a new concept of "parental responsibility" were to replace the ambiguous and confusing terms used at present. Such a change would make little difference in substance but it would reflect the everyday reality of being a parent and emphasise the responsibilities of all who are in that position. It would also accord with the recommendation on parental responsibilities adopted in 1984 by the Committee of Ministers of the Council of Europe.[17] Most of those who responded to our Working Papers on Guardianship and Custody thought that such a change would be helpful and we so recommend.

2.5 One further advantage is that the same concept could then be employed to define the status of local authorities when children have been compulsorily committed to their care. The reports of the inquiries into the deaths of Jasmine Beckford and Tyra Henry[18] indicate how helpful this would be in emphasising the continuing parental responsibility of the local authority even if the child has been allowed to live at home.

(a) *The scope of parental responsibility*

2.6 The concept of "parental responsibility" can be defined by reference to all the incidents, whether rights,[19] claims, duties, powers, responsibilities or authority, which statute and common law for the time being confer upon parents. It would be superficially attractive to provide a list of these but those who responded to our Working Paper on Guardianship[20] recognised the practical impossibility of doing so. The list must change from time to time to meet differing needs and circumstances. As the *Gillick* case itself demonstrated,[21] it must also vary with the age and maturity of the child and the circumstances of each individual case.

2.7 Three points should, however, be made clear. First, the incidents of parenthood with which we are concerned are those which relate to the care and upbringing of a child until he grows up. This does include some power to administer the child's property on his behalf but it does not include the right to succeed to the child's property on his death (which will almost always be without leaving a will because children under 18 can only make wills in very exceptional circumstances). The right to succeed is a feature of being related to the deceased in a particular way and operates irrespective of who has responsibility for bringing him up.[22] Because there appears to have been some doubt about this in the past,[23] we recommend that it be clarified in the legislation.

2.8 Secondly, it might also be helpful to clarify the nature and extent of a parent's powers to administer or deal with a child's property, for the law on this is most obscure. However, this would undoubtedly be a large task which is best handled outside the current exercise, although we have done a certain amount of work upon it and hope to be able to return to it later. But a particular uncertainty is whether the parents have the same powers as do guardians, for example to receive a legacy on the child's behalf.[24] Our provisional proposal that parents should be in no worse position than guardians in this respect[25] was approved on consultation and we so recommend.

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[14]Mrs. Gillick sought a declaration that DHSS guidance allowing doctors in certain circumstances to give contraceptive advice and treatment to girls under 16 without parental consent was an unlawful interference in her parental rights; the provisions referring to parental rights in sections 85 and 86 of the Children Act 1975 were relied upon in support.

[15][1988] 2 W.L.R. 398.

[16]*Infra*, paras. 2.17 *et seq.*

[17]Council of Europe, *Parental responsibilities*, Recommendation No. R(84)4, adopted by the Committee of Ministers of the Council of Europe on 28 February 1984 and Explanatory Memorandum, Principle 1 and paragraph 6 respectively.

[18]*A Child in Trust—The Report of the Panel of Inquiry into the Circumstances surrounding the Death of Jasmine Beckford* (Chairman: L. Blom-Cooper Q.C.) (1985); *Whose Child? The Report of the Public Inquiry into the Death of Tyra Henry* (Chair: S. Sedley Q.C.) (1987).

[19]The analysis above is not inconsistent with describing some incidents as "rights", particularly where these are of a procedural nature, such as the right to take part in care proceedings or to appeal against a school placement.

[20](1985) Working Paper No. 91, para. 1.9.

[21][1986] A.C. 112; hence a parent may not prevent doctors giving medical advice or treatment to children who are mature enough to consent for themselves.

[22]Thus, e.g., a father can succeed to his child's property even though he has never been married to the mother and thus has no automatic parental responsibility.

[23]See e.g. S. Maidment, "The Fragmentation of Parental Rights and Children in Care", [1981] J.S.W.L. 21, at p.32.

[24](1985) Working Paper No. 91, paras. 2.32–2.34.

[25]*Ibid.*, para. 3.5.

2.9 Thirdly, the fact that a person does, or does not, have parental responsibility for the care and upbringing of a child does not affect the rights of the child, in particular to be maintained[26] or to succeed to a person's estate. The principle that children should have the same rights whatever the marital status of their parents was an essential feature of our recommendations on illegitimacy[27] which have recently been implemented by the Family Law Reform Act 1987. Once again, we recommend that this be made clear in the definition of the new concept.

(b) *The power to act independently*

2.10 In most cases there are two people, usually the child's parents, with parental responsibility, but the present law is not clear about whether they may act independently. The Guardianship Act 1973[28] provides that married parents may do so, but the Children Act 1975[29] provides that "joint" holders of any parental right may act alone only if another holder has not signified disapproval. As we explained in our Working Paper on Custody,[30] we believe it important to preserve the equal status of parents and their power to act independently of one another unless and until a court orders otherwise. This should be seen as part of the general aim of encouraging both parents to feel concerned and responsible for the welfare of their children.[31] A few respondents suggested that they should have a legal duty to consult one another on major matters in their children's lives, arguing that this would increase parental co-operation and involvement after separation or divorce. This is an objective which we all share. However, whether or not the parents are living together, a legal duty of consultation seems both unworkable and undesirable. The person looking after the child has to be able to take decisions in the child's best interests as and when they arise. Some may have to be taken very quickly. In reality, as we pointed out in our Working Paper on Custody,[32] it is that person who will have to put those decisions into effect and that person who has the degree of practical control over the child to be able to do so. The child may well suffer if that parent is prevented by the other's disapproval and thus has to go to court to resolve the matter, still more if the parent is inhibited by the fear that the other may disapprove or by the difficulties of contacting him or of deciding whether what is proposed is or is not a major matter requiring consultation. In practice, where the parents disagree about a matter of upbringing the burden should be on the one seeking to prevent a step which the other is proposing, or to impose a course of action which only the other can put into effect, to take the matter to court. Otherwise the courts might be inundated with cases, disputes might escalate well beyond their true importance, and in the meantime the children would suffer. We recommend, therefore, that the equal and independent status of parents be preserved and, indeed, applied to others (principally guardians) who may share parental responsibility in future.[33] This will not, of course, affect any statutory provision which requires the consent of each parent, for example to the adoption of the child.[34]

(c) *The effect of court orders*

2.11 Allied to this is the principle that parents should not lose their parental responsibility even though its exercise may have to be modified or curtailed in certain respects, for example if it is necessary to determine where a child will live after his parents separate. Obviously, a court order to that effect will put many matters outside the control of the parent who does not have the child with him. However, parents should not be regarded as losing their position, and their ability to take decisions about their children, simply because they are separated or in dispute with one another about a particular matter. Hence they should only be prevented from acting in ways which would be incompatible with an order made about the child's upbringing. If, for example, the child has to live with one parent and go to a school near home, it would be incompatible with that order for the other parent to arrange for him to have his hair done in a way which will exclude him from the school. It would not, however, be incompatible for that parent to take him to a particular sporting occasion over the weekend, no matter how much the parent with whom the child lived might disapprove. These principles

[26]Thus, e.g., a father, or a person who has treated a child as a member of the family, may be ordered to maintain whether or not he has parental responsibility.

[27](1982) Law Com. No. 118 and (1987) Law Com. No. 157.

[28]s. 1(1).

[29]s. 83(3).

[30](1986) Working Paper No. 96, paras. 4.25 and 7.17.

[31]Council of Europe, *op. cit.* n. 16, para. 5.

[32](1986) Working Paper No. 96, paras. 4.51–4.53, 7.17.

[33]This is the position adopted in Scotland; see Report on Illegitimacy (1984), Scot. Law Com. No. 82, para. 9.21; Law Reform (Parent and Child) (Scotland) Act 1986, s. 2(4).

[34]Adoption Act 1976, s. 16(1); as to consent to marriage, see *infra*, paras. 7.5–7.11; as to the present law, see Guardianship Act 1973, s. 1(7).

form part of our general aim of "lowering the stakes" in cases of parental separation and divorce, and emphasising the continued responsibility of both parents, to which we shall return.[35] However, they are equally important where children are committed to local authority care. The crucial effect of a care order is to confer parental responsibilities upon the authority and there will be detailed regulations about how these are to be exercised. But the parents remain the parents[36] and "it will continue to be important in many cases to involve the parents in the child's care".[37] Clearly, the order will leave little scope for them to carry out their responsibilities, save to a limited extent while the child is with them, because the local authority will be in control of so much of the child's life.[38] But the parents should not be deprived of their very parenthood unless and until the child is adopted or freed for adoption.

(d) *Arrangements and agreements with parents and others*

2.12 It is a rule of the common law, now confirmed by statute,[39] that parental responsibility cannot be surrendered or transferred by private agreement. An exception was made for separation agreements between husband and wife,[40] originally so that a separated wife could obtain custody by agreement since she had no claim to it in law,[41] but the court will not enforce such an agreement if it will not be for the benefit of the child to do so. Under the Family Law Reform Act 1987,[42] this exception is extended to all parents, married or unmarried, but limited to the "exercise" of their parental "rights" rather than the rights themselves.

2.13 It is clearly important to maintain the principle that parental rights or responsibility cannot be legally surrendered or transferred without a court order and we so recommend. Equally, it is always possible, and a common practice, for parents to delegate the exercise of some or all of their parental responsibilities either between themselves or to other people or agencies, such as schools, holiday camps, foster parents or local authorities. It would be helpful for the law to recognise this expressly, for two reasons. First, parents are now encouraged to agree between themselves the arrangements which they believe best for their children, whether or not they are separated.[43] It is important, therefore, that they should feel free to do so. Secondly, as we recognised in our Working Paper on Guardianship,[44] it is helpful if, for example, a school can feel confident in accepting the decision of a person nominated by the parents as a temporary "guardian" for the child while they are away. Hence we recommend that the power to make such arrangements be recognised expressly.

2.14 We do not recommend, however, that such arrangements should be legally binding so that the parents cannot revoke or change them. The possibility of appointing formal temporary guardians, raised in our Working Paper on Guardianship,[45] would in effect amount to that. It attracted little support. It would scarcely be in the best interests of children for parents to be bound by such arrangements should they wish to change them. No court would uphold them if they were contrary to the child's interests but the burden of taking the case to court should not lie with the parents. This is particularly important in the context of arrangements made with or through local authorities. Both the Review of Child Care Law and the Government's response to it have emphasised that these should always be voluntary and that court proceedings should be required before any compulsory interference with the parents' responsibilities.[46]

2.15 As between the parents themselves, it was argued in our Working Paper on Illegitimacy that the exception for separation agreements between spouses serves little useful purpose.[47] It no longer confers rights which the parent would not otherwise have. The agreement will not be enforced if it is not for the child's benefit and we know of no reported

[35] *Infra*, paras. 4.6 *et seq*.

[36] Indeed an unmarried father might acquire parental responsibility while a care order is in force; *infra*, para. 2.18.

[37] The Law on Child Care and Family Services (1987), Cm. 62, para. 35.

[38] Thus the order will provide that the child is to be cared for by the authority and regulations will control the exercise of the power to allow the child to go home for a while.

[39] Children Act 1975, s. 85(2).

[40] Custody of Infants Act 1873, s. 2; see now Guardianship Act 1973, s. 1(2); see also (1982) Law Com. No. 118, paras. 7.44 to 7.47.

[41] Illegitimacy (1979), Working Paper No.74, para. 4.22.

[42] s. 3.

[43] This lies behind the whole movement for conciliation in children's cases in divorce; see also (1986) Working Paper No.96, para. 4.20(b).

[44] (1985) Working Paper No.91, paras. 4.7–4.8.

[45] *Ibid.*

[46] Review of Child Care Law (1985), para. 2.8; The Law on Child Care and Family Services (1987), Cm. 62, para. 21.

[47] (1979) Working Paper No.74, para. 4.23; *supra*, para. 2.12.

case in which the provision has even been cited. It was retained because of the encouragement it would give to unmarried couples to resolve matters by agreement and we later propose a formal method for doing so.[48] As between those who share parental responsibility, however, a provision for legally binding agreements might inhibit them from making whatever arrangements seem best at the time for fear that it might later be difficult to change them. Any disagreement will eventually have to be resolved by a court and in practice the burden will still lie on the one wishing to change the agreed arrangements. The court, in deciding what is best for the child, will no doubt take account of the arrangements agreed, the reasons for them, and the risks of changing them. But if they have already been changed in fact it would be wrong for there still to be a bias in favour of the previous agreement. Hence we are of the view that the exception has now outlived its usefulness and may be repealed.

(e) *The position of those without parental responsibility*

2.16 However, it would be helpful to clarify the position of those who have actual care of a child without having parental responsibility for him in law. Section 87(2) of the Children Act 1975 provides that a person with "actual custody" has the same duties as a person with "legal custody",[49] but those duties can only be deduced from the general law of crime and tort.[50] There is criminal liability for, *inter alia,* ill-treatment, neglect[51] and failure to educate,[52] whether or not a person has legal custody. Section 87 would therefore seem to serve little useful purpose. But there may be confusion about the power of such people to take certain decisions about the child. We therefore recommend that it be made quite clear that anyone with actual care of a child may do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare. The obvious example is medical treatment. If the child is left with friends while the parents go on holiday, it would obviously not be reasonable to arrange major elective surgery, but it would be reasonable to arrange whatever was advised in the event of an accident to the child. We also recommend that the concept of "actual care" replace that of "actual custody", which is defined by section 87(1) of the 1975 Act as "actual possession of his person, whether or not that possession is shared with one or more other persons". "Possession" is not only unrealistic in fact where an older child is concerned but is also a concept more familiar to the law of property than persons. "Care" is more consistant with the modern approach to looking after children whether by individuals or by local authorities.

Acquisition of parental responsibility by parents

2.17 We do not propose any change in the present basic rules for the allocation of parental responsibility. Thus, where the parents of a child were married to one another at or after his conception, they both have parental responsibility automatically.[53] Where they were not so married, only the mother has parental responsibility automatically[54] although the father may later acquire it.[55] The possibility of changing these rules was thoroughly canvassed but rejected in our first Report on Illegitimacy[56] and they have recently been confirmed by the enactment of the Family Law Reform Act 1987.

2.18 However, the Family Law Reform Act 1987[57] will allow a court to order that an unmarried father shall have full parental status, sharing it with the mother in the same way that married parents do. In our Working Paper on Guardianship,[58] we pointed out that such judicial proceedings may be unduly elaborate, expensive and unnecessary unless the child's mother objects to the order. We suggested,[59] therefore, that the mother might be permitted to appoint the father guardian to share responsibility while she was alive. A large majority of

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[48] *Infra,* paras. 2.18–2.19.

[49] For the definition of "legal custody", see *infra,* para. 4.2.

[50] See further, e.g., P. M. Bromley and N. V. Lowe, *Family Law,* 7th ed. (1987), pp.278–283; H. K. Bevan, *The Law relating to Children* (1973), chapters 6 and 7.

[51] Children and Young Persons Act 1933, s. 1; by s.17 this covers anyone with actual possession or control.

[52] Education Act 1944, ss. 35–40; by s. 114(1), "parent" includes every person with actual custody.

[53] Provided they marry before the birth, the father's status is natural guardian at common law and the mother's position is equal by virtue of the Guardianship Act 1973, s. 1(1); if they marry later, they acquire the same status by virtue of the Legitimacy Act 1976, ss. 2 to 4.

[54] The common law eventually recognised her status as equivalent to that of a married father, confirmed by the Children Act 1975, s. 85(7).

[55] *Infra,* paras. 2.18–2.20.

[56] (1982) Law Com. No.118, paras. 4.14–4.43; see also (1979) Working Paper No.74. The same conclusion was reached by the Scottish Law Commission, (1984), Scot. Law Com. No.82, paras. 2.2–2.5; see Law Reform (Parent and Child) (Scotland) Act 1986, s. 2(1).

[57] s. 4; this section is not yet in force.

[58] (1985) Working Paper No.91, para. 4.21.

[59] *Ibid,* paras. 4.20 and 4.24.

those who responded, including the leading organisations representing single parents and children's interests, supported this suggestion. It was pointed out, however, that it would be more consistent with the primary concept of parenthood if the father were to acquire the same status by such an appointment as he would by a court order. We therefore recommend that mother and father should be able to make an agreement that the father shall share parental responsibility with the mother. This will have the same effect as a court order. Both, for example, will confer upon him the power to give or withhold agreement to the child's adoption or to appoint a guardian. More importantly perhaps, both an agreement and an order may only be brought to an end by a court order made on the application of either parent (or a guardian).[60] The child should also be able to make such applications, but only if the court is satisfied that he has sufficient understanding to do so.[61]

2.19 For this reason, we also recommend that the agreement be made in a prescribed form which would have to be checked by a county court (we envisage a simple paper procedure with a small standard fee) and preserved on the court records. The object is to ensure that, as far as possible, both parents understand the importance and effects of their agreement. Overall, this should provide a simple and straightforward means for unmarried parents to acknowledge their shared responsibility, not only for the support, but also for the upbringing of their child. Once again, it would move our law in the direction recommended by the Council of Europe.[62]

2.20 This procedure will serve to distinguish the private appointment of the father to share parental responsibility during the mother's life-time from the private appointment of a guardian to take a parent's place after his death. The effect upon the person appointed is the same, in that he acquires full parental responsibility,[63] but the effect upon the appointer is quite different, in that she loses sole control over certain decisions. Given the serious concern about the pressures to which mothers may be subject, which was expressed at the time of our first Report on Illegitimacy,[64] it is appropriate for the machinery for such sharing appointments to be different from, and more formal and deliberate than, the machinery for appointing a guardian.[65] However, although it is hoped that more and more unmarried parents will agree to share parental responsibility, there may still be cases in which they would prefer the mother to have sole responsibility during her life-time but for the father to assume it in the event of her death. It should therefore remain possible for the mother to appoint him guardian and in such cases there is no reason why she should not be able to use the normal procedure for doing so.

2.21 It may be worth pointing out at this stage that the acquisition of parental responsibility by parents and guardians can happen by operation of law (such as legitimation), private agreement or appointment or court order, irrespective of whether there is any other order in being about the child's care, residence or upbringing. For example, the parents may marry while the child is committed to care under a care order. This may affect the status of the father in the proceedings but it will not affect the order itself. Hence the effect of any court order conferring parental responsibility upon a father, or appointing a guardian, should not be to alter the child's residence or care, unless the court so decides.

Acquisition of parental responsibility by guardians

2.22 The Working Paper on Guardianship discussed various situations in which *inter vivos* appointments of guardians might be made[66] but these attracted little support and we do not propose to pursue them. There was unanimous support for the power of parents and courts to appoint guardians to act after the parents' death. But a number of modifications to the present law seem desirable in order to integrate the existing patchwork of common law and statute in a coherent modern structure.

(a) *The parental responsibility of guardians*

2.23 Central to that structure is the principle that parental responsibility should mean what it says. The power to control a child's upbringing should go hand in hand with the responsibility to look after him or at least to see that he is properly looked after. Consultation

[60] As at present; Family Law Reform Act 1987, s. 4(3).
[61] The position of the child in proceedings about his upbringing is discussed further, *infra*, paras. 4.44 and 6.22 *et seq.*
[62] *Supra*, para. 2.4 and Council of Europe, *op. cit.* n. 16, Principles 7 and 8 and paras. 27–33.
[63] *Infra*, paras. 2.22 *et seq.*
[64] (1982) Law Com. No.118, para. 4.39.
[65] *Infra*, para. 2.29.
[66] (1985) Working Paper No.91, paras. 4.9 *et seq.*

confirmed our impression that it is now generally expected that guardians will take over complete responsibility for the care and upbringing of a child if the parents die.[67] If so, it is right that full legal responsibility should also be placed upon them.[68]

2.24 Consultation also confirmed our provisional view, which is the logical consequence of that principle, that there should be no distinction between guardianship of the person and guardianship of the estate of the child.[69] Guardians of the estate are still occasionally appointed, for example to receive foreign legacies or awards under the criminal injuries compensation scheme, but our consultations have satisfied us that trusteeship would adequately and more appropriately fill any gap. Similarly, it should not be possible to appoint a guardian for one specific purpose, such as to give or withhold consent to marriage.[70] Given the number of modern statutes, including the Adoption Act 1976 and the Foster Children Act 1980, which place a "guardian" in the same position as a parent, such appointments would now lead to considerable confusion.

2.25 We recommend, therefore, that guardianship of the estate be abolished and that all guardians be given the same parental responsibility as parents.[71] This means that a guardian will have the parents' duty to see that the child is provided with adequate "food, clothing, medical aid and lodging",[72] and to educate the child properly, whether or not he is actually caring for the child. His means will be taken into account should he apply for maintenance for the child against a parent. We do not recommend, however, that a guardian become a "liable relative" under the Social Security Act 1986[73] or be potentially subject to the same orders for financial provision or property adjustment as a parent.[74] This would be a major change from the policy of the present law, under which financial responsibility rests almost exclusively upon natural parents, and those who care for orphans receive a social security "guardian's allowance" for doing so.[75] Such financial liability might act as a serious deterrent to appointments being made or accepted. We do, however, recommend that guardians should themselves have the same power as parents to appoint a replacement to act in the event of their death.[76] The balance of opinion amongst respondents was in favour of this, which is consistent with the general support given to testamentary guardianship. If appointing a guardian is an aspect of responsible parenthood, it can be no less an aspect of responsible guardianship. This is particularly so if, as we recommend below,[77] most guardians will only take office after the death of both parents. The court will have ample power to remove guardians or to make whatever other orders are necessary to safeguard or promote the child's welfare.

(b) *Parental appointment of guardians*

2.26 At present each parent may appoint a guardian to replace him on his death.[78] The appointment takes effect then, unless the survivor objects, in which case the burden rests with the guardian to apply to a court. The guardian may also apply if he considers the survivor "unfit to have legal custody" of the child. The court may then confirm the guardian alone, or the parent alone, or order them to act jointly.[79] There are several defects in these rules.[80] They contain considerable potential for conflict between surviving parent and guardian. It is not clear when the survivor must object, so the guardian may remain vulnerable until the survivor's death. If the guardian goes to court, the court has the draconian and almost unprecedented power to remove the survivor from guardianship.[81] The rules also take no

[67] *Ibid.*, para. 3.11 and Appendix B, an account by Mrs. J. Priest, of the University of Durham, of interviews she conducted with solicitors in the North East of England.

[68] *Ibid.*, para. 3.67.

[69] *Ibid.*, para. 3.76.

[70] *Re Woolscombe* (1816) 1 Madd. 213; see also (1985) Working Paper No. 91, para. 3.82; but see *infra*, paras. 7.5 *et seq.* on consent to marriage generally.

[71] Transitional provision will, of course, be made for those acting as guardian of the minor's estate at present, so that they will continue to act in the terms of their appointment rather than as full guardians.

[72] Children and Young Persons Act 1933, s. 1(2)(a).

[73] s. 26, as amended by Family Law Reform Act 1987, s. 2(1), (3).

[74] (1985) Working Paper No. 91, para. 3.69.

[75] Social Security Act 1975, s. 38; in this respect guardians are very like custodians who have legal custody during the parents' lifetime; they too are not "liable relatives" or potentially subject to orders, although like guardians their means can be taken into account in orders made against others; and they too may receive financial assistance from local authorities; Children Act 1975, ss. 34A(1)(a) and (b) and 34(6).

[76] (1985) Working Paper No. 91, para. 3.74.

[77] *Infra*, paras. 2.27–2.28.

[78] Guardianship of Minors Act 1971, s. 4(1) and (2).

[79] *Ibid.*, s. 4(4).

[80] (1985) Working Paper No. 91, paras. 3.30 *et seq.*

[81] The nearest equivalent is section 42(3) and (4) of the Matrimonial Causes Act 1973, discussed *infra* para. 7.3, where we recommend its repeal.

account of the situation where conflict may be most likely and (it would seem) where appointments are also becoming more common, namely where the parents were separated or divorced.[82]

2.27 The present law is the product of the days before parents had equal status[83] and the child's welfare became the paramount consideration in all questions affecting his upbringing.[84] The aim of a modernised system must be to balance the claims of the surviving parent and the wishes of the deceased in the way which will be best for the child. Those, comparatively few,[85] children who experience the death of a parent while they are under 18 will usually have been living with both parents at the time. There can be little doubt that those children's interests will generally lie in preserving the stability of their existing home and thus in confirming the continued responsibility of the survivor. There seems little reason why the survivor should share that responsibility with a guardian who almost invariably will not be sharing the household. The present law gives her an invidious choice: either she accepts the deceased's wishes, when neither may have realised that this was the effect of appointing a guardian in his will; or she objects, when she may be more than happy for the person appointed to take over after her own death, whether alone or alongside her own appointee. The rule which appears both simpler and in accordance with the principles of the modern law is that appointments should generally only take legal effect after the death of the surviving parent. This will not prevent the surviving parent seeking the advice and help of the person appointed by the deceased if she so wishes, but it will prevent that person attempting to exercise a control which cannot and should not be his if the children are not with him. If he wishes to have the children to live with him, or to challenge some other decision of the survivor, he may apply to the court for the orders which we discuss in Part IV,[86] but that will not place the survivor's parental status at risk. We are apparently the only member country of the Council of Europe which permits guardianship to operate during the life-time of the survivor. Hence this recommendation would also move our law in the direction recommended by the Council.[87]

2.28 The child's interests may dictate a different solution where the parents were separated or divorced. If, as we hope will increasingly happen, they have agreed the arrangements between themselves and there is no court order about the child's residence, then the position should be as proposed above. The survivor will assume sole responsibility (subject to any applications for residence which others may make). If there is a court order that the child live with the surviving parent, then *a fortiori* an appointment made by the deceased should not affect matters while the survivor is still alive. However, if there was a court order that the child should live with the parent who has died, that parent should be able (and indeed encouraged) to provide for the child's future upbringing in the event of his death. We recommend, therefore, that in such circumstances the appointment should have immediate effect. The guardian will therefore share parental responsibility with the surviving parent. This does not mean that the guardian's wishes will prevail over those of the survivor. Any dispute as to the child's residence, or any other matter, will have to be resolved by a court according to what is best for the child. In practice, the burden of taking the case to court will lie with the person wishing to change the existing arrangements. This again seems the scheme best designed to protect the interests of children at a time of considerable distress and potential insecurity for them.

2.29 At present, guardians must be appointed by deed or will. We suggested in our Working Paper that there might be a simpler method of appointment,[88] given the general desirability of encouraging parents to appoint guardians and an extremely common reluctance (perhaps particularly among young adults) to make wills.[89] Although in one sense an appointment is always a "will" in that it is intended to take effect on death, there should be no doubt that a guardian's appointment is effective whether or not there is any property requiring a grant of probate for its administration. Hence we recommend that it should be possible to appoint a guardian by any document which is signed and dated and to revoke appointments in the same way. A later appointment should revoke an earlier one unless clearly intended to add to the existing appointments. No doubt most appointments will still be made in wills, and it should be made clear that the appointment is revoked, not only by such

[82] *Ibid.*, Appendix B, an account by Mrs. J. Priest, of the University of Durham, of interviews she conducted with solicitors in the North East of England.

[83] *Supra*, para. 2.2.

[84] Guardianship of Infants Act 1925, s. 1; see now Guardianship of Minors Act 1971, s. 1; *infra*, paras. 3.12 *et seq.*

[85] For what is known of the factual background, see (1985) Working Paper No. 91, paras. 1.29–1.30.

[86] As he will not yet be the child's guardian, he may require leave; *infra*, paras. 4.39 *et seq.*

[87] Council of Europe, *op. cit.* n. 16, Principle 9 and paras. 34–37; given the support for testamentary guardianship from our respondents, we would not be justified in recommending any further limitation.

[88] (1985) Working Paper No. 91, para. 3.43.

[89] Distribution on Intestacy (1988), Working Paper No. 108, para. 1.3.

documents or later appointments, but also if the will is revoked (whether deliberately or by operation of law).[90] Appointees should be able to disclaim their appointments within a reasonable time of these taking effect (or of learning of them, if later).

(c) *Court appointment and removal of guardians*

2.30 At present, the courts' powers to appoint guardians mirror those of parents. They may make appointments when a parent could have done so but has not or when a guardian appointed by a parent has died or refused to act.[91] As we shall explain later,[92] we recommend that the courts should have ample and flexible powers to deal with all manner of questions arising about a child's upbringing, which will include the power to order that he live with someone other than a parent or guardian. That person will then acquire most, but not quite all, the responsibilities of a parent. The court's power to appoint a guardian can therefore be limited to cases in which there is a need to appoint a complete substitute for a parent who is no longer there at all. If a complete substitute is required for a parent who is still alive, the appropriate mechanism is adoption, no doubt preceded if need be by local authority care proceedings in some cases. We therefore recommend that the courts' powers to appoint guardians should continue to mirror those of parents. Hence they should be able to appoint a guardian whenever there is no parent with parental responsibility or when there was an order that the child should live with a parent or guardian who has died (but not with the other parent).

2.31 The courts should also have power to remove a guardian appointed either by a parent or by the court. At present this power is limited to the High Court.[93] We see no good reason for this, given that all courts have power to appoint guardians and in effect to remove parents by freeing children for adoption or granting adoption orders, sometimes without parental consent, and that the concern today is with the care and upbringing of the child rather than his property. We therefore recommend a general power to remove guardians. It will then be for the court to decide whether or not to appoint a new guardian to replace the one removed.

2.32 In our Working Paper we also considered[94] whether there should be any further powers to control guardians, along the lines of those for supervising or disqualifying foster parents under the Foster Children Act 1980. It may well be thought anomalous that such controls operate if a parent arranges for someone to look after the child while he is alive but not once he is dead. There was some support for supervisory controls and rather more for a list of disqualifications, but strong arguments were also raised against such an extension of the 1980 Act. Even a list of disqualifications would require a system of monitoring to make it effective. It is difficult to justify expending the resources of social services departments upon this when they have other and more pressing demands and no clear need for it has been shown. It might also be thought inconsistent with the emphasis on guardians' undertaking complete parental responsibility for their children, which is the cornerstone of these recommendations.

[90] As generally happens on marriage, Wills Act 1837, s. 18.
[91] Guardianship of Minors Act 1971, ss. 3 and 5.
[92] *Infra*, paras. 4.25–4.28.
[93] Guardianship of Minors Act 1971, s. 6.
[94] (1985) Working Paper No. 91, para. 3.23 *et seq*.

PART III

PRINCIPLES GOVERNING COURT ORDERS

3.1 We have dealt first with the position where there is no court order affecting a child's upbringing because, happily, the great majority of children go throughout their childhood without any such order being made. We have also discussed orders appointing fathers or guardians to hold full parental responsibility,[1] which will normally arise in situations where there is no dispute. Nevertheless, the same general principles should apply to them as will apply to orders dealing with particular aspects of parental responsibility. This is therefore a convenient point at which to discuss those principles.

The need for an order

3.2 As we pointed out in our Working Paper on Custody,[2] a tendency seems to have developed to assume that some order about the children should always be made whenever divorce or separation cases come to court. This may have been necessary in the days when mothers required a court order if they were to acquire any parental powers at all, but that is no longer the case.[3] Studies of both divorce and magistrates' courts have shown that the proportion of contested cases is very small,[4] so that orders are not usually necessary in order to settle disputes. Rather, they may be seen by solicitors as "part of the package" for their matrimonial clients and by courts as part of their task of approving the arrangements made in divorce cases.[5] No doubt in many, possibly most, uncontested cases an order is needed in the children's own interests, so as to confirm and give stability to the existing arrangements, to clarify the respective roles of the parents, to reassure the parent with whom the children will be living, and even to reassure the public authorities responsible for housing and income support that such arrangements have in fact been made. However, it is always open to parents to separate without going to court at all, in which case there will be no order. If they go to court for some other remedy, they may not always want an order about the children. The proportion of relatively amicable divorces is likely to have increased in recent years and parents may well be able to make responsible arrangements for themselves without a court order. Where a child has a good relationship with both parents the law should seek to disturb this as little as possible. There is always a risk that orders allocating custody and access (or even deciding upon residence and contact)[6] will have the effect of polarising the parents' roles and perhaps alienating the child from one or other of them.

3.3 For these reasons, the Working Paper[7] proposed a more flexible approach, in which it was not always assumed that an order should be made, but the court would be prepared to make one even in uncontested cases if this would promote the children's interests. Most of those who responded agreed with this approach. In particular, the Association of Chief Officers of Probation, who are responsible for the work of divorce court welfare officers, supported a change in practice towards fewer orders being made. Such a change would be consistent with the view that anything which can be done to help parents to keep separate the issues of being a spouse and being a parent will ultimately give the children the best chance of retaining them both.[8] On the other hand, the impression should not be given that an application or an order is a hostile step between them. We therefore recommend that the court should only make an order where this is the most effective way of safeguarding or promoting the child's welfare.

3.4 This recommendation has several further advantages. First, it accords well with the retention (and even slight extension) of the courts' powers to make orders of their own motion in the course of matrimonial proceedings;[9] there are procedural advantages in such powers, and it may be necessary to use them in the child's own interests, but they should not become or even be seen as a *carte blanche* for courts to intervene in cases where their aid is

[1] *Supra*, paras. 2.18 and 2.30.
[2] (1986) Working Paper No. 96, para. 4.18.
[3] *Supra*, para. 2.2.
[4] See S. Maidment, "A Study in Child Custody", (1976) 6 Fam. Law 196 and 236; J. Eekelaar and E. Clive, *Custody after Divorce* (1977), Family Law Studies No. 1, Centre for Socio-legal Studies, Wolfson College, Oxford; J. Eekelaar, "Children in Divorce: Some Further Data", [1982] O.J.L.S.63; S. Maidment, *Child Custody and Divorce* (1984), Chapter 3; J. A. Priest and J. C. Whybrow, *Custody Law in Practice in the Divorce and Domestic Courts* (1986), Supplement to Working Paper No. 96, Part III.
[5] Priest and Whybrow, *op. cit.*, para. 8.2.
[6] *Infra*, para. 4.11.
[7] (1986) Working Paper No. 96, para. 4.21.
[8] See C. Clulow and C. Vincent, *In the Child's best interests? Divorce court welfare and the search for a settlement* (1987), pp. 223–224.
[9] *Infra*, paras. 4.30, 4.33–4.38.

neither sought nor needed. Secondly, it coincides with one limb of the proposed grounds for making care and supervision orders, which permit the authorities to intervene in the family.[10] This would reflect the fundamental principle that local authority services for families should be provided on a voluntary basis and compulsory intervention confined to cases where compulsion itself is necessary.[11] Finally, the rule can usefully be applied to ancillary functions, such as commissioning welfare officers' reports or making the child a party to the proceedings.[12]

The courts' duty in matrimonial proceedings

3.5 As we have said,[13] one possible reason why orders are almost always made at present is the divorce court's present duty under section 41 of the Matrimonial Causes Act 1973 to declare itself satisfied as to the arrangements made for the children of the family[14] before making absolute a decree of nullity or divorce or making a decree of judicial separation. Magistrates' domestic courts have a similar duty[15] not to dismiss or make a final order on an application for financial relief without deciding what order, if any, to make about the children.

3.6 The original main aims[16] of the section 41 procedure were to ensure that divorcing parents made the best possible arrangements for their children and to identify cases of particular concern where protective measures might be needed. In our Working Paper on Custody we canvassed at length the arguments for and against the present duty in section 41 and also reviewed the evidence on its operation.[17] We concluded that the procedure had not been successful in achieving either of these aims. The information currently available to the court is too limited, being based on a brief statement from the petitioner alone; the arrangments are usually discussed in a short interview with the judge, which cannot be other than perfunctory in many cases; and, most importantly, the practical power of the court to produce different outcomes is very limited, nor can it ensure that the approved arrangements are subsequently observed. Although there are undoubtedly exceptional cases in which protective measures of supervision or even care may be needed, the present process is not principally designed to discover these.

3.7 Hence the Working Paper provisionally proposed[18] replacing the divorce court's present duty to declare that the arrangements are "satisfactory" or "the best that can be devised in the circumstances"[19] with the domestic court's more modest duty to consider what order, if any, to make. To help the court to decide this question, procedural improvements along the lines recommended by the Booth Committee[20] might be made. These included an expanded statement of arrangements, allowing or requiring the respondent to join with the petitioner's statement or to file his own, and considering these at an earlier stage in the proceedings than at present.[21]

3.8 There was a large measure of support for these proposals and in particular for the idea of substituting a duty to consider the arrangements proposed for the duty to approve the arrangements made. But it was thought by some of our respondents that a duty invariably to have decided what order to make before granting the decree absolute went too far. We accept that this requirement would be too strong if it meant that no divorce could be granted while a custody dispute existed. This would create a serious risk of children becoming pawns in their parents' own battles. A parent opposed to the divorce might drag out the dispute indefinitely if divorce were thereby unobtainable. Such a bar would in fact be more onerous than the present law, as declarations may be granted even where the resolution of a custody dispute is

[10]The Law relating to Child Care and Family Services (1987), Cm. 62, para. 59c; *infra*, para. 5.6.

[11]*Supra*, para. 2.1.

[12]See further in Part VI.

[13]*Supra*, para. 3.2.

[14]A "child of the family" includes not only a child of both parties to the marriage but also any other child (apart from one who has been boarded out with them by a local authority or voluntary organisation) who has been treated by both of them as a child of their family; Matrimonial Causes Act 1973, s. 52(1).

[15]Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(1); the definition of child of the family is the same, save that only a child who is currently being boarded out is excluded, s. 88(1).

[16]Royal Commission on Marriage and Divorce 1951–1955 (1956), Cmd. 9678 (the Morton Commission), paras. 366 *et seq*.

[17](1986) Working Paper No. 96, paras. 4.8–4.10.

[18]*Ibid*, para. 4.16.

[19]The court may alternatively find that it is impracticable for the parties before the court to make any arrangements or that there are exceptional circumstances in which the decree should be made absolute without delay, but in the latter case the parties must undertake to return to court within a specified time; Matrimonial Causes Act 1973, s. 41(1)(b)(ii), (c) and (2).

[20]Report of the Matrimonial Causes Procedure Committee (1985), paras.4.33–4.37; see also Appendix 4, form 3.

[21](1986) Working Paper No. 96, para. 4.13.

still outstanding.[22] Moreover, satisfactory arrangements are often most difficult to devise where the family circumstances are particularly desperate, so that to deny the relief associated with divorce may make matters even worse.[23]

3.9 We recommend, therefore, that once divorce, nullity or judicial separation proceedings have been initiated, the court should have a duty to consider the arrangements proposed for the children in order to decide whether to exercise any of its powers under this legislation. Where this is so, but only in exceptional circumstances, the court should also have power to direct that the decree absolute (or a decree of judicial separation) cannot be made until the court allows it. The cases in which such a sanction would be required are indeed exceptional, because delaying the decree may also delay the making of other arrangements, for example about the home, which will be for the children's benefit. But it would provide them with a measure of protection where the parties are refusing to consider how best to meet their parental responsibilities in the changed circumstances. In such cases, the effect would be the same as in our original proposal and in line with the position in domestic proceedings.

3.10 This system would have many advantages over the present somewhat ineffectual arrangements. First, in order to remind parents of their responsibilities towards their children, the statement of arrangements required from the petitioner should be improved. The respondent should be encouraged to join with the petitioner's statement or to file his own. If he wishes to dispute the arrangements proposed about the child's residence, he should be required to file a statement.[24] This in itself should act as some disincentive to raising disputes simply in order to cause difficulties for the petitioner and as some incentive to consider the arrangements jointly. Secondly, once the court has this information it will be in a better position to identify those children whose welfare may require further action and will then have the whole range of powers in the legislation at its disposal. Where the statements reveal a possible need for social work intervention, further inquiries can be commissioned or the family referred to appropriate agencies. Where the statements reveal a dispute between the parties, they may be pointed towards available conciliation services, a welfare report may be commissioned,[25] and an appropriate time-table set by the court.[26] All this can be done at a much earlier stage than the present interview with the judge. It may be done by a registrar, preferably with the help of a welfare officer, with power to call the parties for an interview and to refer cases to the judge if need be. Insisting that every divorcing couple with children discuss their arrangements with a judge could be seen as singling out parents who divorce as necessarily more irresponsible than others. It was accepted by the Royal Commission on Marriage and Divorce that "in the great majority of cases parents are the best judges of their children's welfare" so that where they are agreed upon the arrangements "very strong evidence indeed would be required to justify setting aside their proposals".[27] Further, requiring the court to find the arrangements satisfactory may be imposing higher standards on those who divorce than on those who remain happily married. It may even encourage the court to interfere unnecessarily to impose its own views upon them. Making the divorce itself conditional on such approval gives them little encouragement to distinguish in their minds the issue of being a spouse from that of being a parent.[28] We are aware of the imaginative methods used in some courts to encourage couples to see matters in this light. The system we recommend will do nothing to impede this. It should, however, prove a more effective use of resources, as these will be directed at the cases where they are needed most.

3.11 The divorce court's present duty applies to all children under 16, those of 16 and under 18 who are being educated or trained, and any other child whom the court directs to be included for special reasons.[29] As was pointed out in the Working Paper,[30] for many school-leavers it is a matter of chance whether they are employed, unemployed or on a training programme at the time of the hearing and it is certainly not obvious why the last should be singled out as in need of special attention. It will be necessary still to collect some information about all minor children, in order to discover those to whom the section should apply. But the

[22] *A.* v. *A.* [1979] 1 W.L.R.533; similarly courts can approve the arrangements even though financial provision has not yet been decided; *Cook* v. *Cook* [1978] 1 W.L.R.994, *Hughes* v. *Hughes* [1984] F.L.R.70 and *Yeend* v. *Yeend* [1984] F.L.R.937.

[23] Thus, e.g., in practice declarations are usually refused where the parties are still in the same house, but some petitioners may be unable to achieve a separation until the decree absolute.

[24] The Booth Committee, *op. cit.* n. 20, recommended this requirement whenever the respondent wishes to claim custody or access, but this might unnecessarily impede the making of agreed orders, especially as to access.

[25] *Infra,* paras. 6.14 *et seq.*

[26] *Infra,* paras. 4.54 *et seq.*

[27] *Op. cit.* n. 16, para. 371.

[28] *Supra,* para. 3.3.

[29] Matrimonial Causes Act 1973, s. 41(5).

[30] (1986) Working Paper No. 96, para. 4.16.

court's duty to consider the arrangements for children of 16 or over should be limited to those where the statements reveal some exceptional circumstance. Only in such cases, as we later recommend[31] should the court have power to make orders as to their future. As the court has no power to make orders about the upbringing of children who have reached 18, we recommend that the courts' duty be limited in any event to those under 18.[32]

The criterion for deciding upon orders

3.12 The present law is contained in section 1 of the Guardianship of Minors Act 1971:[33]

> Where in any proceedings before any court . . .
> (a) the legal custody or upbringing of a child; or
> (b) the administration of any property belonging to or held on trust for a child, or the application of the income thereof,
>
> is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

The exposition of this rule which has most frequently been relied upon in later cases is that of Lord MacDermott in *J.* v. *C.*[34] It means:

> more than that the child's welfare is to be treated as the top item in a list of items relevant to the matters in question. [The words] connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

As we observed in our Working Paper on Custody:[35]

> His Lordship therefore makes it plain that the decision of the court must be "that which is most in the interests of the child's welfare". Hence the court need only take into account considerations which are relevant to the child's welfare and all other factors, including the way in which married parents have behaved towards one another, are relevent only in so far as they cast light upon that welfare.[36] In other words the rule of paramountcy must be applied "without qualification, compromise or gloss."[37]

In the context of disputes between parents and others, we later observed that "the indications are that the priority given to the welfare of the child needs to be strengthened rather than undermined. We could not contemplate making any recommendation which might have the effect of weakening the protection given to children under the present law.[38] Hence we proposed that the welfare of the child should continue to be the paramount consideration whenever custody or upbringing is in question between individuals. There was unanimous support for this recommendation.

3.13 We suggested, however, two modifications in the present formulation of the paramountcy rule. First, the interests of the child whose future happens to be in issue in the proceedings before the court should not in principle prevail over those of other children likely to be affected by the decision.[39] Hence their welfare should also be taken into consideration. Secondly, the word "first" had caused confusion in that it had in the past led some courts to balance other considerations *against* the child's welfare rather than to consider what light

[31] *Infra*, para. 3.25.

[32] The question of whether courts should have any powers over the care and treatment of people who have reached 18 is part of the much wider issue of the status of mentally handicapped adults and is outside the scope of the present exercise.

[33] As amended by the Guardianship Act 1973, the Domestic Proceedings and Magistrates' Courts Act 1978 and the Family Law Reform Act 1987; it first appeared as section 1 of the Guardianship of Infants Act 1925.

[34] [1970] A.C. 668, at pp. 710–711.

[35] (1986) Working Paper No. 96, para. 6.9.

[36] *S. (B.D.)* v. *S. (D.J.)* [1977] Fam. 109; see also *Re-Adoption Application No. 41/61* [1963] 1 Ch. 315, *per* Danckwerts L. J. at p. 329.

[37] *Re C. (A Minor)* (1979) 2 F. L. R. 177 *per* Roskill L. J. at p. 184.

[38] (1986) Working Paper No. 96, para. 6.22.

[39] (1986) Working Paper No. 96, para. 6.16.

they shed upon it.[40] Since *J. v. C.*,[41] that view has been decisively rejected in the courts[42] and a modern formulation should reflect this.[43] These proposals were approved by all those who commented upon them.

3.14 It could be said that, given its recent interpretation in the courts, retaining the present formula does no harm. However, merely to drop "first", as a piece of "draftsman's duplicity (now obsolete)",[44] does nothing to resolve the earlier confusion. Litigants might still be tempted to introduce evidence and arguments which had no relevance to the child's welfare, in the hope of persuading the court to balance one against the other. The whole aim of these proposals is to state the modern law simply and clearly. We recommend, therefore, that in reaching any decision about the child's care, upbringing or maintenance, the welfare of any child likely to be affected by the decision should be the court's only concern. Where the decision relates to the administration or application of the child's property, however, the court should only be concerned with the welfare of that child.[45]

3.15 If formulated in this way, the rule can be applied to *all* decisions under the Bill, for all are solely concerned with the children's welfare. However, certain types of decision can only be taken in defined circumstances. These circumstances limit the courts' powers to entertain certain applications or to make certain orders, but they do not affect the fundamental principle that if the court does have power to make an order it is guided solely by the children's welfare. Thus, for example, we later recomend that non-parents will be able to apply for all types of order about a child's upbringing, but in most cases only if they have leave of the court.[46] We also recommend the factors which the court should consider in giving leave, but these are designed to clarify and focus the situations in which it will be for the child's own benefit to permit the application to proceed. Similarly, the conditions recommended by the Review of Child Care Law[47] for the making of care and supervision orders are designed to ensure that the authorities cannot intervene simply because what they propose will be better than what the parents can provide. They are all nevertheless related to the child's own welfare and not to other factors. This is one welcome effect of drawing a clear distinction between civil and criminal proceedings relating to children.

3.16 No such conditions will operate once the court has to decide what order, if any, to make between private individuals who are disputing some aspect of the child's upbringing (the usual case being a custody or access dispute between parents). In such cases, the new formulation still allows, and indeed requires the court to take into account *all* the relevant circumstances and factors bearing upon the children's welfare. It merely excludes factors which have no relevance to their welfare and explains the relevance of others. Many of the complaints which divorcing couples make against one another are of no concern at all to their children or their children's welfare.[48] Others, such as violence or serious irresponsibility, may very well be relevant. Similarly, the strength of a parent's natural "wishes and feelings", which can stem from parenthood itself,[49] may be "capable of ministering to the welfare of the child in a very special way".[50] They may also blind the parent to the overall needs of the child, which must always prevail.

A checklist of relevant factors

3.17 In our Working Paper on custody,[51] we also suggested that a statutory "checklist" of factors relevant to custody and similar decisions might assist the courts in carrying out this

[40]e.g. *Re L. (Infants)* [1962] 1 W. L. R. 886 and *Re F. (An Infant)* [1969] 2 Ch. 238, at p. 241.

[41][1970] A. C. 668.

[42]*Re K. (Minors) (Children: Care and Control)* [1977] Fam. 179 and *S. (B. D.)* v. *S. (D. J.)* [1977] Fam. 109; see also *Re K.D. (A Minor) (Ward: Termination of Access)* [1988] 2 W. L. R. 398, at p. 414, where Lord Oliver observed, ". . . I do not find it possible to conceive of any circumstances which could occur in practice in which the paramount consideration of the welfare of the child would not indicate one way or the other whether access should be had or should continue."

[43](1986) Working Paper No. 96, para. 6.9; see also F. R Bennion, "First Consideration: A Cautionary Tale", (1976) 126 N. L. J. 1237.

[44]F. R. Bennion, *loc. cit.*

[45]Property includes the beneficial interest in property held on trust for the child; but it cannot be right to require the trustees or the courts to regard the welfare of a child beneficiary as paramount over the interests of other beneficiaries in the administration of the trust property itself; section 1 of the 1971 Act may appear to require this but has not to our knowledge been so interpreted.

[46]*Infra*, para. 4.42.

[47]Review of Child Care Law (1985), R. 116; The Law on Child Care and Family Services (1987), Cm. 62, para.59; *infra*, para. 5.6.

[48]As is amply demonstrated by the feelings of many when their parents part; see e.g. A. Mitchell, *Children in the Middle* (1985).

[49]*Re C. (M. A.) (An Infant)* [1966] 1 W.L.R. 646.

[50]*J. v. C.* [1970] A. C. 668, *per* Lord MacDermott at p. 715.

[51](1986) Working Paper No. 96, paras. 6.34–6.39.

duty. Such checklists already exist in relation to the other discretionary powers of the courts in family matters, notably over the occupation of the matrimonial home, [52] financial provision,[53] and property adjustment.[54] They are found in many other common law jurisdictions to assist the courts in making decisions about children.

3.18 The "checklist" received a large majority of support from those who considered the matter. It was perceived as a means of providing greater consistency and clarity in the law and was welcomed as a major step towards a more systematic approach to decisions concerning children. Respondents pointed out that it would help to ensure that the same basic factors were being used to implement the welfare criterion by the wide range of professionals involved, including judges, magistrates, registrars, welfare officers, and legal advisers. One respondent, for example, who is a magistrates' clerk, thought that the list would be particularly useful when advising magistrates in making decisions in contested custody cases and in formulating reasons in the event of an appeal. It would also provide a practical tool for those lacking experience and confidence in this area. Perhaps most important of all, we were told that such a list could assist both parents and children in endeavouring to understand how judicial decisions are made. At present, there is a tendency for advisers and their clients (and possibly even courts) to rely on "rules of thumb" as to what the court is likely to think best in any given circumstances. A checklist would make it clear to all what, as a minimum, would be considered by the court. At the very least, it would enable the parties to prepare and give relevant evidence at the outset, thereby avoiding the delay and expense of prolonged hearings or adjournments for further information. Moreover, we were informed that solicitors find the checklist applicable to financial matters most useful in focussing their clients' minds on the real issues and therefore in promoting settlements. Anything which is likely to promote the settlement of disputes about children is even more to be welcomed. We recommend, therefore, that a statutory checklist similar to that provided for financial matters be provided for decisions relating to children.

3.19 We recognise, however, that a statutory checklist contains certain dangers against which the legislation must be careful to guard. It should not appear to increase the burden upon courts in uncontested cases and thus encourage them to intervene unnecessarily in the course of considering the arrangements proposed for the children. There is no evidence at all that the checklist for financial matters has had this effect. In the light of the proposals which we have already made,[55] there is even less reason to suppose that a checklist for children would have such an effect. The courts would only apply it where an issue had arisen. Secondly, while the checklist may provide a clear statement of what society considers the most important factors in the welfare of children, it must not be applied too rigidly or be so formulated as to prevent the court from taking into account everything which is relevant in the particular case. Thirdly, a statutory checklist is only practicable if it is confined to the major points, leaving others to be formulated elsewhere. If a detailed checklist is provided, it cannot be appropriate to all types of decision and thus separate lists would be needed to deal with each issue. This would lead to unnecessary complexity, not only in the statute, but also in legal proceedings, where issues of custody and access (or residence and contact) often go side-by-side. The more detailed the list, the greater the risk of an appeal if the court were to fail to cover every single point in the course of explaining its decision. Finally, if a detailed list is prescribed by statute, it can only be changed by statute, yet knowledge and understanding of children and their needs is developing all the time and the courts must be able to keep pace with this.

3.20 In our Working Paper on Custody[56] we suggested an example of a checklist which was based upon the factors found relevant in recent decisions of the courts. Subject to some points of detail, it found favour with almost all who commented upon it. For the reasons given above, however, it appears to us too complex and detailed a list to appear in legislation. We have therefore sought to reduce it to the essentials, taking into account the very helpful comments received. We recommend that the court, in considering making an order between individuals, is to have regard to all the circumstances of the case, including:

(a) the ascertainable wishes and feelings of the child, considered in the light of his age and understanding;

(b) the child's physical, emotional and, where relevant, educational needs;

[52]Matrimonial Homes Act 1983, s. 1(3).
[53]Matrimonial Causes Act 1973, s. 25; Domestic Proceedings and Magistrates' Courts Act 1978, s. 3.
[54]Matrimonial Causes Act 1973, s. 25.
[55]*Supra*, paras. 3.3 and 3.9.
[56](1986) Working Paper No. 96, para. 6.38.

(c) the effect upon the child of any change in his circumstances, having regard to their duration and to his separation from any person with whom he has been living;
(d) the child's age, sex, background and other relevant characteristics;
(e) any harm which the child has suffered or is at risk of suffering;
(f) how capable each parent and any other relevant person is of meeting the child's needs.

3.21 As the list is so brief, courts will clearly have power to specify other matters which they would wish to see covered in any welfare officer's report. Further, regulations or rules of court should be able to specify in more detail what is to be covered in reports unless the court orders otherwise, as is done in adoption and custodianship cases at present.[57] This will enable the details to be developed in the light of experience and changing needs and should promote consistency of practice in welfare officers and courts. We did consider whether the matter could be entirely dealt with in this way but decided against it for two main reasons. First, if it is intended that courts as well as welfare officers must address their minds to certain factors then it should be so provided in the legislation. Secondly, that approach would run counter to the strong support for a statutory checklist proposal from so many quarters on consultation.

The views of the child

3.22 The Working Paper on Custody[58] provisionally proposed that, at least in contested cases, the court should have to ascertain the "wishes and feelings" of the child and give due consideration to them in the light of his age and understanding. Such a requirement already exists in adoption cases.[59] Views were invited upon whether the requirement should be expressed independently or as part of a "checklist" and on whether it should extend to uncontested cases. The two questions are related for, as we have already seen,[60] the effect of including the requirement in a checklist is in practice to limit it to contested cases.

3.23 The opinion of our respondents was almost unanimously in favour of the proposal to give statutory recognition to the child's views. Obviously there are dangers in giving them too much recognition. Children's views have to be discovered in such a way as to avoid embroiling them in their parents' disputes, forcing them to "choose" between their parents, or making them feel responsible for the eventual decision. This is usually best done through the medium of a welfare officer's report, although most agreed that courts should retain their present powers to see children in private.[61] Similarly, for a variety of reasons the child's views may not be reliable, so that the court should only have to take due account of them in the light of his age and understanding. Nevertheless, experience has shown that it is pointless to ignore the clearly expressed wishes of older children.[62] Finally, however, if the parents have agreed on where the child will live and made their arrangements accordingly, it is no more practicable to try to alter these to accord with the child's views than it is to impose the views of the court.[63] After all, united parents will no doubt take account of the views of their children in deciding upon moves of house or employment but the children cannot expect their wishes to prevail.[64]

3.24 These considerations all point towards including the child's views as part of a statutory checklist, which in practice will be limited to contested cases, rather than as a separate consideration in their own right. This solution was generally favoured by our respondents and we so recommend. Were there not to be a statutory checklist, however, the increasing recognition given both in practice and in law to the child's status as a human being in his own right,[65] rather than the object of the rights of others, would clearly require an independent duty in the court to take account of his views to the same extent as that in adoption cases.[66]

3.25 One further point may conveniently be mentioned here. The courts' present powers to make custody and access orders endure until the child reaches 18, although the court will

[57] e.g. Adoption Rules 1984, S.I. 1984/265, sched. 2; Custodianship (Reports) Regulations 1985, S.I. 1985/792, (as amended by S.I. 1985/1494), sched.; see further *infra*, para. 6.19.
[58] (1986) Working Paper No. 96, paras. 6.40–6.44 and 7.37.
[59] Adoption Act 1976, s. 6.
[60] *Supra*, para. 3.19.
[61] Judges in the High Court and county courts may do so, but magistrates may not; see (1986) Working Paper No. 96, para. 2.86; the question of separate legal representation and party status for children is discussed *infra*, paras. 6.22 *et seq*.
[62] e.g. *M.* v. *M. (Transfer of Custody: Appeal)* [1987] 2 F.L.R. 146.
[63] *Supra*, para. 3.6.
[64] M. King, "Playing the Symbols—Custody and the Law Commission", (1987) 17 Fam. Law 186, at p. 190.
[65] *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] A.C.112.
[66] Once again, this is recommended by the Council of Europe, *op. cit.* Part II, n. 16.

rarely, if ever, make a custody order which is contrary to the wishes of a child who has reached 16.[67] Any other approach is scarcely practicable, given that this is the age at which children may leave school and seek full-time employment and become entitled to certain benefits or allowances in their own right. However, the matter goes beyond the question of what is practicable. There are powers of direct enforcement of custody orders which operate upon the child rather than the adults involved.[68] The older the child becomes, the less just it is even to attempt to enforce against him an order to which he has never been party. As we explain below,[69] it is usually thought unnecessary to accord party status to children in family disputes and in general we would not disagree. We recommend, therefore, that orders relating to the child's residence, contact or other specific matters of upbringing should not be made in respect of a child who has reached 16 unless there are exceptional circumstances and that orders made before that age should expire then unless in exceptional circumstances the court orders otherwise.[70] There may be exceptional cases in which it is necessary to protect an older child from the consequences of immaturity[71] but these will be rare and the court will no doubt always wish to make the child a party before doing so.

[67] *Hall* v. *Hall* [1946] 175 L.T. 355.
[68] e.g. Family Law Act 1986, s. 34.
[69] *Infra*, paras. 6.22 *et seq.*
[70] As is the law in e.g. New Zealand; see Guardianship Act 1968, s. 24(12) and (2).
[71] An example might be *Re S. W. (A Minor) (Wardship: Jurisdiction)* [1986] 1 F.L.R.24, where a 17-year-old girl was made a ward for the few remaining months of her minority in an attempt to control her behaviour.

PART IV

ORDERS BETWEEN PARENTS AND INDIVIDUALS

4.1 We now turn to the orders which courts may make dealing with particular aspects of parental responsibility, usually between parents but sometimes between parents and other individuals. Our Working Paper on Custody[1] listed the twelve different provisions under which the courts may at present make final orders for custody and access and identified the many gaps, inconsistencies and anomalies amongst them. Apart from the inevitable confusion resulting from these, there are two main causes for concern. First, the system may no longer be the best designed to cater for the needs of children whose parents are separated or divorced. Secondly, because of the gaps in the present system, some matters can only be resolved by resorting to the wardship jurisdiction of the High Court, even though the expertise or authority of the High Court would not otherwise be needed.

Orders between parents

4.2 There are three main difficulties with the present law. First, as analysed in detail in the Working Paper,[2] the orders available differ according to the proceedings brought. Divorce courts may allocate "custody", "care and control" and "access" in any way they see fit.[3] The most common order is for sole custody to one parent and reasonable access to the other, but joint custody orders are becoming increasingly common.[4] Joint custody orders in this country, unlike many of those in the United States, do not share the actual care of the children between the parents, although the courts do have power to do this.[5] Instead, care and control is granted to one parent and the joint custody order gives the other parent a power of veto over "strategic" decisions such as education, religion or major medical treatment.[6] Domestic courts hearing applications for financial relief under the Domestic Proceedings and Magistrates' Courts Act 1978 and all courts hearing applications for custody or access under the Guardianship of Minors Act 1971 can only make orders for "legal custody" and "access".[7] They cannot make orders for joint legal custody as such although they can give the same power of veto over specified or even all decisions apart from actual custody.[8] It is doubtful whether they can make orders relating to actual custody alone, for example that it be shared.[9] "Legal custody" is defined in the Children Act 1975[10] as "so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent) . . ." while it now appears that "custody" under the Matrimonial Causes Act 1973 covers everything, including such powers over property as may exist.[11]

4.3 The second difficulty is that the effect of these orders is no longer clear or well-understood. Parents not unnaturally think that a sole custody order puts the custodial parent in sole control, but the Court of Appeal appeared to say otherwise in *Dipper* v. *Dipper*.[12] Parents who are reluctant to concede sole custody are advised that joint custody is "an important ratification of their continued parental role".[13] Parents with care and control who see joint custody as a threatening interference are told that it is simply "a matter of words".[14] In most cases, this is obviously right, because the strategic matters over which a power of veto might be exercised very rarely arise. The fact that a joint custody order technically gives a power of veto may not be generally appreciated. Certainly, both judges and solicitors have reported difficulty in explaining the effect of orders to clients.[15]

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[1](1986) Working Paper No. 96, Part II.

[2]*Ibid.*

[3]Matrimonial Causes Act 1973, s. 42.

[4]J. A. Priest and J. C. Whybrow, *Custody Law in Practice in the Divorce and Domestic Courts,* (1986) Supplement to Working Paper No. 96, esp. Table 6.

[5](1986) Working Paper No. 96, para. 4.44–4.46; but see *Riley* v. *Riley* [1986] 2 F.L.R. 429.

[6]*Ibid.*, paras. 2.42–2.43, 4.35–4.43; it is also possible to grant "care and control" to one parent and sole custody to the other, as was done in the past to ensure that the children were in fact brought up by the parent best able to do so, even though she might be the guilty party in their divorce, without depriving the "unimpeachable" parent of his rights, e.g. *Allen* v. *Allen* [1948] 2 All E.R. 413; it is no longer thought appropriate to deprive the parent looking after the children of her share in those rights, e.g. *Dipper* v. *Dipper* [1981] Fam. 31, *Williamson* v. *Williamson* [1986] 2 F.L.R. 146; but for an exceptional case where it was done, see *Jane* v. *Jane* (1983) 4 F.L.R. 712.

[7]1978 Act, s. 8(2); 1971 Act, ss. 9 and 10, as substituted by Family Law Reform Act 1987.

[8]1978 Act, s. 8(4); 1971 Act, s. 11A(1).

[9](1986) Working Paper No. 96, paras. 2.45–2.48.

[10]s. 86.

[11]See *Hewer* v. *Bryant* [1970] 1 Q.B.357, *per* Sachs L. J. at p. 373 where it is doubted whether this was the original intention.

[12][1981] Fam. 31, *per* Ormrod L. J. at p. 45; see also Cumming-Bruce L. J. at p. 48; (1986) Working Paper No. 96, paras. 2.36–2.38.

[13]Priest and Whybrow, *op. cit.* n. 4, para. 8.4.

[14]*Ibid.*

[15]*Ibid.*, para. 5.25.

4.4 The third difficulty is that the views and practices of courts differ very considerably, largely because of differences of opinion amongst judges, legal practitioners and clients about the merits of joint custody orders. While some see them as an important means of encouraging the "non-custodial" parent to remain involved, others see them as a purely symbolic exercise which is unnecessary if the couple will co-operate in any event and a recipe for continual conflict if they cannot.[16] The result is that the place at which the parents divorce is likely to have a considerable effect upon the orders made, even though the practical outcome, in terms of where the child lives, is much the same. Our supplemental study of orders made in ten courts, for example, found that joint custody formed only 2 per cent of custody orders in one busy court but nearly 33.8 per cent in another. Yet irrespective of the order made, the children lived with the mother in between 85 per cent and 92.6 per cent of cases.[17]

4.5 In framing a scheme of orders to replace the present law, we have had in mind throughout the clear evidence that the children who fare best after their parents separate or divorce are those who are able to maintain a good relationship with them both.[18] The law may not be able to achieve this—indeed we are only too well aware of the limits of the law in altering human relationships—but at least it should not stand in their way. Our respondents were generally agreed on three points. Where the parents are already able to co-operate in bringing up their children, the law should interfere as little as possible. Where they may be having difficulty, it should try to "lower the stakes" so that the issue is not one in which "winner takes all" or more importantly "loser loses all". In either case, the orders made should reduce rather than increase the opportunities for conflict and litigation in the future.

4.6 The scheme which we provisionally proposed in the Working Paper had three basic elements.[19] The first, as we have already explained,[20] is that the parents should retain their equal parental responsibility and with it their power to act independently unless this is incompatible with the court's order. A parent who does not have the child with him should still be regarded in law as a parent. He should be treated as such by schools and others, so that he can be given information and an opportunity to take part in the child's education.[21] He should not be able to exercise a power of veto over the other, but should be able to refer any dispute to the court if necessary. A parent who does have the child with him should be able to exercise his responsibilities to the full during that time.

4.7 As already seen, this aspect of our scheme was supported by the majority of our respondents. It also bears a striking resemblance to the conclusions of the Law Commission on the last occasion that we consulted and made recommendations in this area. There we said that the position where the parent without actual custody deserved sympathetic consideration should have the following features:[22]

(a) The mother (assuming she is the person in whose actual custody the court decides the child should live) would be free to exercise her full parental rights and authority without consulting the father;

(b) The father would, however, retain parental rights and authority in relation to the child, other than the right to actual possession of the child. He would also be entitled to access to the child;

(c) As the father would retain parental rights and authority, except for the right to actual custody, he would be entitled to his own point of view on the way in which the child was being brought up . Where he was in agreement with the mother's unilateral decisions regarding upbringing, he would not need to intervene in any way. Where, however, he thought she was mistaken in some course of action affecting the child's welfare, he should be entitled to apply to the court for their direction on the particular matter in issue.

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[16] *Ibid.*, Part V; our consultations revealed the same strong divergence of opinion.

[17] *Ibid.*, Table 9 and Figure F.4.

[18] e.g. J. S. Wallerstein and J. B. Kelly, *Surviving the Breakup* (1980), M. Lund, "The non-custodial father" in C. Lewis and M. O'Brien (eds), *Reassessing Fatherhood* (1987); for overviews, see M. Richards and M. Dyson, *Separation, Divorce and the Development of Children: A Review* (1982), S. Maidment, *Child Custody and Divorce* (1984), Ch. 6.

[19] (1986) Working Paper No. 96, paras. 4.51–4.59.

[20] *Supra*, paras. 2.10–2.11.

[21] Currently the definition of parent in the Education Act 1944, s. 114(1), is not affected by which of them has custody; however, an order that the child is to live with one of them will usually put the choice of school under the control of that parent, subject to any views the other might wish to express and to any specific direction of the court if the issue is disputed.

[22] Report on Matrimonial Proceedings in Magistrates' Courts (1976), Law Com. No. 77, para. 5.31.

We see no reason why these features should not generally apply to all parents. What requires to be changed are the orders which were devised to give effect to the decisions about where the child should live.

4.8 The second element in our proposals was designed to reflect the practical reality that parental status is largely a matter of everyday responsibility rather than rights. It is "a mistake to see custody, care and control and access as differently-sized bundles of powers and responsibilities in a descending hierarchy of importance".[23] Most parental responsibilities can only be exercised while the parent has the child, for only then can the parent put into effect the decisions taken. Equally, however, it is then that the parent must be in a position to meet his responsibilities as the circumstances and needs of the child dictate. Parental responsibilities, therefore, largely "run with the child".[24] Clearly, in most cases, one parent carries a much heavier burden of that responsibility than does the other. The present system of orders, by concentrating on the allocation of "rights", appears more concerned with whether one parent can control what the other parent does while the child is with the other, than with ensuring that each parent properly meets his responsibilities while the child is with him. The practical question in most cases is where the child is to live and how much he is to see of the other parent. Hence we provisionally proposed that custody and access orders should be replaced by a single order, possibly termed "care and control", allocating the child's time between the parents.

4.9 The majority of our respondents agreed with this approach. There were some who argued that the terms "custody" and "access" were reasonably well understood so that change was unnecessary. But the evidence from our supplemental study,[25] from our meetings with judges and others and from many respondents with great practical experience is clearly to the contrary. One prominent organisation observed that the present law only works because of the general misunderstanding of its effect. Further, while some were afraid that the proposal would encourage interference and exacerbate hostility, most thought that the reverse would be the case. They welcomed its emphasis on the continuing parental responsibility of both parents. There should be a general "lowering of the stakes" in disputed cases and less encouragement for either party to interfere with the other. If there is concern that one parent will cause difficulties for the other in the way he exercises his responsibilities, it can be dealt with under the third element of our proposals. This was that the court should be able to attach conditions or specify matters in respect of which one or other parent was not to have the power of independent action. It should also be borne in mind that neither parent is to act in a way which is incompatible with the court's order.[26]

4.10 However, several respondents who approved of the general thrust of our provisional proposals suggested different terminology from "care and control" which still carries some of the proprietorial connotations of "custody". There is also a practical disadvantage in having only a single order which divides the child's time between his parents. Most children will live with one parent for most of the time and spend variable amounts of time with the other. The usual order at present is for "reasonable" access.[27] Our respondents did not think it desirable for orders to spell this out in any more detail unless and until disputes arose. Parents are usually able to agree upon their own arrangements, which have to be flexible enough to meet changing needs and circumstances. Rather than being required to specify the periods of time intended, therefore, the court should normally deal with where (or, more accurately, with whom) the child is to live, whom he should see, and any other specific matters which have to be resolved.

4.11 We recommend, therefore, that the courts should have the following orders available:

(a) a "residence order", settling the arrangements as to the person or persons with whom the child is to live;

(b) a "contact order", requiring the person with whom the child lives or is to live to allow the child to visit or otherwise have contact with another person;

(c) a "specific issue" order, resolving a dispute about a particular aspect of parental responsibility;

(d) a "prohibited steps" order, that a specified step is not to be taken without the consent of the court.

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[23](1986) Working Paper No.96, para. 4.51.
[24]*Ibid.*, para. 7.17.
[25]Priest and Whybrow, *op. cit.* n. 4.
[26]*Supra*, para. 2.11.
[27](1986) Working Paper No. 96, paras. 2.56 and 4.27–4.34.

In making any such order the court should also be able:

(a) to include directions about how it is to be carried into effect;

(b) to impose conditions to be complied with by any person with parental responsibility or in whose favour the order is made;

(c) to specify the period for which the order, or any provisions in it, is to have effect;

(d) to make such incidental, supplemental or consequential provisions as the court thinks fit.

The purpose and effect of these orders is explained below. The power to make them should include power to vary or discharge them.

(a) *Residence orders*

4.12 Apart from the effect upon the other parent, which has already been mentioned,[28] the main difference between a residence order and a custody order is that the new order should be flexible enough to accommodate a much wider range of situations. In some cases, the child may live with both parents even though they do not share the same household. It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children's benefit.[29] However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged.[30] None of our respondents shared the view expressed in a recent case[31] that such an arrangement, which had been working well for some years, should never have been made. More commonly, however, the child will live with both parents but spend more time with one than the other. Examples might be where he spends term time with one and holidays with the other, or two out of three holidays from boarding school with one and the third with the other. It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order covering both parents rather than a residence order for one and a contact order for the other. Hence we recommend that where the child is to live with two (or more) people who do not live together, the order may specify the periods during which the child is to live in each household. The specification may be general rather than detailed and in some cases may not be necessary at all.

4.13 Under the present law some, but not all, custody orders lapse if the parties later live together for more than six months.[32] Although this could be seen as an impediment to reconciliation, it is unrealistic to keep in being an order that the child should live with one parent rather than the other when both are living together. If they separate again, the circumstances may well be different and it would be wrong to place one in an automatically stronger position than the other. Hence we recommend that all residence orders should lapse if parents who both have parental responsibility live together for a continuous period of more than six months. These arguments only apply where the couple both have parental responsibility, so that we would not recommend applying this rule where they do not or to spouses who are not both parents of the child. It would be extremely difficult to do so in the unified structure of orders which we recommend.

4.14 The effect of a residence order is simply to settle where the child is to live. If any other conditions are needed they must usually be specified. However, the Matrimonial Causes Rules 1977 at present specify two conditions which must be included in divorce court custody orders unless the court otherwise directs. First, the parent with custody must not change the child's surname without the written consent of the other parent or the leave of a judge.[33] The child's surname is an important symbol of his identity and his relationship with his parents. While it may well be in his interests for it to be changed,[34] it is clearly not a matter on which the parent with whom he lives should be able to take unilateral action. We recommend, therefore, that it should be an automatic condition of all residence orders that the child's surname should not be changed without either the written consent of each person with parental responsibility or the leave of the court.

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[28] *Supra*, para. 4.6; see also para. 2.11.

[29] (1986) Working Paper No. 96, para. 4.45.

[30] *Ibid.*, para. 4.44.

[31] *Riley* v. *Riley* [1986] 2 F.L.R. 429.

[32] Domestic Proceedings and Magistrates' Courts Act 1978, s. 25(1); Guardianship Act 1973, s. 5A(1) (covering orders under the Guardianship of Minors Act 1971); under the former, the parties may be a married couple who are not both parents of the child, but there is no equivalent in the Matrimonial Causes Act 1973.

[33] Matrimonial Causes Rules 1977, r. 92(8); there is no equivalent in any other jurisdiction but the law is probably the same, see *Re T. (orse H.) (An Infant)* [1963] Ch. 238, *Y.* v. *Y. (Child's Surname)* [1973] Fam. 147.

[34] For the approach of the courts to this question, cf. *W.* v. *A. (Minors: Surname)* [1981] Fam. 14, *Re W.G.* (1976) 6 Fam. Law 210; and *R.* v. *R. (Child: Surname)* [1977] 1 W.L.R. 1256, *D.* v. *B. (orse D.) (Surname: Birth Registration)* [1979] Fam. 38.

4.15 Secondly, a divorce court order for custody or care and control must provide for the child not to be removed from England and Wales without leave of the court except on such terms as the court may specify in the order.[35] This means that, unless the court makes an exception at the outset, the child cannot be taken on holiday abroad (or even to Scotland), even if the other parent agrees, without the trouble and expense of an application for leave. This is clearly quite unrealistic these days and we suspect that the requirement is often ignored. Otherwise, an order for legal custody does not permit a person to arrange the child's emigration unless he is a parent or guardian[36] but the order contains no more stringent requirement unless the court specifically prohibits removals[37] and we understand that it rarely does so. The matter could be dealt with entirely by the criminal law.[38] However, taking the child abroad indefinitely can obviously have a serious effect upon his relationship with the other parent and it may be important to remind the residential parent of this, and of the steps to be taken if she wishes to do so. A simple, clear general rule seems most likely to be remembered and observed. Hence we recommend that it should be an automatic condition of all residence orders that the child should not be taken out of the United Kingdom[39] by any person for longer than a calendar month without the written consent of any person with parental responsibility or the leave of the court. If there is particular cause to believe that either parent might remove the child permanently, of course, the court may make a more specific prohibition under its general powers to attach conditions or prohibit specified steps.[40] Hence there is no need for the more specific powers to prohibit removal which may be repealed. Similarly, the court may grant the leave required in advance either in general or in particular. It follows that we also recommend revocation of the relevant provision in the Matrimonial Causes Rules. Where going abroad is within the terms of the order, it should be treated as happening with the leave of the court for the purposes of the Child Abduction Act 1984.

4.16 Thus far, the discussion has assumed that both parents have parental responsibility. But it is possible that an unmarried father will apply to have the child to live with him, even though he does not then have parental responsibility by a court order or agreement.[41] If his application is successful, it would be wrong to deny him the full range of parental responsibilities as well. These are principally the power to withhold agreement to adoption and to appoint a testamentary guardian, both of which he acquires at present under a custody order.[42] Hence we recommend that the automatic effect of a residence order in favour of such a father should be a parental responsibility order as well. That order should last at least as long as the residence order and should not automatically end if the residence order is changed. Once an unmarried father has undertaken full responsibility and formed an ordinary paternal relationship with the child it will rarely be in the child's interests for him to be treated differently from any other father. It is a fundamental principle of all these recommendations that changes in the child's residence should interfere as little as possible in his relationship with both his parents.

(b) *Contact orders*

4.17 Where the child is to spend much more time with one parent than the other, the more realistic order will probably be for him to live with one parent and to visit the other. There are important differences between this and the present form of access order. It will not provide for the "non-custodial" parent to have access to the child. It will provide for the child to visit and in many cases stay with the parent. While the child is with that parent, the parent may exercise all his parental responsibilities. He must not do something which is incompatible with the order about where the child is to live.[43] The court may also attach other conditions if there are particular anxieties or bones of contention but these should rarely be required. If visiting is not practicable, the court may nevertheless order some other form of contact with the child, including letters or telephone calls or visits to the child. We would expect, however, that the normal order would be for reasonable contact, which would encompass all types. As

[35]Matrimonial Causes Rules 1977, r. 94(2).

[36]Children Act 1975, s. 86.

[37]Domestic Proceedings and Magistrates' Courts Act 1978, s. 34; Guardianship of Minors Act 1971, s. 13A; Children Act 1975, s. 43A, as amended by Family Law Act 1986, s. 35(1).

[38]Child Abduction Act 1984, s. 1.

[39]The provisions referred to *supra* at n. 37 now refer to the United Kingdom, as does section 1 of the Child Abduction Act 1984; the Family Law Act 1986 provides for the reciprocal enforcement of orders within the United Kingdom.

[40]*Infra*, paras. 4.18 and 4.23.

[41]*Supra*, para. 2.18.

[42]Adoption Act 1976, ss. 16 and 72(1), latter as substituted by Family Law Reform Act 1987, s. 7; Guardianship of Minors Act 1971, s. 3(4), as inserted by Family Law Reform Act 1987, s. 6.

[43]For an example, see *supra*, para. 2.11.

with residence orders, a contact order requiring one parent to allow the child to visit the other should lapse automatically if the parents live together for a continuous period of more than six months.

(c) *Specific issue orders*

4.18 Specific issue orders may be made in conjunction with residence or contact orders or on their own. As between parents, they are the equivalent of orders under section 1(3) of the Guardianship Act 1973.[44] These are so rare that we suspect that wardship proceedings are more often invoked when parents are in dispute about a particular matter. As with conditions attached to other orders, the object is not to give one parent or the other the "right" to determine a particular point. Rather, it is to enable either parent to submit a particular dispute to the court for resolution in accordance with what is best for the child. A court can determine in the light of the evidence what decision will be best for the child at the time. It may equally be content for decisions to be taken by each parent as they arise in the course of everyday life in the future. It may even attach a condition to a residence or contact order that certain decisions may not be taken without informing the other or giving the other an opportunity to object. But to give one parent in advance the right to take a decision which the other parent will have to put into effect is contrary to the whole tenor of the modern law.[45] A court can scarcely be expected to know in advance that the first parent's decision will be the best for the child.

4.19 However, a specific issue order is not intended as a substitute for a residence or contact order. There is obviously a slight risk that they might be used, particularly in uncontested cases, to achieve much the same practical results but without the same legal effects. We recommend, therefore, that it should be made clear that a specific issue order cannot be made with a view to achieving a result which could be achieved by a residence or contact order.

(d) *Prohibited steps orders*

4.20 Prohibited steps orders are also modelled on the wardship jurisdiction. The automatic effect of making a child a ward of court is that no important step may be taken without the court's leave.[46] An important aim of our recommendations is to incorporate the most valuable features of wardship into the statutory jurisdictions.[47] It is on occasions necessary for the court to play a continuing parental role in relation to the child, although we would not expect those occasions to be common. If this is in the best interests of the child, it should be made clear exactly what the limitations on the exercise of parental responsibility are. Hence, instead of the vague requirement in wardship, that no "important step" may be taken, the court should spell out those matters which will have to be referred back to the court. We would expect such orders to be few and far between, as in practice the wardship jurisdiction is more often invoked to achieve a particular result at the time than to produce the continuing over-sight of the court. One example, however, might be to ensure that the child is not removed from the United Kingdom, especially in a case where there is no residence order and so the automatic prohibition[48] cannot apply. As with specific issue orders, however, we recommend that these orders should not be capable of being made with a view to achieving a result which could be achieved by a residence or contact order.

(e) *Supplemental provisions*

4.21 The courts have interpreted their powers under section 42 of the Matrimonial Causes Act 1973 so flexibly as to enable them to make interim orders, delay implementation or attach other special conditions.[49] The other legislation contains specific provisions for similar purposes.[50] The object of our recommendation is to preserve the present flexibility of the divorce courts' powers within the new scheme of orders. We would not expect these supplemental powers to be used at all frequently, as most cases will not require them and all are subject to the general rule that orders should only be made where they are the most effective means of safeguarding or promoting the child's welfare.[51]

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[44]See also Guardianship of Minors Act 1971, s. 7 for disputes between joint guardians; Children Act 1975, s. 38 for disputes between joint custodians; and Domestic Proceedings and Magistrates' Courts Act 1978, s. 13 for disputes between people having a right jointly under s. 8(4).

[45]In particular, the disapproval of the old form of "split" orders giving custody to one and care and control to the other; *Williamson* v. *Williamson* [1986] 2 F.L.R.146.

[46]Wards of Court (1987), Working Paper No. 101, para. 2.15; N. Lowe and R. White, *Wards of Court*, 2nd ed., (1986), paras. 5.6 *et seq.*

[47]*Supra*, para. 1.4.

[48]*Supra*, para. 4.15.

[49](1986) Working Paper No. 96, paras. 2.70 and 2.73.

[50]Domestic Proceedings and Magistrates' Courts Act 1978, ss. 8(4) and (6) and 19; Guardianship of Minors Act 1971, ss. 11A(1) and (2) and Guardianship Act 1973, ss. 2(4)–(5E).

[51]*Supra*, para. 3.3.

4.22 The power to give directions as to how an order is to be put into effect is principally designed to enable the court to smooth the transition in those, in practice rare, cases in which it orders a change in the existing arrangements. In particular it will enable a delay before the child's residence is changed.[52] It will also confirm the existing power to define more precisely what contact is to take place under a contact order, if that is needed. Here again, it may be important to build up contacts gradually, sometimes with the help of a third party such as a relative or welfare officer.

4.23 The power to attach conditions and other incidental or supplemental provisions is principally designed to enable the court to resolve particular disputes or to direct how such a dispute is to be dealt with in the future. If, for example, there is a dispute about which school the child should attend, it can be made a condition of a residence order that the child attend a particular school. If there is a real fear that while the child is visiting one parent he will be removed from the country and not returned, then a condition of the contact order can prohibit all removal. If, on the other hand, as happened in *Jane* v. *Jane,*[53] there is real concern that the parent with whom the child is to live will not agree to a blood transfusion for the child, then a condition of the residence order can require her to inform the other parent so that he can agree to it. Alternatively, the court could order that such transfusions be given on specified medical advice without such agreement. Either solution is a more practical and realistic way of dealing with the problem than was an old-style "split" order made in that case, giving care and control to the mother and sole custody to the father only in order that he could agree to a blood transfusion should it ever be necessary. As with specific issue orders, the object is to provide a practical answer to a practical problem rather than to allocate "rights" for the future.

4.24 The power to specify the period for which the order, or any provision in it, is to have effect is intended to preserve the more flexible position under the Matrimonial Causes Act 1973, in which no rigid distinction is drawn between "interim" and "final" orders.[54] In reality, any order made about the child is interim in the sense that it can always be changed in the future as circumstances dictate. The court must always do the best it can on the information available to it at the time. If the information is inadequate the court itself should be setting the time-table for the case to come back. The rigid time-limits on interim orders in the other legislation[55] add nothing to these principles. We also suspect that their existence is largely ignored in courts which are more accustomed to setting return dates or making orders "until further orders". In our Working Paper on Care, Supervision and Interim Orders in Custody Proceedings, therefore, we provisionally recommended that the distinction between final and interim orders and the rigid limits on interim orders should be abolished.[56] There was general approval for this part of the recommendation. It should, however, be made clear that where a question relating to the child arises in matrimonial or any other proceedings the court has power to make an order before the main issue is heard. We shall deal later with the related question of a timetable to reduce delays in disputed cases.[57]

Orders between parents and non-parents

4.25 Under the present law, there are also discrepancies between the orders which may be made in favour of non-parents such as step-parents, relatives or foster-parents similar to those between parents.[58] In divorce proceedings, the court may again make any sort of order, for example that a step-parent and parent have joint custody, or that they have joint "care and control" while the other parent retains his parental status through a joint custody order or no order at all. In all other proceedings, the court can only grant "legal custody" to a third party;[59] if the third party is a step-parent, he shares it with the parent to whom he is married; otherwise there is no provision for sharing responsibilities between parents and non-parents,

[52]Although there was probably always power to do this, it was thought necessary to spell it out in the provisions referred to above; see (1976) Law Com. No. 77, paras. 5.39–5.47.

[53](1983) 4 F.L.R. 712.

[54]Care Supervision and Interim Orders in Custody Cases (1987), Working Paper No. 100, Part IV; see also *Rayden on Divorce,* 15th ed., (1988), pp. 1403–4.

[55]Domestic Proceedings and Magistrates' Courts Act 1978, s. 19; Guardianship Act 1973, s. 2(4) and (5C)–(5E); Children Act 1975, s. 34(5).

[56](1987) Working Paper No. 100, paras. 4.11–4.12.

[57]*Infra,* paras. 4.54–4.58.

[58]*Supra,* para. 4.2; see also (1986) Working Paper No. 96, para.5.52.

[59]This is because non-parents (other than spouses involved in matrimonial proceedings) can only be granted legal custody by way of a custodianship order; see Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(3), Children Act 1975, s. 37(3).

so that parents are deprived of almost all their status.[60] In divorce proceedings, the court may also grant access to any third party, but in other proceedings there are only very limited powers to grant access to grand-parents.[61] The one exception is that where a married couple have treated a child as a child of their family, the court hearing divorce or matrimonial proceedings between them has the same powers as it would if they were both parents and thus can make orders for access as well as the usual varieties of custody.[62]

4.26 The Working Paper provisionally proposed replacing the current inconsistent scheme of orders with a new scheme similar to that available between parents.[63] There would have to be some differences. As with unmarried fathers,it would be necessary to make it clear that a non-parent with whom it was ordered that the child was to live should have almost all the powers and responsibilities of a parent during that time. For this reason, such people might be termed "guardians",[64] as had originally been recommended by the Houghton Committee[65] for what has since become "custodianship". There would, moreover, be a difference between non-parents with whom the child was to live and those with whom the child was to have contact, as the latter would not have parental responsibilities other than those inevitably associated with having the child for a short time.[66]

4.27 Many respondents welcomed the proposed removal of the present terms and the greater flexibility that this would bring. Given the range of orders which is now proposed between parents,[67] we see no reason why the same range of orders should not be available for non-parents (although the circumstances in which the courts will be able to make these will be more limited).[68] We doubt, however, whether it would be helpful for the law to use the term "guardian" for people with whom the child is to live. "Guardian" is clearly preferable to "custodian". It is a familiar term and emphasises that it is the responsibility to care for the child which gives rise to the powers to act for his benefit. However, there is a distinction between a guardian who completely replaces a deceased parent and a person who is undertaking some of the responsibilities of a living parent. Some of the statutory provisions which equate guardians with parents would not be appropriate, in particular the power to appoint a testamentary guardian[69] or to consent to adoption or to freeing the child for adoption.[70] The child is not "theirs" to dispose of in this way; indeed, they may wish to adopt him against the parents' will. To distinguish different types of "guardian" in the legislation would lead to considerable complexity. Instead, we recommend that the same range of orders be available in favour of non-parents as is available between parents. Further, a residence order in favour of a non-parent should carry with it all the parental responsibilities, apart from those specifically limited to parents or guardians, but these should only last for as long as the residence order lasts.

4.28 There will still be two crucial differences between parents and non-parents. First, a parent will retain his parental responsibilities, subject to the requirements of a residence order, whereas a non-parent will only have the responsibilities given by the order. Secondly, the circumstances in which orders in favour of non-parents may be made will be far more limited than those in which orders may be made between parents.

Circumstances in which orders may be made

4.29 There are at present three ways in which the courts' powers to make orders arise, and these again are a source of considerable confusion and complexity. The first and probably the most common method in practice is on application in proceedings for divorce, nullity or judicial separation. The parties to the proceedings, who will usually be the child's parents but may sometimes be a married couple who have treated the child as a "child of the family",[71]

[60]Children Act 1975, s. 44.
[61]Domestic Proceedings and Magistrates' Courts Act 1978, s. 14; Guardianship of Minors Act 1971, s. 14A; Children Act 1975, s. 34(1)(a).
[62]Matrimonial Causes Act 1973, ss. 42 and 52(1); Domestic Proceedings and Magistrates' Courts Act 1978, ss. 8 and 88(1).
[63](1986) Working Paper No. 96, paras. 5.53–5.60.
[64]*Ibid.*, para. 5.58.
[65]Report of the Departmental Committee on the Adoption of Children (1972), Cmnd. 5107, para. 123.
[66](1986) Working Paper No. 96, para. 5.62.
[67]*Supra*, para. 4.11.
[68]*Infra*, paras. 4.33, 4.42 and 4.48.
[69]*Supra*, para. 2.24.
[70]Adoption Act 1976, s. 18.
[71]Matrimonial Causes Act 1973, s. 52(1).

may make such applications as of right.[72] The Matrimonial Causes Rules 1977 provide that a guardian, or step-parent, or any person who has custody, care and control, care or supervision of the child by court order, may also apply without leave.[73] Anyone else may apply but must first get leave to intervene in the suit.[74] It is an interesting question whether this includes a parent who is neither a party to the marriage in question nor a guardian.[75]

4.30 The second method of making orders is of the court's own motion in proceedings under the Matrimonial Causes Act 1973[76] or for financial relief between spouses under the Domestic Proceedings and Magistrates' Courts Act 1978.[77] Clearly no court will foist an order upon an unwilling recipient, for this would scarcely be in the child's best interests. Nor will it make an order affecting the legal position of a person who is unaware of the possibility, unless it is necessary to do so in an emergency. But it is not uncommon in divorce proceedings for a consensus to emerge in the course of considering the arrangements proposed and for orders to be made accordingly, whether or not any formal application has been made. The same applies in matrimonial proceedings before magistrates, who can deal with the children's future without the necessity for separate applications (which would have to be by way of complaint) to be made. They may grant legal custody or access to either spouse or to a parent who is not a party to the marriage in question.[78] If they wish to grant custody to anyone else they may proceed as if that person were entitled to apply and had applied for custodianship under the Children Act 1975.[79]

4.31 Thirdly, a much more limited group of people may make free-standing applications relating to custody, access or particular aspects of upbringing. All parents with full parental "rights and duties" may apply for legal custody, access or the resolution of particular matters of dispute over which they have equal or joint rights.[80] Guardians may apply for legal custody if either parent is still alive, and to vary existing custody orders after the death of either parent.[81] Joint guardians may also apply for the resolution of particular matters in dispute between them.[82] Otherwise they appear to have no right to apply for custody or access. Unmarried fathers who do not have full parental rights and duties may apply for legal custody or access[83] but not for the resolution of particular matters of dispute.[84] Grandparents may apply for access, but only if there is a custody order in force, or if the parent who is their child is dead.[85] People who are qualified to do so may apply for custodianship.[86] Briefly, these are relatives or step-parents[87] who have had the child for three months and apply with the consent of "a person having legal custody"; other people who have had the child for a total of 12 months[88] and apply with such consent; and any person who has had the child for a total of three years.[89]

4.32 Other than this, any interested person who wishes to resolve an issue about the child's upbringing may bring wardship proceedings in the High Court.[90] Apart from applications by parents, who could often just as well resort to the court's statutory powers, the most frequent use of wardship by private individuals is by relatives. There are only two limitations. First, the court may presumably decline jurisdiction, if the case would be better dealt with elsewhere or

[72]The Matrimonial Causes Rules 1977 do not provide a complete procedural code for applications relating to children. They do provide for the petitioner to make such applications in the petition and for the respondent to do so in an answer. The respondent should also note his intentions as to custody and access on the acknowledgment of service and may file his own statement of arrangements. In practice, formal applications may be made on notice in the usual way. See further Rayden, *op. cit.* n. 54, pp. 1405–1406.

[73]Rule 92(3).

[74]Rayden, *op. cit.* n. 54, p. 1406.

[75]i.e. a married mother or an unmarried father; see *supra*, paras. 2.2 and 2.17.

[76]Section 42(1) gives power to do so in suits for divorce, nullity and judicial separation, section 42(2) when making an order for financial provision in an application under section 27. No doubt this is why the rules do not provide expressly for the manner of application in many cases.

[77]ss. 2, 6 and 7.

[78]1978 Act, s. 8(2).

[79]*Ibid.*, s. 8(3).

[80]Guardianship of Minors Act 1971, s. 9; Guardianship Act 1973, s. 1(3).

[81]Guardianship of Minors Act 1971, ss. 9 and 10, as substituted by the Family Law Reform Act 1987, ss. 10 and 11.

[82]*Ibid.*, s. 7.

[83]*Ibid.*, s. 9.

[84]Guardianship Act 1973, s. 1(3A), as inserted by the Family Law Reform Act 1987, s. 5.

[85]Domestic Proceedings and Magistrates' Courts Act 1978, s. 14; Guardianship of Minors Act 1971, s. 14A; Children Act 1975, s. 34(1)(a).

[86]Children Act 1975, s. 33(1) and (3).

[87]Step-parents are usually excluded if the child has been named as a "child of the family" in divorce etc. proceedings, presumably because they not only can but should apply in the divorce proceedings themselves; *ibid.*, s. 33(5) and (8).

[88]Including the past three months; *ibid.*, s. 33(3)(b).

[89]Again including the past three months; *ibid.*, s. 33(3)(c).

[90]See generally, Wards of Court (1987), Working Paper No. 101; Lowe and White, *op. cit.* n. 46.

if the plaintiff is not a person interested, but apparently it very rarely does so.[91] Secondly, the court must decline to exercise the wardship jurisdiction if the statutory powers of local authorities are involved and the authority objects to the court's intervention.[92] The extent to which courts should decline to exercise their statutory powers where local authorities are involved is much more doubtful. There is an express prohibition on making access orders under the 1978 Act while a child is in care,[93] but custodianship orders under the 1975 Act were expressly designed for such children (among others).[94] The question of the inter-relationship between the powers of courts and the powers of local authorities is currently under consideration by the House of Lords.[95]

4.33 Once again, our object has been to devise a unified scheme which is consistent and clear so that everyone may know their position. Although this is most conveniently achieved by collecting all the courts' powers in one statute, it is intended that wherever possible orders should be made in the course of existing proceedings about the family. This is not only to avoid wasteful duplication but also to try to ensure that so far as possible all applications relating to the same child can be dealt with together. Hence we recommend that there should continue to be three ways in which orders relating to children should be capable of being made:

(a) on application in the course of certain family proceedings;

(b) of the court's own motion in the course of those proceedings;

(c) on free-standing application in the absence of any other proceedings.

Wherever possible, preference should be given to hearing the case in the course of existing proceedings.

4.34 The range of family proceedings in which orders may be made is at present strangely limited. Domestic courts may make orders in the course of applications for financial relief, whether or not these are successful,[96] whereas divorce courts can only make orders in financial provision cases if an order for financial relief is actually made[97] (and have only limited powers if a divorce, nullity or judicial separation petition is dismissed).[98] Courts hearing other types of financial application, for the variation of maintenance agreements[99] or for financial relief after foreign divorce[100] have no associated power to make orders relating to children. Similarly, domestic courts hearing applications for orders for personal protection against violence[101] have no such powers, nor do county courts hearing applications under the Domestic Violence and Matrimonial Proceedings Act 1976 or under the Matrimonial Homes Act 1983 relating either to protection from violence or other molestation or to the occupation of the matrimonial home. We would not suggest that the court should be obliged to consider the children in such cases, as it is in divorce and domestic proceedings for financial relief. Often the case is far too urgent for that. But the needs of the children are frequently an important factor in determining upon the relief sought.[102] It seems highly artificial for the court to make an order excluding one person from the family home, at least in part for the sake of the children, without at the same time having power to order that the children should live with the parent who remains there or to regulate the contact which they should have with the other.

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[91] *Ibid.*, para. 2.5; Practice Direction [1967] 1 W.L.R. 623.

[92] *Ibid.*, paras. 3.39–3.45; *A.* v. *Liverpool City Council* [1982] A.C. 363; *Re W. (A Minor) (Wardship: Jurisdiction)* [1985] A.C. 791.

[93] Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(7)(b); in *Re M. and H. (Minors) (Local Authority: Parental Rights)* [1987] 3 W.L.R.759, the Court of Appeal held that although there was jurisdiction to make an order for access under Guardianship of Minors Act 1971, s. 9, in the light of *A.* v. *Liverpool City Council, supra*, any such application would have to be declined; for the purposes of the appeal, however, Balcombe L. J. assumed that an application for custody might be heard on its merits; see *R.* v. *Oxford JJ., ex parte H.* [1975] Q.B.1.

[94] Houghton Report, *op. cit.* n. 65, paras. 120–122.

[95] *Re M. and H., supra* n. 93.

[96] Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(2).

[97] Matrimonial Causes Act 1973, s. 42(2).

[98] *Ibid.*, s. 42(1)(b).

[99] *Ibid.*, ss. 34–36; Family Law Reform Act 1987, ss. 15–16.

[100] Matrimonial and Family Proceedings Act 1984, Part III.

[101] Domestic Proceedings and Magistrates' Courts Act 1978, ss. 16–18.

[102] Matrimonial Homes Act 1983, s. 1(3).

4.35 The same applies to proceedings about the children themselves. If the court appoints a father or guardian to hold full parental responsibility,[103] it should in the same proceedings have power to make orders about residence, contact and other issues. If wardship or any other proceedings under the inherent jurisdiction of the High Court are brought, the court should be able to dispose of them by means of an order under the new scheme. It is a major objective of these proposals to reduce the need to resort to the wardship jurisdiction of the High Court. The knowledge that the outcome may well be the same in any event may reduce the parties' temptation to do so. In many cases, wardship is invoked, not because of any need for the court to exercise continuing parental responsibility, but because no other proceedings are available.[104] Once they are, the court itself may be more inclined to decline jurisdiction or at least dispose of the proceedings in this way.

4.36 It would also be helpful if a court hearing an adoption application had power to make orders under the new scheme. One object of the Children Act 1975 was to enable and encourage courts to make custody rather than adoption orders where these would be more appropriate, usually in applications by relatives or step-parents.[105] The relevant provisions[106] have caused difficulty for two reasons. First, they have been so worded that they appear to add little to the requirement to choose whichever order will be best for the child.[107] Secondly, while the court may always make a custody order instead of an adoption order if the child has previously been involved in divorce proceedings, in other cases it may only do so if the required agreements to adoption have been given or can be dispensed with.[108] This means that the court cannot of its own motion make a custody order when the parent is reasonably withholding her agreement to adoption because custodianship would be better.[109] This difficulty would disappear if adoption preceedings became family proceedings for the purpose of this legislation. The puzzling provisions attempting to encourage custody rather than adoption in some cases could then be repealed. Once the court has a freer choice of outcomes it will be able to make whatever order is best in the particular case before it.

4.37 We recommend, therefore, that family proceedings for this purpose should mean (i) any inherent jurisdiction of the High Court in relation to wardship, maintenance or upbringing of children, and (ii) proceedings under the following provisions:

(a) Parts I and II of the annexed Bill (including Schedule 1);

(b) the Matrimonial Causes Act 1973;

(c) the Domestic Violence and Matrimonial Proceedings Act 1976;

(d) the Adoption Act 1976;

(e) the Domestic Proceedings and Magistrates' Courts Act 1978;

(f) sections 1 and 9 of the Matrimonial Homes Act 1983;

(g) Part III of the Matrimonial and Family Proceedings Act 1984.

4.38 Two points should be emphasised. First, the courts would be bound by the general rule that orders may only be made when they are the most effective way to safeguard or promote the child's welfare.[110] Secondly, therefore, orders would normally be made on application rather than of the court's own motion. The same people should be able to make applications in the course of family proceedings as can initiate free-standing proceedings relating to the children alone. This in itself would eliminate a major source of confusion in the present law.

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[103] *Supra*, paras. 2.18 and 2.30.

[104] (1987) Working Paper No.101, Part III.

[105] Houghton Report, *op. cit.* n. 65, paras. 107–114

[106] Adoption Act 1976, ss. 14(3) and 15(4); Children Act 1975, s. 37(1) and (2).

[107] *Re D. (Minors) (Adoption by Step-parent)* (1980) 2 F.L.R. 102; *Re S. (A Minor) (Adoption or Custodianship)* [1987] Fam.98.

[108] Children Act 1975, s. 37(1) and (2); *Re M. (A Minor) (Custodianship: Jurisdiction)* [1987] 1 W.L.R.162; *Re A. (A Minor) (Adoption: Parental Consent)* [1987] 1 W.L.R.153.

[109] *Re M., supra, per* Sir David Cairns, at p. 174; the temptation to find that the parent is unreasonable in withholding agreement to adoption must therefore be considerable.

[110] *Supra*, para. 3.3.

4.39 There are three categories of people who should always be able to make applications for these orders. The first are parents, married or unmarried. The only change from the present law would be to allow unmarried fathers to apply for specific issue or prohibited steps orders. This he can already do by making the child a ward of court. In practice, as we have already seen,[111] disputes about particular issues are very rare and there is no reason to think that this right would be any more abused than the present right to apply for access. We know there are fears of harassment and pressure in some cases, but we consider that these are better dealt with by a general power in the courts to counteract persistent and harmful applications.[112] The second category is guardians. The present haphazard limitations on their powers of application are the result of historical accidents and cannot be justified if guardians are genuinely to undertake the same parental responsibilities as parents.[113] The third category is people who for the time being have the benefit of a residence order. In practice, they will only require to apply for specific issue or prohibited steps orders (or possibly for contact orders in some circumstances) or for orders to be varied or discharged,[114] but in principle while they have parental responsibility they should have parental access to the courts.

4.40 As for people outside these categories, the Working Paper provisionally proposed that all non-parents should be able to apply to take care of a child with leave of the court.[115] This would replace the present confusing array of provisions, including custodianship. It was welcomed by most of those who responded. The paper also proposed that a more limited range of non-parents should be able to apply for a "visiting order" to keep in touch with a child who was living with someone else.[116] Again, there was no dissent from the proposed order and a number of respondents thought that any person should be able to apply with leave of the court. As for specific issues, the Working Paper on Custody assumed that these would only arise between parents or guardians.[117] In our later paper on Wards of Court, however, we canvassed the possibility of incorporating specific issue orders into the statutory scheme.[118] This would play an important part in the objective of limiting wardship to cases where the continuing parental responsibility of the court is genuinely needed. As with the other orders, such applications could only be made with leave.

4.41 The object of this scheme is to enable anyone with a genuine interest in a child's welfare to make applications relating to his upbringing, as can at present be done by making the child a ward of court. A person does, of course, include any body, authority or organisation professionally concerned about the child's welfare. The requirement of leave is intended as a filter to protect the child and his family against unwarranted interference in their comfort and security, while ensuring that the child's interests are properly respected. Leave will be a considerable hurdle to any outsider who cannot establish an obvious connection with the child and a good reason for wanting to bring the case before the court. There will hardly ever be a good reason for interfering in the parents' exercise of their responsibilities unless the child's welfare is seriously at risk from their decision to take, or more probably not to take, a particular step, and only the people involved in taking that step for them would have the required degree of interest (the obvious example is medical treatment). On the other hand, leave will scarcely be a hurdle at all to close relatives such as grand-parents, uncles and aunts, brothers and sisters, who wish to care for or visit the child and who have no difficulty in obtaining leave in divorce proceedings at present. The new scheme will enable such issues to come before the courts whenever there is good reason to believe that the child's welfare will benefit. At present, as we have seen,[119] the power to make applications or orders usually depends upon the arbitrary fact of whether there are other proceedings on foot about the child.

4.42 Hence we recommend that any person should be able to apply for any order discussed in this Part provided that he has leave of the court. In deciding whether to grant leave the court should have regard to (a) the nature of the proposed application: (b) the applicant's connection with the child: (c) any risk of harmful disruption to the child's life because of the application. Two types of applicant, however, require special consideration.

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[111] *Supra*, para. 4.18.
[112] *Infra*, para. 6.31.
[113] *Supra*, paras. 2.23–2.25.
[114] Custodians may at present apply for the revocation of a custodianship order; Children Act 1975, s. 35(1)(a).
[115] (1986) Working Paper No. 96, paras. 5.37–5.39.
[116] *Ibid.*, paras. 5.61–5.62.
[117] *Ibid.*, paras. 7.31 and 7.36.
[118] (1987) Working Paper No. 101, para. 4.23(iv)
[119] *Supra*, paras. 4.29–4.31.

4.43 The first are local authority foster parents. The Working Paper acknowledged that they might be a special case.[120] It is important to maintain the confidence of parents in the voluntary child care system. They should not feel more at risk of losing their children by accepting the services of a local authority than they would by making private arrangements. However, allowing local authority foster parents to apply with leave would put them in no better position than any other non-parent. It is also important that local authorities should feel confident in their responsibility to plan the best possible future for children in both voluntary and compulsory care, which may well include a careful scheme for rehabilitation with the parents. However, there is little to suggest any desire on the part of foster parents to make premature applications for custody.[121] They stand to lose the boarding-out allowance and ready access to local authority help should things go wrong. It would also be somewhat illogical to allow others to apply with leave when those looking after the child could not. We therefore see no need to exclude them altogether; if there is thought to be a problem, the better approach might be to add to the criteria for granting leave: (d) where the child is boarded-out with the applicant by a local authority, the plans made by the local authority for the child's future.

4.44 The second special category is the child himself. In our Working Paper on Guardianship[122] it was proposed that the child should be able to apply for a guardian to be appointed, removed or replaced and there was no dissent from this.[123] The discharge of parental responsibility orders and agreements [124] is in the same category as the removal of guardians. Although the matter was not raised in our Working Paper on Custody, several respondents urged that the child should be able to make applications about his own upbringing. It is already open to a child to make himself a ward of court for this purpose.[125] The number of applications would probably be small but it may be important for a child to have access to the courts to protect himself in this way. At present, he is automatically a party in care and supervision proceedings and thus able to apply in his own right for orders to be varied or discharged.[126] Although he is not normally a party in proceedings between private individuals, it is important that the law can achieve consistency where this is needed. Hence we recommend that children should themselves be able to apply for these orders, but again only with leave of the court. Leave should only be granted if the court is satisfied that the child has sufficient understanding to make the proposed application. Any adult who wishes to apply for the child's sake would be able to seek leave to do so personally.

4.45 The Working Paper stressed that there is little reason to believe that allowing non-parents who wish for custody open access to the courts would expose parents or children to any significant risk of unwarranted applications.[127] Agreeing with this, a number of respondents suggested that certain non-parents should be able to apply without leave. We do not see the leave requirement as a great hurdle in the sort of cases where applications are most likely, but we accept that it is an unnecessary one in cases where leave will invariably be granted. The main category consists of people in relation to whom the child has become a "child of the family". This happens under the present law when both parties to a marriage, almost always a parent and step-parent, treat a child who is not the child of them both as a member of their family. Step-parents do not acquire any parental responsibility automatically,[128] but they have the right to apply for custody and access in matrimonial proceedings, [129] and they may also be ordered to make financial provision for the child.[130] We do not suggest that they should have automatic parental responsibility; this would clearly be controversial, as the tentative proposal in our Working Paper on Guardianship[131] that parents should be able to appoint them guardians to share parental responsibility attracted little support. However, it seems illogical to equate them with parents at the end of their relationship while

[120](1986) Working Paper No. 96, paras. 5.41–5.48.

[121]Figures for custodianship applications are given *infra* at n. 142, a substantial proportion of which are thought to be by relatives with no local authority involvement. Research into long-term fostering suggests that few will see custodianship as a desirable solution, J. Rowe, H. Cain, M. Hundleby and A. Keane, *Long-Term Foster Care* (1984), pp. 152, 171 and 200–201.

[122](1985) Working Paper No. 91, paras. 3.49, 3.50, 3.58.

[123]There is no restriction on those who may apply at present and none is recommended.

[124]*Supra,* para. 2.18.

[125]Lowe and White, *op. cit.* n. 46, para. 3.4.

[126]Review of Child Care Law (1985), paras. 14.10–14.18; *infra,* paras. 6.23–6.24.

[127](1986) Working Paper No. 96, paras. 5.38–5.39 and 5.63.

[128]*Re N. (Minors) (Parental Rights)* [1974] Fam.40.

[129]*Supra,* para. 4.29 and 4.30.

[130]*Infra,*para 4.63.

[131](1985) Working Paper No. 91, paras. 4.15–4.19.

denying them parental access to the courts when their marriage is a going concern. This recommendation would remove the present discrimination between step-parents who marry a divorced parent[132] and those who marry a widowed or unmarried parent.[133]

4.46 Once a child has become "a child of the family", he remains one. However, there is at present a slight discrepancy between the definitions of "child of the family" in the Matrimonial Causes Act 1973[134] and the Domestic Proceedings and Magistrates' Courts Act 1978.[135] Both refer to any child who has been treated by both parties as a child of their family; the former excludes any child who "has been" boarded-out with them by a local authority or voluntary organisation, whereas the latter only excludes a child who "is being" boarded-out. We consider the latter definition preferable, as there is no reason to exclude children for whom the local authority or voluntary organisation is no longer responsible. We recommend therefore that it be applied throughout.

4.47 Two further categories are based on the present qualifications to apply for custodianship. The first is a person with whom the child has lived for a total of at least three years ending within the past three months. The present qualification in custodianship requires that the period include the three months before the application.[136] There are then elaborate provisions to forestall removal by parents or anyone else just before the application can be made.[137] A much simpler and probably less costly[138] solution is to allow the application even though the child has very recently been removed. In many cases, the court will make a short-term order[139] to restore the *status quo* before the full hearing. In any event, it is so improbable that a court would deny leave to such a person who wished to apply for residence or indeed contact under the new scheme that it would be wasteful to require it.

4.48 The same applies to any person who makes the application with the consent of the people whose legal position will be affected by it: that is, each parent or guardian with parental responsibility, or each person with the benefit of a residence order, or a local authority in whose care the child has been placed by a care order. Here again, there is a slight difference from the present qualifications for custodianship, which require a period of residence before the application, but only the consent of "a" person having legal custody.[140] However, the object here is not to provide a qualification for applying, as anyone may do so with leave, but to dispense with the requirement of leave in cases where it would be a meaningless formality. No distinction should be made in either these or the three year cases between local authority foster parents and others. None is made at present and the reasons for thinking them a special case in other circumstances do not apply.[141]

4.49 We recommend, therefore, that three categories of people be permitted to apply for residence or contact orders without leave of the court:

(a) any person in relation to whom the child has become a "child of the family";

(b) any person with whom the child has lived for a period of at least three years, not necessarily continuous but ending not more than three months before the application is made; and

(c) any person who has the consent:

  (i) of each of those who have parental responsibility; unless

  (ii) there is a residence order, in which case of each of those with whom the child is to live under the residence order; or

  (iii) there is a care order, in which case of the local authority in whose care the child has been placed under the order.

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[132]Who may also apply without leave for orders in the parents' divorce proceedings; Matrimonial Causes Rules 1977 r. 92(3).

[133]Who have to qualify to apply for custodianship under the Children Act 1975, s. 33(3).

[134]s. 52(1).

[135]s. 88(1).

[136]Children Act 1975, s. 33(3)(c).

[137]*Ibid.*, ss. 41 and 42; these prohibit removal of a child from the people with whom he has lived for a total of three years without their consent or the leave of the court.

[138]In 1987 there were 210 applications and 214 orders for leave to remove in county courts, compared with a total of 328 custodianship applications of all sorts; it would therefore seem that the rule generates more litigation than would the proposal made here.

[139]*Supra*, para. 4.24; the power to make interim orders under the Guardianship Act 1973, s. 2(4), is applied to custodianship proceedings at present by the Children Act 1975, s. 34(5).

[140]*Supra*, para. 4.31; see (1986) Working Paper No. 96, paras. 5.15–5.26 for detailed criticism of the qualifications in custodianship.

[141]*Supra*, para. 4.43.

It is possible that certain other categories will emerge where leave is so commonly granted that it becomes an unnecessary formality. If so, it should be possible for rules of court to provide that leave is not necessary and we so recommend. We hope, however, that the power will rarely be used, as it is likely to lead to the same sort of confusion and complexity as exists at present. Applications by non-parents under the present statutory provisions or in wardship are still comparatively rare.[142] The custodianship provisions, in particular, have been little used so far.[143] There is no reason to believe that people are so anxious to undertake legal responsibility for other people's children that any more elaborate provisions than those which we have proposed will be necessary.

Inter-relationship with care orders

4.50 One advantage of limiting the categories of applicant for residence orders in this way is that they can also be used where the child is in the care of a local authority under a care order or provided with local authority services, including accommodation, on a voluntary basis. The relationship between the orders which may be made in private law and those in public law is neither clear nor consistent at present. It is a major aim of these proposals to remedy both those defects. We shall be dealing in the next part of this report with the circumstances in which care and supervision orders may be made in the course of family proceedings. In addition, the Government has already proposed that courts should be able to make custody (or in our terms residence) orders in the course of care proceedings.[144]

4.51 A fundamental principle underlying the recommendations of the Review of Child Care Law was that care proceedings, like family proceedings, are civil proceedings about the meeting of parental responsibilities for a child, rather than quasi-criminal proceedings against the child. Hence the legal effects of a care order and a residence order should be the same, although both statute and regulations might provide in more detail than would be appropriate for private individuals how local authorities should carry out their responsibilities under the order.[145] As the Bill annexed to this report demonstrates, we see no difficulty in equating the effects of a care order with those of a residence order in favour of non-parents.

4.52 The major difference would be in the powers of the courts to make subsidiary orders while the child was in care. Under the present law, neither the wardship jurisdiction, nor the statutory powers of the courts to award access in private law, can be used to interfere with the local authority's exercise of its statutory parental responsibilities.[146] The Review of Child Care Law proposed no change in this basic proposition, although it recommended both a greatly improved scheme of access orders for children in care and the institution of complaints procedures with an independent element.[147] These recommendations have been accepted by the Government.[148] Consistently with that, therefore, the courts should not have power to make contact, specific issue or prohibited steps orders while a child is in care under a care order and we so recommend.

4.53 Residence orders are a different matter. Their whole purpose is to determine where the child is to live. Custodianship orders can at present be made in any court while the child is in care and divorce courts at least may be able to make custody orders which supersede a care order.[149] In principle, therefore, just as care orders can supersede whatever the previous arrangements for the child's upbringing have been, residence orders should do the same. The recommendations which we have made above are not only consistent with this but also with

[142]In 1987, there were 450 custodianship applications in magistrates' courts (of which 11 per cent were withdrawn, 1 per cent refused, and 87 per cent successful), 328 in county courts and 3 in the High Court. There were 80 grandparents' applications for access in magistrates' courts (of which 25 per cent were withdrawn, 2 per cent refused, and 73 per cent successful) and 19 in county courts (8 per cent of which were successful). In 1985, about 400 orders were made in divorce proceedings giving custody to third parties, see Priest and Whybrow, *op. cit.* n. 4, para. 7.3. A sample of wardship cases in the Principal Registry in 1985 indicated that some 13 per cent were initiated by relatives, which if extrapolated would suggest some 366 cases nationally, (1987) Working Paper No. 101, para. 3.3.

[143]Research into custodianship is currently being undertaken by the University of Bristol Socio-legal Centre for Family Studies.

[144]The Law on Child Care and Family Services (1987), Cm. 62, para. 63; Review of Child Care Law (1985), paras. 19.7–19.11; hence we have provided an illustration of how these proposals might be implemented in the draft Bill annexed to this report.

[145]Review of Child Care Law (1985), paras. 8.2–8.10.

[146]*Supra*, para. 4.32.

[147]*Ibid.*, paras. 2.20–2.26, 9.11–9.12, 21.13–21.25.

[148]The Law on Child Care and Family Services (1987), Cm. 62, paras. 31 and 64.

[149](1986) Working Paper No. 96, para. 2.78; *E. v. E. and Cheshire County Council No. 2* (1979) 1 F.L.R.73; magistrates may be able to do so under the Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(2), see *M. v. Humberside County Council*, [1979] Fam. 114, or even under the Guardianship of Minors Act 1971, s. 9, see n. 90 *supra*, but the effect of such orders might simply be to determine who should have the child if the care order were discharged.

the approach of the Review of Child Care Law to the discharge of care orders.[150] Thus, parents and guardians should always have the right to apply for discharge of a care order or for a residence order which will have the same effect. Of course, such a residence order will not be necessary if the parents are living together, but where they are separated or divorced it will be helpful to cover both points at once. The same applies to spouses who have treated the child as a member of their family.[151] People who have had the child for three years or who apply with the local authority's consent are equivalent to applicants for custodianship at present. The only difference is that, if made, the residence order will supersede rather than suspend the care order,[152] but it will be open to the court to make a supervision order if appropriate, and of course to make a care order if the residence order comes to an end. That leaves the people who may only apply with the court's leave and subject to criteria which in these circumstances will be very difficult to satisfy. Only in quite exceptional cases would leave be granted against the wishes of the local authority. It must also be borne in mind that the child may always apply for the discharge of a care order and the court will then be able to make a residence order instead. We therefore recommend that it should be possible to apply for a residence order while the child is subject to a care order. The question of venue, however, is a separate and important matter to which we shall return.[153]

A timetable in family proceedings

4.54 In our Working Paper on Care, Supervision and Interim Orders in Custody Proceedings,[154] we provisionally proposed that where there is a dispute about the child's upbringing the court should always set a fixed return date. The dispute should be heard within a maximum of (it was suggested) three months, although this could be extended if the extension was justified and not prejudicial to the child's interests.

4.55 The case for a scheme along these lines is very strong indeed.[155] Prolonged litigation about their future is deeply damaging to children, not only because of the uncertainty it brings for them, but also because of the harm it does to the relationship between the parents and their capacity to co-operate with one another in the future. Moreover, a frequent consequence is that the case of the parent who is not living with the child is severely prejudiced by the time of the hearing. Regrettably, it is almost always to the advantage of one of the parties to delay the proceedings as long as possible and, what may be worse, to make difficulties over contact in the meantime. At present, particularly in divorce courts, the responsibility for the progress of the proceedings lies principally with the adult parties, although a considerable source of delay is the time taken to prepare welfare officers' reports and sometimes to attempt conciliation between the parties.

4.56 The response to our Working Paper confirmed our view that there is serious concern, particularly among the judiciary, about the present delays and that action is required to remedy the situation.[156] There may be problems in preparing welfare reports, given the other constraints within which welfare officers have to work, and in some cases time may be beneficial in enabling an agreed solution to emerge, perhaps with the help of conciliation. Nevertheless, the "child's sense of time"[157] is quite different from the adults' and it is the child's interests which should prevail.

4.57 The most effective practical action which can be taken to remedy matters is to place a clear obligation upon the court to oversee the progress of the case and to ensure that the court regards all delay as prejudicial to the child's interests unless the contrary is shown. (An example might be where the benefit to the child from a thorough report outweighed the detriment of having to wait for it, but the Court of Appeal has said that if one has to wait as long as nine months it is better to do without one[158]). This approach is something of a novelty within our legal system, which is generally content to leave such matters to the parties themselves. For that reason, it is necessary to provide for it in the legislation, even though the details of how it is to be applied in each type of case are best left to rules of court.

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[150] *Supra*, paras. 4.42 and 4.49; see also Review of Child Care Law (1985), paras. 20.1-20.4, 20.10.

[151] See *M.* v. *Humberside County Council* [1979] Fam. 114.

[152] As it apparently does at present, although the position is not entirely clear; see Children Act 1975, s. 44(1).

[153] *Infra*, para. 6.13.

[154] (1987) Working Paper No. 100, para. 4.16.

[155] *Ibid.*, paras. 4.9–4.10.

[156] Evidence of the delays in care proceedings has emerged from the research into the representation of the child in civil proceedings at the University of Bristol, Socio-legal Centre for Family Studies and this study may also yield data on the time taken in custody proceedings; see M. Murch and L. Mills, *The Length of Care Proceedings* (1987).

[157] The concept was coined in J. Goldstein, A. Freud and A. J. Solnit, *Beyond the Best Interests of the Child* (1973), p. 40.

[158] *Re C. (A Minor) (Custody of Child)* [1980] 2 F.L.R.163.

4.58 Hence we recommend that where an application is made for any of the orders described in this Part, or where the court determines that it may be necessary to make an order of its own motion, the court should specify a time-table within which the various steps needed to dispose of the matter must be taken. In specifying the time-table, the court should presume that delay is prejudicial to the child's interests unless the contrary is shown. The court should also be able to give directions for the purpose of ensuring, so far as reasonably practicable, that the timetable is kept. Nevertheless, the principal obligation and sanction must rest with the court. If the required steps are not taken in time, the court will have to consider how best to proceed for the child's welfare in the light of the information available at the time. Sometimes, the best way of doing this will be by requiring progress reports rather than a hearing, but in many cases it will be by setting return dates. County courts are quite accustomed to operating in this way when dealing with applications for injunctions and there is no reason to suppose that they could not do so in children's cases if so required.

Financial provision and property adjustment for children

4.59 The principle object of the recommendations in this report is to reform and assimilate the various private law provisions relating to the upbringing of children. However, those provisions all have associated powers to make orders for financial relief, and in some cases adjustment of property rights, for the benefit of the children concerned. Our proposals would therefore be incomplete if they did not include these powers. As we have already indicated,[159] we have concluded, not without some reluctance, that it is only practicable to assimilate and incorporate into our scheme the powers which are currently contained in the Guardianship of Minors Acts 1971 and 1973 and the Children Act 1975. Where the court also has power to make orders for the benefit of an adult, as in the Matrimonial Causes Act 1973,[160] and the Domestic Proceedings and Magistrates' Courts Act 1978,[161] it is more convenient for all the orders to be made under the same provisions. It would in any event be a task of some complexity to pull them apart, whereas the assimilation and merger of the current provisions in the 1971, 1973 and 1975 Acts can be achieved with little change in the substance of the existing law and with the benefit of considerable simplification.

4.60 Orders for the benefit of children alone may at present be made on the application of either parent, or in some cases of a guardian, under the Guardianship of Minors Act 1971. Until the amendments made by the Family Law Reform Act 1987, these could only be made in conjunction with orders for "actual custody" and only for periodical payments and limited lump sums. Following the 1987 Act,[162] orders may be made irrespective of whether there is an order for actual custody and the High Court and county courts have power to award secured periodical payments, unlimited lump sums and to adjust the property rights of either parent.[163] The object was to enable all children to have the benefit of the same range of powers as is at present available to the children of married parents when their parents divorce.[164]

4.61 As between parents, therefore, these powers should be reproduced in the new scheme. Guardians, of course, can only apply where there is a surviving parent against whom an order can be made. At present, there is still a difference between the children of married and unmarried parents, in that a guardian appointed by an unmarried mother cannot apply against the father unless the father has some parental or custodial rights.[165] Under our proposals,[166] guardians will rarely take office during the life-time of the survivor, but where they do, they should clearly have the same rights of application as do parents.

4.62 Orders for periodical payments and limited lump sums may also be made on the application of custodians under the Children Act 1975.[167] The equivalent under our proposals will be persons with the benefit of a residence order. However, we see no reason in principle why the range of orders should be so limited. If it is right that parents should on occasions be liable to make capital provision for their children,[168] it must be right no matter where the children are to live. If custody of children is given to third parties in the course of divorce

[159] *Supra*, para. 1.8.
[160] ss. 23(1)(d) (e) (f), 24, 24A.
[161] ss. 2, 6 and 7; see also s. 11.
[162] The relevant provisions of which are not yet in force.
[163] Guardianship of Minors Act 1971, ss. 11B and 11C, as substituted by Family Law Reform Act 1987, ss. 12 and 13.
[164] See Illegitimacy (1982), Law Com. No. 118, paras. 6.5–6.11.
[165] Guardianship of Minors Act 1971, s. 11C as substituted by Family Law Reform Act 1987, s. 13; this result may not have been intended, see (1982) Law Com. No.118, para. 6.28.
[166] *Supra*, paras. 2.27–2.28.
[167] s. 34(1)(b) and (c).
[168] The courts have held that in most cases this cannot be expected if the child's maintenance and education are properly provided for; see *Chamberlain* v. *Chamberlain* [1973] 1 W.L.R. 1557, *Lilford (Lord)* v. *Glynn* [1979] 1 W.L.R.78.

proceedings at present, then the full range of orders is available.[169] To restrict the range of orders available outside divorce proceedings is therefore to perpetuate the sort of discrimination against children whose parents have never been married to one another which it was the object of the 1987 Act to remove. We therefore recommend that the full range of orders be available on the application of parents, guardians or people with the benefit of a residence order.

4.63 We also recommend that spouses who have treated the child as a "child of the family"[170] should be placed in the same position as parents under the new scheme. They are already in that position if there are proceedings under the Matrimonial Causes Act 1973, the Domestic Proceedings and Magistrates' Courts Act 1978 and the Children Act 1975.[171] Once again, we see no logical reason to exclude them from entitlement or liability under these provisions. The theoretical result is that a parent of either sex might seek an order against, say, a step-parent of either sex but in practice the reverse is more likely.[172] Once again, the result is to generalise for all children the benefit of principles which have already been established in the context of particular proceedings.

4.64 The criteria governing the court's decision, including the special factors to be applied when considering orders against a person who is not a parent of the child, can largely be adopted from the present law. We recommend, however, the addition of "the manner in which he was being or was expected to be educated or trained", which is at present contained in the Matrimonial Causes Act 1973[173] but not in the other legislation. This omission again savours of discrimination against the children of unmarried parents. On the other hand, lump sum orders should be generally available for the purpose of meeting expenses incurred in connection with the birth of the child (in addition to any other expenses reasonably incurred before the making of the order), a factor taken over from affiliation proceedings which are abolished by the Family Law Reform Act 1987.[174]

4.65 The present provisions in the Guardianship Act 1973 relating to interim financial orders are extremely complicated.[175] We accept that it may be necessary to spell out the courts' powers to grant in effect emergency relief before the full hearing of an application, but there is no need to impose strict time limits upon their use. Orders may very well be made at the same time as temporary orders for residence and contact,[176] and the court may wish to specify the same timetable so that all issues can be decided together.[177] We recommend, therefore, that the present provisions for interim orders be replaced and simplified by removing the current time limits and allowing for orders to be renewed.

4.66 We consider that all orders are essentially interim, in the sense that they are the best order that can be made at the time, but circumstances may change and create the need for a further order. The court should therefore have power to make further orders for periodical payments or lump sums "from time to time" after the original application has been determined. However, property adjustment orders are intended as a once and for all settlement when a relationship ends.[178] Under the Matrimonial Causes Act 1973, it is not possible to make a further order or to vary an existing one. We therefore recommend that the courts should not be able to make a further property adjustment order against the same person in respect of the same child.

4.67 Otherwise, the provisions relating to the duration, variation and enforcement of financial orders and the maintenance of older children should be the same as those currently contained in the Guardianship of Minors Act 1971 and, where appropriate, the Children Act 1975. As at present, where there is a change of residence, the person with whom it is ordered that the child is to live should be able to obtain a variation of any financial order made in other proceedings.[179] The new provisions should also include the present power of local authorities to contribute towards the maintenance of children where a residence order provides for them to live with a person who is neither a parent nor step-parent.[180]

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[169]See Matrimonial Causes Act 1973, ss. 23(1)(d), (e), (f) and 24(1).

[170]*Supra*, para. 4.45–4.46.

[171]s. 34(2).

[172]Not least because the criteria for making orders against a person who is not a parent of the child concerned include the liability of any other person to maintain the child, whereas the criteria for making orders against a parent do not.

[173]s. 25(3)(d).

[174]s. 17.

[175]ss. 2(4)(5B)–(5E).

[176]*Supra*, para. 4.24.

[177]*Supra*, para. 4.58.

[178](1982) Law Com. No. 118, para. 6.6.

[179]Children Act 1975, s. 34(1)(e).

[180]Children Act 1975, s. 34(6); although this is not a power of the courts, it is perhaps best included here as the children are no longer in local authority care or accommodation.

4.68 Generally, the courts' powers will only be exercisable on application. However, an application for a financial order will be "family proceedings" for the purpose of this legislation,[181] so that the court will have power to make an order about the child's residence or upbringing, if this is necessary to safeguard and promote his welfare, without the need for a separate application. Similarly, if the court makes a residence order it would be wasteful and unnecessary to require a separate application for a financial order. Hence, as used to be the case under the Guardianship of Minors Act 1971,[182] these powers should be exercisable of the court's own motion whenever it makes a residence order under this legislation. This will include cases where the court makes a residence order in the course of an application for financial provision under sections 2, 6 or 7 of the Domestic Proceedings and Magistrates' Courts Act 1978 or section 27 of the Matrimonial Causes Act 1973, but cannot make an order for the child under those provisions, because, for example, the grounds cannot be satisfied or the child is to live with someone other than the adult applicant.

4.69 The powers of the court to make orders for the maintenance of wards of court[183] are much more limited than those which are available under the amended Guardianship of Minors Act 1971. There seems no good reason why the court, of its own motion in wardship proceedings, should not have the same powers as it would have on application under this legislation and we so recommend.

Conclusion

4.70 The recommendations in this Part of the Report are designed to provide a single system of powers to deal with the upbringing of children, which builds upon the principles developed both in wardship and in divorce proceedings, but adapts them to modern conditions and to all proceedings in which the upbringing of children may arise in the courts at present.

[181] *Supra*, para. 4.37.

[182] s. 9(2). This is essentially a procedural matter; in (1982) Law Com. No. 118, para. 6.27, the Commission envisaged that the court should have power in all applications under the Guardianship of Minors Act 1971 to make financial orders whether or not any other order is sought.

[183] Family Law Reform Act 1969, s. 6.

PART V

CARE, SUPERVISION AND FAMILY ASSISTANCE ORDERS IN FAMILY PROCEEDINGS

5.1 In this Part, we discuss the powers given to courts hearing certain family proceedings[1] to make orders in exceptional circumstances committing the child to the care of a local authority or placing him under the supervision of a local authority or probation officer. The Review of Child Care Law recommended that the grounds for and effects of such committals to care should be the same as those in ordinary care proceedings.[2] The Government has accepted that recommendation.[3] We are here concerned only with putting this into effect, so as to ensure that parents and children receive the same protection in family proceedings as they will do in care proceedings under the Government's proposals. The Review also recommended that further consideration be given to supervision orders made in family proceedings, in the light both of the proposals made by the Matrimonial Causes Procedure Committee[4] and the concern felt in local authorities about what was expected of them under these orders.[5] Accordingly, we published a Working Paper on Care, Supervision and Interim Orders in Custody Proceedings[6] as part of our overall review of procedures and orders in private law. In framing our recommendations, we have been able to take account, not only of the responses to that Working Paper, but also of a study of the conduct of matrimonial supervision orders in three local authorities, carried out by the Thames/Anglia region of the Social Services Inspectorate.[7]

Care orders

5.2 At present, the courts may of their own motion commit a child to the care of a local authority whenever they have jurisdiction to make a custody order, or when they refuse an adoption application. There must be "exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties to the marriage or to any other individual"[8] and the local authority must first be given an opportunity to make representations to the court.[9] The legal effect is not to give full parental responsibility to the authority, but as the child cannot be removed from care, the practical effect is the same as any other care order.[10] The object of the Government's proposals, therefore, was to remove the uncertainty as to the effects of these committals, while ensuring that they only take place in circumstances which would justify such an order in care proceedings.[11] The object of the provisional proposals in our Working Paper, similarly, was to ensure that both parents and children received the same procedural protection as they would in care proceedings. We suggested that this could be done by placing the local authority in the position of an applicant for an order in all cases and thus under the same duties as an applicant in care proceedings.[12] This approach was accepted by all who responded to our Working Paper.

5.3 There are, however, two ways of bringing this about, which correspond to the ways in which such orders are in practice made at present. The first is where a local authority wishes to apply for a care order and, learning that there are family proceedings on foot, seeks an order in those proceedings rather than by separate application to a juvenile court. This is most likely in divorce proceedings, where an authority may intervene with leave, or without leave if it already has a supervision order over the child.[13] The local authority's object is probably to bring the case before a judge in a court where the procedure is closer to that in wardship than in the juvenile and domestic courts. For this reason, intervention in other types

[1]Whenever the court has jurisdiction to make a custody order in divorce, nullity, judicial separation or failure to maintain proceedings under the Matrimonial Causes Act 1973, by ss. 43 and 44; similarly in financial relief proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978, by ss. 9 and 10; in applications by parents for custody under the Guardianship of Minors Act 1971, by the Guardianship Act 1973, s.2(2); in custodianship proceedings under the Children Act 1975, by ss. 34(5) and 36(2) and (3); and on refusing an adoption application under the Adoption Act 1976, by s. 26.

[2](1985), R. 46 and R. 118, paras. 8.20–8.22 and 15.35–15.37.

[3]The Law on Child Care and Family Services (1987), Cm. 62, para. 36.

[4]Report of the Matrimonial Causes Procedure Committee (the Booth Report) (1985), paras. 4.139–4.140.

[5]Review of Child Care Law (1985), R. 169 and paras. 18.22–18.30.

[6](1987) Working Paper No. 100.

[7]To be published later this year.

[8]Matrimonial Causes Act 1973, s. 43(1); the other provisions, listed *supra* at n. 1, are to like effect.

[9]*Ibid.*, s. 43(2).

[10](1987) Working Paper No. 100, paras. 2.15–2.18.

[11]*Ibid.*, paras. 2.9–2.13.

[12]*Ibid.*, para. 2.21.

[13]Matrimonial Causes Rules 1977, r. 92(3).

of proceeding is less likely and no formal procedures exist, although the same effect can be achieved informally in practice.[14] We recommend, therefore, that where there are family proceedings on foot in which the courts at present have power to commit the child to care,[15] it should be possible to make a care application in those proceedings. No leave requirement seems necessary, as it is difficult to imagine on what basis a court would refuse it.

5.4 The second type of case is where the court, as a result of what it has learned in the course of the family proceedings, decides that committal to care may be appropriate. In such cases, the Working Paper proposed that the court should be able to direct that the local authority be treated as if it had made a care application, once again so as to place it under the same duties as such an applicant.[16] Although there was little dissent from this, there are obvious disadvantages in directing an authority to apply for an order which it may not want. It would be more appropriate simply to refer the case to the local authority for investigations to be made. If a divorce court is considering the arrangements[17] for a child who is in voluntary care, for example, it may at present use the power of committal simply to confirm the *status quo*. The mere fact that the child is in care could be "exceptional" from the divorce court's point of view, but the object of the Government's proposals is to ensure that there are sufficient grounds to convert a voluntary arrangement into a compulsory one.[18] The court may therefore wish the authority to consider the matter. Other cases for investigation may arise as a result of other information contained in the statement of arrangements, or the contents of a welfare officer's report, or the evidence given in a disputed case.

5.5 We therefore recommend that, where in such family proceedings it appears to the court that there are exceptional circumstances in which a care application may be appropriate, the court may direct the local authority to conduct an investigation. Having investigated, the authority should consider whether the case is more appropriate for a care or supervision order, or for the provision of services on a voluntary basis, or for some other action (such as referral for services from some other agency). If there is a case for an order, the authority will presumably be under a statutory duty to apply for one.[19] If the authority decides not to apply for an order, it should report back to the court on the reasons for that decision and on the alternative action taken, if any.

5.6 However, the court may need to safeguard the child's welfare in the meantime, just as it may when the authority intervenes to apply for an order. The court must, of course, have some reason to believe that such an application would be successful. Under the Government's proposals,[20] the criteria in care proceedings would be:

(a) that the child has suffered or is likely to suffer harm;

(b) that the harm is attributable to a lack, or likely lack, of a reasonable standard of parental care or the child being beyond parental control; and

(c) that the order proposed is the most effective means available to the court of safeguarding the child's welfare.

The criteria recommended for interim orders are, first, that there is reasonable cause to believe that conditions (a) and (b) may be satisfied, and secondly, that the power to remove or detain the child is necessary to safeguard his welfare in the interim period.[21] Thus we recommend that when a care application is made or a direction to investigate given, the court should have power to make interim care or supervision orders on the same grounds as in ordinary care proceedings.

[14]The Review of Child Care Law (1985), para. 23.12 recommended that local authorities should be able to seek leave to intervene in these cases.

[15]We do not recommend any extension in these, although we see a case for doing so, at least in domestic violence cases; cf. *supra*, paras. 4.34–4.38.

[16](1987) Working Paper No. 100, paras. 2.22–2.23.

[17]Under Matrimonial Causes Act 1973, s. 41; *supra*, para. 3.5.

[18]Review of Child Care Law (1985), paras. 15.35–15.36; the Review also recommended that the administrative procedure for assuming parental rights over children in voluntary care should be discontinued, para. 7.35; The Law On Child Care and Family Services (1987), Cm. 62, accepted both proposals, paras. 54 and 59.

[19]Children and Young Persons Act 1969, s. 2(2); as to the proposed duties of investigation, see Review of Child Care Law (1985), Ch. 12; The Law on Child Care and Family Services (1987), Cm. 62, para. 42.

[20]The Law on Child Care and Family Services (1987), Cm. 62, para. 59.

[21]*Ibid.*, para. 61; (1987) Working Paper No. 100, para. 2.45.

5.7 Thereafter, matters should proceed as they would in care proceedings. The limitations on the duration and renewal of interim orders should be the same as those proposed for ordinary care proceedings, "because of the crucial importance of determining the child's future as soon as possible."[22] The Review of Child Care Law proposed that the same limits should apply to adjournments where no interim order is made.[23] We have already proposed a machinery for setting a timetable in family proceedings which could be used for this purpose.[24] The court's powers as to contact while the child is in care should also be the same as in ordinary care proceedings. Under the Government's proposals, there will be a statutory duty on the local authority to permit reasonable contact. The court will be able to resolve disputes about whether there should be contact, and what contact is reasonable, preferably at the outset but also subsequently.[25] If the child is not in care, of course, the court will have all the powers which it has in the family proceedings themselves.

5.8 The object is to secure that all these cases are dealt with as if they were ordinary care proceedings. The local authority will have the same duty to put the case for a care order before the court and the same rules of evidence should apply. Respondents were almost unanimously in favour of the provisional proposal in the Working Paper that the Civil Evidence Acts 1968 and 1972 should be applied to domestic magistrates' courts in such cases,[26] as is already proposed for care proceedings in juvenile courts.[27] If they are applied in care cases, they might also be applied in all domestic proceedings, and we so recommend.

5.9 Similarly, the Working Paper proposed that the procedural protection available to the parents and the child should be equivalent to that available in care proceedings.[28] This can for the most part be achieved by rules of court. Parents and any person whose legal position will be affected by the order should become parties.[29] This should include anyone with whom the child is living who might wish to argue that there should be no order at all. Courts should have power to receive representations and evidence from people who have relevant information to present, even though they do not wish to apply for an order for their own benefit.[30] The protection available for the child should clearly be no less than is available in care proceedings and we shall return to this in Part VI of this report.[31]

Supervision orders

5.10 Supervision orders may at present be made whenever the court makes an order for custody, legal custody or care and control in family proceedings, or on refusing an adoption application, if there are "exceptional circumstances making it desirable that the child should be under the supervision of an independent person".[32] The independent person is either a probation officer or a local authority. These orders were originally devised, as an integral part of the scheme for approving the arrangements in divorce cases, to enable the court to oversee the custody arrangements with a view to varying them if need be.[33] They have developed to fulfil a wide variety of purposes, sometimes to provide support for the parent with whom the children are living, sometimes to reassure the parent with whom they are not living, and sometimes to help resolve problems between the parents over access, and so on.[34] For this reason, the Review of Child Care Law rejected the suggestion that the grounds and effects of such orders should, as with committal to care, invariably be the same as those of orders made in care proceedings.[35]

5.11 It is difficult to determine the exact number of orders made at present, because of the different methods of recording used by courts, local authorities and the probation service.[36] Although they are only made in a small proportion of cases coming before the courts, they

[22]The Law on Child Care and Family Services (1987), Cm. 62, para. 61.
[23]Para. 17.19.
[24]*Supra*, paras. 4.54–4.58.
[25]The Law on Child Care and Family Services (1987), Cm. 62, para. 64.
[26](1987) Working Paper No. 100, para. 2.46.
[27]The Law on Child Care and Family Services (1987), Cm. 62, para. 57.
[28](1987) Working Paper No. 100, paras. 2.24–2.38.
[29]The Law on Child Care and Family Services (1987), Cm. 62, paras. 55–56.
[30]The Law on Child Care and Family Services (1987), Cm. 62, para. 56; see now Magistrates' Courts (Children and Young Persons) Rules 1988, r. 19; *infra*, para. 6.30.
[31]*Infra*, paras. 6.20 and 6.23 *et seq*.
[32]Matrimonial Causes Act 1973, s. 44(1); the other provisions, listed *supra* at n. 1, are to like effect.
[33](1987) Working Paper No. 100, para. 3.3.
[34]*Ibid.*, para. 3.9; Social Services Inspectorate, *op. cit.* at n. 7.
[35](1985), para. 18.24.
[36](1987) Working Paper No. 100, para. 3.7.

form a surprisingly large proportion of the statutory work undertaken by local authorities in relation to children.[37] There is considerable concern about the lack of clarity in what is expected of social workers under these orders and a lack of liaison between local authorities, the courts and the probation offices who provide the divorce court welfare service.[38] At the same time, there has been concern in some courts about delay in taking action once a supervision order has been made.

5.12 Hence the Working Paper suggested that there might be a case for drawing a clearer distinction between two different types of supervision order, to reflect the different purposes for which orders are used at present. The first, in favour of local authorities, would approximate to a supervision order in care proceedings.[39] The grounds would relate to harm or likely harm to the child and the court would be able to impose requirements on the parents as well as on the child.[40] It would be appropriate in cases where the main concern was child protection and the supervisor might need to have access to the wide range of services available to local authority social services departments. The second, in favour of a welfare or probation officer, would still be available on the wider "exceptional circumstances" criterion, but would be aimed at giving essentially short-term help to parents or spouses to cope with the immediate problems arising from their separation or divorce, to smooth the transition for them and their children, to promote arrangements for access where these are in dispute, and generally to facilitate co-operation between them in the future.[41]

5.13 The response to our Working Paper revealed considerable support for this distinction. In particular, a small research study by Robert Dingwall of the Oxford Centre for Socio-legal Studies and Adrian James of the University of Hull[42] found that local authorities and probation officers do tend to become involved in different types of case. Similarly, the Social Services Inspectorate study[43] found that child protection was an element in all the cases studied, although social workers were also involved in a wide range of tasks with each family. The probation service saw the local authority as carrying out the longer-term child protection role, while shorter-term intervention relating to problems over custody and access was mainly the responsibility of their own service. These studies support the general consensus of opinion among our respondents, that a clearer distinction between the two types of supervision would be helpful in clarifying the roles and expectations of all concerned, in developing and targetting specialist skills within the two agencies, and in ensuring that families who would benefit from some help during the crisis of separation or divorce are not faced with the prospect of "permanent, long-term intervention in family life on grounds of divorce".[44]

5.14 Such a division would also fit in well with the scheme we have proposed for making care orders in family proceedings. We therefore recommend that the present powers to make supervision orders in these proceedings, including adoption, should be replaced by two different types of order:

(i) a supervision order, with the same grounds and effects as a supervision order in care proceedings; and

(ii) a family assistance order, requiring a welfare officer to advise and assist the family for a short period.

The further recommendations made follow from this basic distinction.[45]

5.15 The Working Paper proposed that the power to make a supervision order should not depend upon whether an order for custody or care and control have been made.[46] This would further a basic aim of our proposals, which is to discourage the making of unnecessary residence orders. It would also reflect the fact that orders are made for other purposes than to review the arrangements for the child's residence. There was almost unanimous support for this proposal. We therefore recommend that both supervision and family assistance orders

[37]Social Services Inspectorate, *op. cit.* at n. 7.
[38]*Ibid.*
[39](1987) Working Paper No. 100, para. 3.18.
[40]*Ibid.*, para. 3.35.
[41]*Ibid.*, para. 3.19.
[42]Unpublished findings from a pilot study of divorce court welfare work, referred to in the authors' response to (1987) Working Paper No. 100.
[43]*Op. cit.*, n. 7.
[44]S. Maidment, *Child Custody and Divorce* (1984), p. 87.
[45]For example, supervision orders would only be available in the proceedings where they are available at present, whereas family assistance orders would be available in all proceedings where the orders discussed in Part IV may be made; *supra,* paras. 4.34–4.38.
[46](1987) Working Paper No. 100, para. 3.14.

should be available in family proceedings irrespective of whether or not any other order relating to the child's residence or upbringing is made. Neither, of course, would be available if there was a care order.

5.16 The Working Paper also proposed that, where practicable, the supervisor should be consulted before a supervision order is made, and that the court should state the reason why supervision is needed and what it is hoped to achieve by it.[47] The object was to avoid the difficulties which can arise, particularly for local authorities, if orders are made without their knowledge in cases where they have not previously been involved. Both proposals were unanimously accepted. In the case of supervision orders, we recommend that the same basic procedure should apply as is recommended for care orders.[48] Hence the authority will either apply of its own accord or after a direction to investigate from the court. An interim supervision order may be made in the meantime. This should avoid the disadvantage of delay[49] while ensuring that a full order is not made without the authority knowing what the problem is and what will be expected under the order.

5.17 A number of other proposals considered in the Working Paper follow automatically from our recommendation that supervision orders should have the same effects as in care proceedings. These were that the courts should be able to impose the same requirements in these supervision orders upon both parents[50] (with their consent) and children as can be imposed in care proceedings.[51] The supervisor should be able to return to court for the requirements to be varied or to seek a care order instead.[52] He should be under a duty to advise, assist and befriend the child and also to safeguard and promote his welfare.[53] The Secretary of State's power to make regulations governing the conduct of supervision orders by local authorities should apply.[54] Orders should last for one year in the first instance,[55] but may be extended on the supervisor's application. Similarly, they may be discharged on the application of the supervisor, child or responsible person.

5.18 Proposals to this or similar effect in the Working Paper were generally welcomed by our respondents and this supports our view that a distinction between supervision and family assistance orders would be helpful. The Social Services Inspectorate study[56] did not find that local authorities were being ordered to supervise families in inappropriate cases. In most of them there were complex and long-standing problems which needed a great deal of work. The family proceedings[57] had enabled these problems to be identified and action taken before matters had reached the point where care proceedings might have been initiated. The proposed new grounds in care proceedings will cover cases where there is a risk of harm to the child which can most effectively be prevented by supervision.[58] Hence the effect of assimilating supervision orders in care and family proceedings should not be to inhibit the courts in ordering supervision in appropriate cases but to secure a much closer involvement of local authorites beforehand and much greater clarity in their powers and duties. Futhermore, the probation service should still be able to act as supervisor in the cases where they may do so in care proceedings at present, generally with older children or where they are already working with the same family.[59]

Family Assistance Orders

5.19 As we have already explained,[60] the purpose of a family assistance order would be to formalise the involvement of a welfare officer for a short period in helping the family to overcome the problems and conflicts associated with their separation or divorce. It should be available whenever the court has power to make an order about the child's residence or upbringing, whether or not such an order is made. As to the details of the order, we recommend that the officer's duty should be to advise, assist and (where appropriate) befriend the members of the family named in the order. These may include any parent or guardian, anyone with whom the child is living, and the child himself. Apart from the child,

[47] *Ibid.*, para. 3.27.
[48] *Supra*, paras. 5.3, 5.5 and 5.6.
[49] Review of Child Care Law (1985), para. 18.28.
[50] Or whoever is "responsible" for the child.
[51] (1987) Working Paper No. 100, para. 3.36.
[52] *Ibid.*
[53] *Ibid.*, para. 3.37.
[54] *Ibid.*, para. 3.39.
[55] *Ibid.*, para. 3.41.
[56] *Op. cit.*, n. 7.
[57] All the orders studied had been made in divorce proceedings.
[58] *Supra*, para. 5.4.
[59] Children and Young Persons Act 1969, ss. 13(2) and 34(1)(a); S.I. 1970/1882.
[60] *Supra*, para. 5.12.

their consent will be needed. We contemplate that the welfare officer would usually be the officer who had compiled a welfare report for the court, and thus a probation officer in most cases. However, we would not exclude the possibility of local authorities acting as welfare officers for this purpose, particularly where they have provided the reports for the court.[61]

5.20 The distinction in effect between this type of order and the conventional supervision order should be clear. The order may include requirements for the people named in it to keep in touch with the welfare officer, but not the much wider range of requirements which may be included in a full supervision order. If there is an order about the child's residence or upbringing, the welfare officer should be able to refer to the court the question of whether it should be varied or discharged; such a power exists at present in some cases but not in all, and the Working Paper suggested that it should apply generally.[62] It would not be appropriate for the welfare officer to have power to seek committal to care, because no ground for this will have been established at the outset, but of course the court might refer the case to the local authority for investigation if cause for concern arose. As the aim of the order is purely short-term assistance, it should last for only six months or such shorter period as the court may order. If the proceedings are still on foot the court will have power, again in exceptional circumstances, to make a further order if need be. It will be particularly important in all orders for the court to make plain at the outset why family assistance is needed and what it is hoped to achieve by it. There is now a Registrar's Direction to this effect for orders made to London Boroughs in the Principal Registry of the Family Division[63] and we recommend that the same practice be adopted in all courts. The overall aim is a more limited form of order in cases where at present the full effect of a supervision order has to be invoked even though it is not needed.

[61] *Infra*, paras. 6.14 *et seq*.
[62] (1987) Working Paper No. 100, para. 3.36.
[63] Children: Supervision Orders, Registrar's Direction, 30 April 1987, para. 2.

PART VI

JURISDICTION AND PROCEDURE

6.1 In this Part, we deal with the procedural and other consequences of the basic substantive scheme which we have proposed. We have not appended clauses to deal with them, because their exact form depends upon the scope of any eventual legislation. To some extent they also depend upon decisions which are still to be taken elsewhere.

Jurisdiction

6.2 As we have already explained,[1] most orders relating to the upbringing of children will be made, as at present, in the course of divorce or other matrimonial proceedings. They will therefore be made by the courts which have jurisdiction in those proceedings. Any Bill to give effect to the recommendations in this Report would, however, have to contain provisions similar to those in the Guardianship of Minors Act 1971[2] and the Children Act 1975[3] as to the courts before which free-standing applications can be brought. The basic position at present is that the equivalent applications can be made to the High Court, any county court or any magistrates' court. Consideration is being given elsewhere to the possibility of establishing a court with a unified jurisdiction in family matters[4] and until that is completed the position should remain broadly as it is at present. Thus we recommend that, in general, the High Court, any county court and any magistrates' court should have jurisdiction to hear applications for the orders discussed in Parts II and IV of this Report.[5]

6.3 There are two types of qualification to that basic position under the present law. The first is that certain orders can only be made in certain courts. For example, only the High Court at present has power to remove guardians. We have already explained[6] that we see no good reason for this and accordingly we recommend that the same courts should have power to remove guardians.

6.4 Other limitations relate to property and finance. Magistrates' domestic courts have no power to deal with the administration or application of any property belonging to or held in trust for a child, or the income thereof,[7] or to make orders for secured periodical payments, unlimited lump sums, transfer or settlement of property.[8] We do not suggest any change in the long-standing principle that magistrates have no power to deal with capital or property. However, magistrates also have no power to deal with applications for financial relief by children who have reached 18[9] or for the revival of lapsed orders for financial relief by children who have reached 16,[10] although they can deal with applications to vary existing orders by children who have reached 16.[11] The Family Law Reform Act 1987 extended the powers of courts to hear applications by older children so as to remove the discrimination against children of unmarried parents and was understandably cautious about doing so.[12] Nevertheless, the effect was to remove the power of magistrates to hear applications for the revival of lapsed orders.[13] We recommend, therefore, that magistrates be given power to hear applications from children who have reached 16 for the revival of lapsed orders and that consideration be given to allowing them to hear applications for new orders from those who have reached 18.[14]

6.5 The second type of qualification is that rules of court may specify which county court or magistrates' domestic court is the appropriate venue for custody applications.[15] The present rules specify the court for the district in which the child habitually resides.[16] We doubt

[1] *Supra*, paras. 4.29, 4.30 and 4.33.
[2] s. 15, recently amended by the Family Law Act 1986, Sched.1, para. 10.
[3] s. 100, recently amended by the Family Law Act 1986, Sched. 3, para. 20.
[4] Inter-departmental Review of Family and Domestic Jurisdiction, A Consultation Paper (1986).
[5] These should remain domestic proceedings for the purpose of section 65 of the Magistrates' Courts Act 1980.
[6] *Supra*, para. 2.31.
[7] Guardianship of Minors Act 1971, s. 15(2)(b).
[8] *Ibid.*, ss. 11B(1)(b) and 11C(1)(b); *supra*, para. 4.60.
[9] *Ibid.*, s. 11D(1).
[10] *Ibid.*, s. 12C(5).
[11] *Ibid.*, s. 12C(4).
[12] Illegitimacy (1982), Law Com. No. 118, paras. 6.32 and 6.33.
[13] Previously under the Guardianship of Minors Act 1971, s. 12C(5), all courts might do so provided that the applicant was under 21.
[14] New orders can only be made if the parents are separated, Guardianship of Minors Act 1971, s. 11D(1); all orders can only be made or last beyond 18 if the child is or will be educated or trained or there are other special circumstances, *ibid.*, ss. 11D(1), 12(1)(b) and (2), and 12C(6).
[15] Guardianship of Minors Act 1971, s. 15(1); Children Act 1975, s. 100(7).
[16] S.I. 1988/278, rr. 22 and 23; S.I. 1988/329, r. 5.

whether these rule-making powers add anything to those in section 75(3) of the County Courts Act 1984 and section 145(1)(g) of the Magistrates' Courts Act 1980. We also doubt whether it is desirable to have rigid rules as to venue in these cases. As already seen,[17] it is important to avoid delay in cases concerning children. Recent research has shown that the speed with which a case can be heard is usually a more important factor in the parties' choice of court than is geographical convenience.[18] The lack of venue rules in divorce proceedings does not seem to cause difficulty at present. It is important to secure that, so far as possible, all applications relating to the same child (or to children in the same family) are dealt with together. It should also be possible for applications which are in effect applications to vary or supersede an order already made in one court to be made to that court.[19] We therefore recommend that there should be much more flexibility in the rules allocating applications concerning children to a particular county court or magistrates' domestic court. Clearly, any court must have jurisdiction for the purposes of Part I of the Family Law Act 1986, which deals with jurisdiction as between different parts of the United Kingdom, but that need not affect the system of internal allocation of such cases within England and Wales.[20]

6.6 There are several other steps which could be taken within the present basic jurisdictional rules to further the aim of bringing all applications relating to the same child before the same court. We have already recommended that a court hearing family proceedings should have power to make the full range of private law orders relating to children.[21] First, therefore, it would be helpful to have an express direction that such applications should be made to the court where there are family proceedings in which the application can conveniently be heard, if this is known to the applicant, and we so recommend.

6.7 Secondly, magistrates' courts already have power to refuse to make an order if the case could more conveniently be dealt with in the High Court.[22] The same principle could be applied to any court which receives an application when there are family proceedings in another court. We therefore recommend that any court to which an application is made be given power to refuse to make an order if there are family proceedings in another court in which the application could more conveniently be heard. The risk of delay would obviously be a factor for the court to consider, but it should have power to make an interim or short-term order as have the magistrates' courts at present.[23] Clearly, the power would only arise where the order applied for could be granted by the other court.

6.8 Thirdly, the same result can sometimes be achieved more directly by using the existing powers to transfer cases from county court to county court[24] or from High Court to county court or county court to High Court.[25] It would scarcely be practicable or appropriate to enable a magistrates' court to transfer cases to the higher courts. However, it should be possible to transer a case from one magistrates' court to another in which the application could more conveniently be heard, at least if there are pending family proceedings and perhaps more generally. We recommend that further consideration be given to this.

6.9 At present, one court has power to make an order which effectively supersedes or varies an order made elsewhere, although magistrates cannot make orders for custody and access in matrimonial proceedings if there is in force a custody order relating to the same child made by any court in England and Wales.[26] It should be made clear that any court has power to make an order which supersedes, varies or discharges an order made in another court. Nevertheless, the principles that magistrates should normally decline to make an order which is inconsistent with the order of a higher court[27] and that higher courts ought not to allow their

[17] *Supra*, para. 4.55.

[18] As to the views of solicitors, see M. Murch with M. Borkowski, R. Copner and K. Griew, *The Overlapping Family Jurisdiction of Magistrates' Courts and County Courts* (1987), University of Bristol Socio-legal Centre for Family Studies, p. 110; litigants seldom choose the court and if the matter is discussed with their solicitors they are invariably content to follow the solicitor's advice, *ibid.*, p. 53.

[19] Thus, for example, it is now provided that an adoption application by parent and step-parent can be made to the court which granted the parent's divorce, so that the court can choose between adoption and joint custody, as required by the Adoption Act 1976, s. 14(3).

[20] Custody of Children—Jurisdiction and Enforcement within the United Kingdom (1985), Law Com. No. 138, paras. 4.62–4.65.

[21] *Supra*, paras. 4.33 and 4.37.

[22] Guardianship of Minors Act 1971, s. 16(4); Children Act 1975, s. 101(3).

[23] Guardianship Act 1973, s. 2(5).

[24] County Courts Act 1984, s. 75(3)(b) and County Court Rules 1981, Ord. 16, Part I.

[25] Matrimonial and Family Proceedings Act 1984, ss. 37–39, County Courts Act 1984, ss. 40–42; Practice Direction (Family Division: Business: Transfer) [1987] 1 W.L.R.316.

[26] Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(7)(a); see also (1986) Working Paper No. 96, para. 2.77.

[27] *Re B. (A Minor) (Adoption by Parent)* [1975] Fam. 127, at p. 142.

powers to be used as a disguised form of appeal from lower courts should be maintained. Hence it should certainly be possible for subsequent applications to be made to the same court, and this should generally be required if the earlier proceedings are still on foot.

6.10 In this way it is hoped to achieve the maximum flexibility in enabling cases concerning children to be dealt with without delay in the court which is most likely to have all the information needed and to be able to deal with all applications concerning the same child, and any related matters, together. For this reason, it will be necessary for any party to proceedings about a child to inform the court of any other family proceedings relating to the same child and we recommend that rules of court so provide.

6.11 So far we have dealt only with jurisdiction in private law. The position in public law proceedings for care and supervision orders is rather different. As already seen, these orders can be made in the course of family proceedings at present and it is recommended that this should continue.[28] Free-standing applications, however, must at present be made to a juvenile court.[29] The Review of Child Care Law recommended that both juvenile and domestic courts should have jurisdiction in care cases,[30] but as yet the Government's response to that recommendation is not known. From a purely technical point of view, it would obviously be much simpler if all the same courts had jurisdiction in care proceedings as they have in other civil proceedings relating to the upbringing of children. It would then be possible to apply all the recommendations made above to them as well.

6.12 For the time being, however, we must assume that this is not practicable and that free-standing applications will continue to be made in juvenile courts alone. Nevertheless, the Review of Child Care Law obviously contemplated that it would avoid confusion, wasteful duplication and delay if all proceedings relating to the same child could be dealt with together.[31] Hence local authorities should be able to intervene in divorce and other family proceedings.[32] The direction giving preference to such interventions, which we have recommended for private law applications,[33] would be equally helpful in this context and we recommend it for consideration. The Review also recommended a power to transfer cases between magistrates' courts[34] and once again we recommend this for consideration. Finally, the Review recommended a power for magistrates to transfer cases to a higher court, where there were pending proceedings relating to the same child in which the care case could more conveniently be heard.[35] As already seen, we doubt whether a power of transfer is practicable, but we do recommend that consideration be given to providing a power to decline jurisdiction in such cases.[36]

6.13 Applications for contact with children in care, or to discharge care or supervision orders, or to vary the requirements of supervision, should generally be made to the court which made the order. It would be a radical departure to suggest that such applications could be made to any court. However, sometimes an application for a residence order is also in effect an application to discharge a care order.[37] At present, custodianship applications relating to children in care often cannot be made to the court which made the care order, and never if that is a juvenile court. There would be much to be said for applying to these cases the principle already recommended[38] that it should be possible to make the application to the court which made the original order and even encouraged in some cases. Generally speaking, that court will be far more familiar with care cases and will be able to make a better assessment of the relative merits of a care order and a residence order. It would also be able to resolve the conflict between the parents' application for contact and the foster-parents' application for residence (or even adoption) which at present can only be done together by using wardship. This would, however, be something of a novel step and we can only recommend that it be given further consideration.

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[28] *Supra*, paras 5.2 *et seq.*

[29] Children and Young Persons Act 1969, s. 1(2); if the child is not brought before the court for the area where he lives, he must normally be sent to that court, *ibid.*, s. 2(11).

[30] Review of Child Care Law (1985), para. 23.6.

[31] *Ibid.*, para. 23.9.

[32] *Ibid.*, para. 23.12.

[33] *Supra*, para. 6.6.

[34] *Supra*, para. 6.8. Review of Child Care Law (1985), paras 23.13–23.15; we notice that in the recent case of *Re T. (Minors), The Times*, 17th June 1988, wardship had to be invoked in order to ensure that two sets of care proceedings, brought by two local authorities in different juvenile courts but relating to four children of one family, could be heard together.

[35] *Ibid.*, para. 23.16.

[36] *Supra*, para. 6.7.

[37] *Supra*, para. 4.53.

[38] *Supra*, para. 6.9.

Welfare reports

6.14 At present, the court may obtain a report from a welfare officer in most proceedings in which orders as to custody, access or specific issues may be made.[39] However, even then there are a few exceptions, and the courts have no power to call for a report in proceedings for the appointment or removal of guardians, or when an unmarried father applies for parental rights and duties.[40] There can be no good reason for denying the court the benefit of a report in cases where such major issues are at stake, while allowing it on relatively minor matters. We recommend, therefore, that the courts should have power to call for a welfare officer's report in all cases in which orders relating to the child's upbringing may be made.

6.15 We recognise, of course, the need for courts to be moderate in using these powers. Welfare officers' time is limited and must be targeted on the cases in which it will be most valuable. At present, it appears that reports are usually ordered in anticipation of a dispute about custody or (perhaps less routinely) access or to assist divorce courts in considering the arrangements for children under section 41 of the Matrimonial Causes Act 1973.[41] Reports play an important part in contested cases and it has recently been emphasised that the court should always give reasons for departing from any recommendations made.[42] On the other hand, reports are also a source of delay,[43] and in some cases the court may have to balance the advantage to be gained from a report against the disadvantages of delaying the hearing until, in effect, the case decides itself.[44]

6.16 In our Working Paper on Custody[45] we drew attention to the different criteria for ordering reports under the present law. Divorce courts "may at any time refer to a court welfare officer for investigation and report any matter arising in matrimonial proceedings which concern the welfare of a child."[46] In custody and custodianship proceedings the court may order a report "with respect to any specified matter... appearing relevant to the application."[47] In matrimonial proceedings before magistrates, the court must similarly specify a matter relevant to the decision to exercise its powers relating to the children, but can only call for a report when "of the opinion that it has not sufficient information to exercise its powers".[48] In the Working Paper, we asked whether the court should have the same powers in all proceedings and there was unanimous support from those who commented on this. We therefore recommend that where a question arises as to the exercise of any of its powers under the legislation, the court should be able to call for a report on any matter which is relevant to the welfare of the child concerned. Like everything else, this will usually be subject to the general rule that the courts should only exercise their powers where this is the best way to safeguard or promote the child's welfare. However, a rather different criterion should apply where the court is considering a care or supervision order and this is discussed further below.[49]

6.17 There are other differences between the courts' powers which ought also to be resolved. Divorce courts can only call for reports from a court welfare officer, who is in fact a probation officer.[50] In all other cases, the report may be sought either from a probation officer or from an officer of the local social services authority.[51] In practice, the arrangements for providing reports are agreed locally. However, there are cases in which it is more sensible to call for a local authority report at the outset, particularly where there is an obvious local authority connection. We recommend, therefore, that in all proceedings it should be possible

[39](1986) Working Paper No. 96, para. 2.83; see Matrimonial Causes Rules 1977, r. 95; Domestic Proceedings and Magistrates' Courts Act 1978, ss. 12(3)–(7), 13(3), 14(4), and 21(5); Guardianship Act 1973, s. 6; Children Act 1975, s. 39; Guardianship of Minors Act 1971, s. 14A(7).

[40]Cf. Guardianship Act 1973, s. 6(1).

[41]J. Eekelaar and E. Clive, *Custody after Divorce* (1977), paras.4.6, 4.7; J. Eekelaar, "Children in Divorce: Some Further Data", [1982] O.J.L.S.63; J. A. Priest and J. C. Whybrow, *Custody Law in Practice in the Divorce and Domestic Courts,* Supplement to Working Paper No. 96 (1986).

[42]*W.* v. *W.*, *The Times*, 14th June 1988; see also *Stephenson* v. *Stephenson* [1985] F.L.R.1145, *Cadman* v. *Cadman* [1982] 3 F.L.R.275, *Re T. (A Minor) (Welfare Report Recommendation)* [1980] 1 F.L.R.59.

[43]Eekelaar and Clive, *op. cit.* n. 41, para. 4.8.

[44]*Re C. (A Minor) (Custody of Child)* [1980] 2 F.L.R.163.

[45](1986) Working Paper No.96, para. 2.84.

[46]Matrimonial Causes Rules 1977, r. 95(1).

[47]Guardianship Act 1973, s. 6(1); Children Act 1975, s. 39(1); this discretion in the court is additional to the requirement that the local authority supply a detailed report on *all* custodianship applications, under the Children Act 1975, s. 40; see *infra*, para. 6.19.

[48]Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(3).

[49]*Infra,* para. 6.20.

[50]Matrimonial Causes Rules 1977, r. 95(1).

[51]Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(3), Guardianship Act 1973, s. 6(1), Children Act 1975, s. 39(1).

to call for a report from a probation officer or an officer of the local social services authority. Once again, the position may be rather different in cases where the court is considering a care or supervision order.[52]

6.18 The divorce courts' powers are contained only in rules and say nothing about how such reports are to be made or received in evidence.[53] This may be because until 1967 divorce jurisdiction lay exclusively in the High Court, which has wide inherent powers in respect of children. The statutory provisions governing reports in all types of proceedings in magistrates' courts contain detailed rules about how they are to be presented to the court.[54] Most of these appear more appropriate to rules of court than to primary legislation.[55] However, there are two provisions which might usefully be applied to reports in all courts. The first is that the report be made either orally or in writing; in practice it is usually made in writing, although it may be supplemented at any hearing. Rules of court can then provide for the report to be disclosed to each party and for them to have the opportunity of putting questions to the officer.[56] The second is that the report may be received and taken into account by the court regardless of any rule of the law of evidence which might otherwise prevent this.[57] This appears to be taken for granted in county courts as well as in the High Court, but it would be as well to put the matter beyond doubt. It would also emphasise the fact that these are reports for the court and not evidence presented by one or other of the parties to the case. We recommend accordingly. We also recommend that the present position, whereby the court has power to call for reports before the hearing, either of its own motion or on the application of any party to the proceedings, should be maintained.[58]

6.19 We have already recommended that power be given for regulations or rules of court to specify the matters which should be covered in reports in particular types of case, unless the court directs that it is unnecessary to do so.[59] We have two types of case particularly in mind. The first is where, instead of the present custodianship application, a non-parent applies for a residence order, usually with leave of the court (which will give the court a useful opportunity to consider what the reports should contain). This, in combination with the power to obtain a report from a local authority in appropriate cases,[60] should replace the current requirements in all custodianship cases (apart from those arising in other family proceedings) to obtain a detailed report from the local authority.[61] There obviously are cases in which this is essential, particularly where the child is in local authority care or accommodation. There are others, however, in which there is no previous local authority involvement, no suggestion that any child protection element is involved, and where it is a matter of chance whether the application can be made in matrimonial proceedings between the parents, in which case there is no mandatory requirement for detailed local authority reports at present.[62] We are concerned that the law should not require the allocation of scarce resources to cases in which they are not needed.

6.20 The second type of case is where the court is considering making a care or supervision order in family proceedings. In principle, the protection available to the child should be as close as possible to that in ordinary care proceedings.[63] At present, where there is a conflict of interest between the child and his parents in care proceedings, the court may appoint a

[52] *Infra*, para. 6.20.

[53] Matrimonial Causes Rules 1977, r. 95.

[54] Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(4)—(7); Guardianship Act 1973, s. 6(2)—(3A); Children Act 1975, s. 39(2).

[55] It is noteworthy that the equivalent provisions for the reception of reports in care proceedings are contained in rules; see Magistrates' Courts (Children and Young Persons) Rules 1988, r. 25, which consolidate with some amendments the previous rules and come into force on 1st August 1988.

[56] Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(4) and (5); Guardianship Act 1973, s. 6(2) and (3); Children Act 1975, s. 39(2) and similar principles apply in divorce proceedings, see *W.* v. *W.*, *The Times*, 14th June 1988; in divorce proceedings, the parties are prohibited from disclosing the contents to anyone else.

[57] Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(6); Guardianship Act 1973, s. 6(3A); Children Act 1975, s. 39(2).

[58] Matrimonial Causes Rules 1977, r. 95(3); Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(9); Guardianship Act 1973, s. 6(6); Children Act 1975, s. 39(2).

[59] *Supra*, para. 3.21; at present, regulations provide for the contents of reports by local authorities under the special provisions dealing with custodianship applications in the Children Act 1975, s. 40, whereas rules of court provide for the contents of reports by adoption agencies, local authorities, reporting officers and guardians *ad litem* under the Adoption Act 1976 and for reports by guardians *ad litem* in care proceedings.

[60] *Supra*, para. 6.17.

[61] Children Act 1975, s. 40; see Custodianship (Reports) Regulations 1985, S.I. 1985/792 (as amended by S.I. 1985/1494).

[62] Children Act 1975, s. 37(4); similarly no such requirement exists in divorce etc. proceedings.

[63] *Supra*, para. 5.9.

"guardian *ad litem*" for the child.[64] Guardians are chosen from panels of social workers administered by local authorities,[65] but are independent of the authority involved in the particular case. The Review of Child Care Law recommended that in future a guardian should always be appointed, unless it appeared unnecessary to do so in order to safeguard the child's interests.[66] Accordingly, in our Working Paper on Care, Supervision and Interim Orders in Custody Proceedings,[67] we provisionally proposed that a court contemplating a care order in family proceedings should always commission an independent report, unless this appeared unnecessary in order to safeguard the child's interests. We recognised that in general members of the guardian *ad litem* panel are better qualified to make the independent assessment in care cases, but to save time and resources it might be necessary for the court welfare officer to do so. Each should have the same duties of investigation and reporting as has a guardian.[68] These proposals were approved by most respondents and the Government has since accepted the recommendations of the Review of Child Care Law on this point.[69] Although we did not discuss this, the same provisions could equally well be applied to supervision orders, although where the court has directed the application it may often be unnecessary to call for any addition to the original welfare officer's report. Accordingly, we recommend that, on receiving or directing an application for a care or supervision order in family proceedings, the court should commission a report from a welfare officer or member of the panel of guardians *ad litem,* each having the duties of a guardian, unless it is unnecessary to do so in order to safeguard the child's interests.

6.21 There would be much to be said for abolishing the present distinction between welfare officers reporting in family proceedings and guardians *ad litem* reporting in care proceedings. The courts could then have the same powers to call for reports, with the criteria for doing so, the qualifications of the officer chosen, and the contents of the report differing, not according to the type of proceedings, but according to the type of order in question. The reason for the present differences lies, however, in the differing status of the child in the proceedings, to which we now turn.

Participation of the child

6.22 In our Working Papers on Custody[70] and on Care, Supervision and Interim Orders in Custody Proceedings,[71] we outlined the differing approaches of the present law towards the representation of the child in family and care proceedings. Generally speaking, in family proceedings reliance is placed upon the welfare officer's report, not only to make an independent and expert assessment of the case but also to present the child's own point of view to the court. The child is rarely made a party, although both the High Court and county courts (but not magistrates' domestic courts) have power to do so.[72] If the child is made a party, a guardian *ad litem* must be appointed. The guardian may be the Official Solicitor,[73] whose staff are highly experienced in conducting High Court cases on behalf of children, but are not trained social workers or probation officers. Any other guardian must also employ a solicitor. Hence the object is largely to provide legal representation for the child, but also to confer full rights of participation in the proceedings, including rights of appeal. Confusingly, an intermediate position is allowed under the Matrimonial Causes Rules 1977, which permit the court to order separate representation with rights of participation in the initial proceedings but apparently without party status and rights of appeal.[74] The guardian's duty in all cases is to act in the child's best interests rather than in accordance with his wishes. Nevertheless, party status is usually only thought appropriate where he is old enough to express a view about his future.[75]

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[64]Children and Young Persons Act 1969, ss. 32A and 32B.

[65]Children Act 1975, s. 103; Guardians Ad Litem and Reporting Officers (Panels) Regulations 1983, S.I. 1983/1908.

[66]Review of Child Care Law (1985), para. 14.12.

[67](1987) Working Paper No. 100, paras. 2.27–2.29.

[68]See Magistrates' Courts (Children and Young Persons) Rules 1988, r. 16(6)(a) (b) (e) (f).

[69]The Law on Child Care and Family Services (1987), Cm. 62, para. 57.

[70](1986) Working Paper No. 96, paras. 2.81–2.82.

[71](1987) Working Paper No. 100, paras. 2.24–2.25.

[72]Rules of the Supreme Court, Ord. 90, r. 6(1).

[73]In wardship proceedings, he should be the first to be approached *Re C. (A Minor) (Wardship Proceedings)* [1984] 5 F.L.R. 419, *Re (A., B., C., D., (Minors), The Times,* 23rd May 1988.

[74]r. 115.

[75]*Re F. (Adoption: Parental Agreement)* [1982] 3 F.L.R.101, *Re C. (A Minor) (Wardship Proceedings)* [1984] 5 F.L.R. 419, Practice Direction [1982] 1 W.L.R. 118.

6.23 In care proceedings, on the other hand, the child is invariably a party with the right to legal representation, to participate fully in the proceedings and to appeal.[76] A guardian *ad litem* may only be appointed if there is a conflict of interest between the child and his parents, but will come from the specialist panels operated by local authorities.[77] The guardian then combines the tasks of investigating and reporting to the court with those of instructing the child's solicitor and deciding whether to appeal.[78] The guardian must act in accordance with the child's best interests although he should convey the child's wishes and feelings to the court. The child's solicitor must normally act upon the guardian's instructions, except where the child's wishes are different and the solicitor considers the child able (given his age and understanding) to give instructions on his own behalf.[79] In disputes between parents and local authorities over the denial of access to a child in care, there is a discretion to make the child a party and appoint a guardian for him.[80]

6.24 The Review of Child Care Law recommended that the child should remain a party to care proceedings and that a guardian *ad litem* should always be appointed unless it appeared unnecessary to do so.[81] Both proposals have been accepted by the Government.[82] The Review also suggested that in future it would be unnecessary to appoint a lawyer for the child in every case, given that the parents will automatically have party status and the right to legal representation. A lawyer should, however, be appointed where the guardian wishes it, or the child is old enough to instruct a lawyer and wishes to do so, or where there is no guardian, or in any other case where the court so directs.[83] In our Working Paper on Care, Supervision and Interim Orders in Custody Proceedings, therefore, we provisionally proposed that the child should be made a party and have legal representation in the same circumstances.[84] However, the Government has not yet indicated its response to the Review's recommendations on this matter. It would therefore be premature for us to make any firm recommendations. We do, however, suggest that in principle, the representation available for a child where care or supervision are contemplated in the course of family proceedings should be the same as that available in care proceedings. We recognise that this will only be practicable if legal aid can be arranged as quickly in these proceedings as it can in care proceedings at present. That in turn depends upon the system of legal aid to be adopted in care cases, which again is not yet known.[85]

6.25 We therefore urge that further consideration be given to the whole subject of independent representation and party status for children whose future is at stake in family or care proceedings. Research is currently in progress at the University of Bristol Socio-legal Centre for Family Studies which should yield valuable evidence about the working of both the present systems.[86] As those systems themselves demonstrate, the issues involved are complex.[87] It is first necessary to distinguish the two aims underlying such representation. One is to provide the court with a source of expert information and evidence, independent of the other parties, in order to help the court arrive at the outcome which will best serve the welfare of the child. The second is to recognise the child's own status as a person whose life, and to some extent liberty, is affected by the decision and who may have an independent point of view which should be properly put before the court. It is then necessary to decide to what extent independent social work assessment, legal representation, and rights of participation or appeal are required to achieve each of those aims.

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[76]Technically, and literally in most cases, he is "brought before the court" as if he were a defendant in criminal proceedings; Children and Young Persons Act 1969, ss. 1(1), 2(4), (5) and (9).

[77]*Supra*, para. 6.20.

[78]However, the guardian should not seek to make the child a ward of court in order to challenge the local authority's management of the child in care. *A.* v. *Berkshire County Council, The Times*, 10th June 1988.

[79]Magistrates' Courts (Children and Young Persons) Rules 1988, r. 16(6)(c), (d).

[80]Child Care Act 1980, s. 12F.

[81]Review of Child Care Law (1985), paras. 14.10–14.12; it was also recommended that the child should be able to apply for access in his own right and that a guardian *ad litem* should always be appointed in access proceedings unless this was unnecessary, *ibid.*, paras. 21.20–21.21

[82]The Law on Child Care and Family Services (1987), Cm. 62, para. 57; as to access, see para. 64.

[83]Review of Child Care Law (1985), paras. 14.16–14.17.

[84](1987) Working Paper No. 100, paras 2.30–2.34.

[85]At present, legal aid in care proceedings can be granted by the court itself, whereas legal aid in family proceedings is granted by the local legal aid committees.

[86]See also M. Murch with K. Bader, *"Separate Representation for Parents and Children–An Examination of the Initial Phase* (1984); A. Macleod and E. Malos, *Representation of Children and Parents in Care Proceedings* (1984).

[87]See, e.g., C. M. Lyon, "Safeguarding Children's Interests? Some Problematic Issues Surrounding Separate Representation in Care and Associated Proceedings" in M. D. A. Freeman (ed.), *Essays in Family Law 1985* (1986).

6.26 In principle, the solutions chosen should depend upon the type of order rather than the type of proceedings. In ordinary family disputes, there is much to be said for allowing both the child's interests and the child's views to emerge through the normal method of a welfare officer's report.[88] Welfare officers do not feel the need for an advocate in these cases. Nor will there be much point in giving the child party status and a right of appeal if none of the adult parties wishes to challenge the decision. Nevertheless, the child does have a vital interest in the outcome, particularly if the order can be enforced against him as well as the adults involved,[89] and perhaps especially in applications by non-parents. Hence, we suggest that all courts should be able to make the child a party. Consideration should be given to requiring them to consider this if he is over a certain age and to requiring welfare officers to advise upon whether the child should become a party. The child will obviously be a party if he is given leave to make his own application.[90]

6.27 Where care or supervision is in question, the need for an independent assessment of the case has been accepted.[91] Guardians *ad litem* have obviously felt the need for legal representation as well,[92] but this is partly because the child is at present the principal defendant in care proceedings. They may feel differently once the parents become the principal defendants and the procedure itself more akin to that in family proceedings. The need to provide the child with legal representation is somewhat diminished once his parents are able to challenge the local authority's case and both they and the authority have rights of appeal.[93] It was for these reasons that the Review of Child Care Law was able to separate the issues of party status and legal representation.

6.28 We suggest that the same approach might be adopted in family proceedings where care or supervision is in question. Intervention by the State is different in kind from choosing between two parents and the case for recognising the child's own point of view is much stronger. While it is generally thought that children should not be asked to choose between their parents, they may feel a strong sense of injustice if they are not given some voice in the decision between their parents' and the local authority's plans. Hence the court should always be required to consider how the child's interests and views are to be represented and, as already seen,[94] to commission a report from an independent person unless satisfied that it is unnecessary to do so in order to safeguard the child's interests. The court could also be required to consider, in the light of the child's age, understanding and any other relevant factors, whether the child should have legal representation at the outset. Otherwise, the independent person should have a duty to consider this question and the power to seek directions on this and on any other matter from the court. This would include reporting to the court if the child wished to be heard. In general, a child who is old enough to have a point of view and wishes to express it should be permitted to do so. We have already suggested[95] that all courts should have power to make the child a party. We therefore recommend that consideration be given to a scheme along these lines.

6.29 These legal issues are distinct from the complex administrative problems of organising both legal and welfare services in the family jurisdictions and in particular of ensuring that reports are prepared within a reasonable time by people who are both suitably qualified for the particular case and clearly independent of any of the parties involved. However, the two are inter-related, if only because it must always be clear where the principal responsibility of the person providing the report lies, whether it is to provide the court with the information it requires, or to promote a resolution of the case in the interests of all concerned,[96] or to safeguard and promote the interests of the child.[97] Hence we welcome the active consideration which is now being given to resolving some of these issues.

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[88] *Supra*, para. 3.24.

[89] Family Law Act 1986, s. 34.

[90] *Supra*, para. 4.44.

[91] It could, of course, be argued that the local authority was itself representing the child's interests, but the 1974 inquiry into the death of Maria Colwell revealed that the reality was much more complex.

[92] J. Masson and M. Shaw, "The Work of Guardians ad Litem" [1988] J.S.W.L.164.

[93] The Law on Child Care and Family Services (1987), Cm. 62, para. 66; under the Children and Young Persons (Amendment) Act 1986, parents can now appeal if the child is separately represented; local authorities still cannot do so.

[94] *Supra*, paras. 6.20–6.21.

[95] *Supra*, para. 6.26.

[96] The High Court has emphasised that the task of a welfare officer at present is to provide information for the court rather than to promote agreement between the parties, *Re H. (Conciliation: Welfare Reports)* [1986] 1 F.L.R. 476, *Scott* v. *Scott* [1986] 2 F.L.R. 320; but provided the first is done, it is not necessarily incompatible with the second.

[97] The task of a guardian *ad litem* in care proceedings is much less ambiguous in this respect than the task of a welfare officer, but both would probably see this as their overall objective.

Participation by adults

6.30 As at present,[98] rules of court should continue to provide for the participation of adults in the proceedings. Generally speaking, any person whose legal position will be affected by the order should be made a party or at least given the automatic right to participate if he wishes to do so. These include parents with parental responsibility, guardians, and those with a residence, care or other order which may be affected by the decision.[99] Some others should be notified, if practicable, and given an opportunity to participate. These include a father who does not have parental responsibility and a local authority which is providing accommodation for the child under voluntary arrangements. We also recommend a provision for all proceedings, similar to that recently adopted for care proceedings, allowing for more limited participation by people with a current interest in the child's welfare whose participation is likely to be relevant to the proceedings.[100] Those applying for orders, whether as of right or with leave,[101] will of course be full parties to the proceedings.

6.31 However, we also recommend that the courts should have power to protect children, and those looking after them, from repeated applications by people who would otherwise have a right to apply whenever they wished to do so. Under the present law, there is nothing to stop either parent from applying for custody or access as often as he likes and no matter how hopeless the case. The courts' powers to restrain vexatious litigants are scarcely adequate or appropriate for this purpose. We have in mind the sort of case where, after a fully argued hearing, a parent is denied contact, or granted only carefully defined contact, with the child but seeks a further order shortly afterwards. Vindictive or obsessive harassment of this kind is regrettably not unknown and it can seriously undermine the security and happiness of the child's home. We therefore recommend that, on disposing of any application for an order discussed in Parts II or IV of this Report, the court should have power to prohibit a named person from making such an application without leave of the court. Such an order should, of course, only be made where it is the most effective way to safeguard or promote the child's welfare.

[98] e.g. Magistrates' Courts (Guardianship of Minors) Rules 1974, r. 9; Magistrates' Courts (Matrimonial Proceedings) Rules 1980, rr. 8 and 9.

[99] Which may then be treated as affecting their position, so that the confusing and inconsistent provisions in the Matrimonial Causes Act 1973, s. 42(5) and the Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(1) and (2) as to the effect upon parents of orders made in matrimonial proceedings can be repealed; see (1986) Working Paper No. 96, paras. 2.16–2.17.

[100] Magistrates' Courts (Children and Young Persons) Rules 1988, r. 19, in force on 1st August 1988.

[101] *Supra*, paras. 4.39 and 4.40.

PART VII

MISCELLANEOUS

7.1 A complete Bill would contain minor and consequential amendments, transitional provisions and repeals and we shall continue to work on these after publication of this Report. In this Part, we make some recommendations for further amendments and repeals which are not solely consequential on the recommendations already made. We have already indicated the major provisions[1] which it is hoped to repeal and replace by the new scheme. We are, of course, only concerned with the legislation as it applies to England and Wales.

Declarations of unfitness

7.2 Included in the provisions of the Matrimonial Causes Act 1973 is the power to declare in a decree absolute of divorce or a decree of judicial separation that one spouse is unfit to have custody of the children of the family.[2] The effect is that the spouse is not then entitled as of right to custody or guardianship on the death of the father. The power is a historical survival from the time when mothers were first given the right to act as guardians after the father's death.[3]

7.3 These declarations are hardly ever made today, as the court should be slow to inflict the stigma of holding that a parent is unfit to have any relationship of a parental or quasi-parental kind with his own child.[4] The court will find it difficult to predict what will be for the best in the unlikely event of the other parent's untimely death, but in any event the courts now have ample powers to protect the child as and when the need arises. There is no equivalent power in any other proceedings in which a parent may have been found unable to carry out his principal responsibilities properly and this has caused no difficulty. The power has already been repealed in Scotland[5] and we recommend that it should also be repealed here.

7.4 The only comparable power is that in section 38 of the Sexual Offences Act 1956, under which a criminal court may divest a person of all authority over a child on convicting him (or her) of incest with that child. This again is a historical survival from the days when the courts' powers to protect children from their parents were much more limited than they are today.[6] The action needed to protect the child in these cases can and should be taken long before any charge of incest comes to be tried. It ought also to be taken in civil proceedings where the court has the full range of powers available and the interests of all concerned are properly protected at the hearing. It is particularly anomalous that a criminal court should have power to appoint a replacement "guardian" for the child.[7] Once again, there is no equivalent power on convicting a parent of any other crime against a child, no matter how serious, and no suggestion that this has caused any difficulty. We recommend, therefore, that section 38 of the Sexual Offences Act 1956 can safely be repealed.

Consent to marriage

7.5 Among the many consequential amendments we have had to consider are those to the Schedule of consents required to the marriage of 16 and 17 year-old children under the Marriage Act 1949.[8] The broad policy of the present Schedule is to require the consent of each parent (with, in our terms, parental responsibility for the child) and each guardian, unless there is a custody order or agreement in force, in which case only the consent of the person with custody is required. Nevertheless, there are several gaps and anomalies within the

[1] *Supra*, paras. 1.6–1.8.
[2] Matrimonial Causes Act 1973, s. 42(3) and (4).
[3] Guardianship of Infants Act 1886, s. 7.
[4] *B.* v *B.* [1976] 3 F.L.R.187.
[5] Law Reform (Parent and Child) (Scotland) Act 1986, s. 10(2) and Sched. 2; see Scottish Law Commission, Report on Illegitimacy (1984), Scot. Law Com. No. 82, para. 9.24.
[6] It is derived from the Punishment of Incest Act 1908, which first made incest a crime; it was not until the Children and Young Persons (Amendment) Act 1952 that children could be removed from their parents on grounds of abuse or neglect without convicting the parents of any offence.
[7] Sexual Offences Act 1956, s. 38(3); the status and powers of such a guardian are quite unclear.
[8] Marriage Act 1949, s. 3 and Sched. 2; technically, positive consent is only required to marriages under the authority of a registrar's certificate or a common licence, s. 3(1) and (2); marriages after publication of banns merely require an absence of dissent, s. 3(3) and (4).

Schedule as originally enacted[9] and as amended by the Family Law Reform Act 1987.[10] Those amendments were regarded as a stop-gap measure until a comprehensive review such as this would enable the same basic policy to be achieved without undue complexity.[11] It is the complexity, rather than the basic approach, of the Schedule which has been criticised. It would certainly be possible, and indeed quite simple, to adapt that approach to the scheme of parental responsibility which we recommend. This would require the consent of each parent with parental responsibility, and each guardian, except where there was a residence order in force, when the consent of each person with whom the child was to live as a result of the order would be required.

7.6 There are, however, two difficulties. The first is the recommendation that residence orders should normally cease when the child reaches 16.[12] The choice is then between requiring the consent of each parent, even though one or both may have been estranged from the child for years, or requiring the consent of the person in whose favour there was an order in force just before the child reached 16. We would recommend the latter, as it is generally safe to assume that the person with whom the child was living then will be the one best qualified to judge whether he is mature enough to marry, but this may not always be so. The second difficulty is that the Review of Child Care Law recommended that where the child was in care under a care order not only the local authority but also the parents should have to consent.[13] It is difficult to reconcile this recommendation with the policy of the present law. This is no longer designed to protect the parent from losing the child or the family patrimony from fortune hunters. The aim is to protect the child from an immature and hasty decision which might lead to much unhappiness in the future. If the people currently responsible for the child believe that consent should be given, it must be difficult for a parent from whom the child is separated, and could well be seriously estranged, to justify disagreement. The child can always apply to the courts for consent[14] and would be very likely to succeed in such a case. The Government has not expressed its view on this matter. We would recommend that the policy in both public and private law be the same, so that the responsibility of protecting the child should lie with the authority having the child in its care under a care order.

7.7 However, an alternative course would be to abolish the requirement of consent altogether. As the Joint Working Party on Solemnization of Marriage observed in 1973, "The enforcement of the rules relating to consent is notoriously difficult and it is well known that the rules can be easily evaded."[15] There seems no prospect in sight of implementation of the Working Party's recommendations, which would have gone some way towards making evasion more difficult.[16] If the marriage takes place without consent it is quite valid.[17] If consent is refused, the child can apply to the court for consent, which is likely to be granted.[18] In technical terms, therefore, it is difficult to justify the present law.

7.8 It can also be argued that a requirement of consent does little good, given that 16 and 17 year-olds are thought old enough to make valid marriages, that many already live away from home and that couples increasingly live together before or instead of marriage. Parental refusal to consent may simply serve to alienate the child and, since parental opposition is often withdrawn if the girl becomes pregnant, unwanted pregnancies may be encouraged. If refusal of consent results in cohabitation rather than marriage, this can be severely disadvantageous to the woman in terms of the courts' powers to protect her position should the relationship run into difficulties,[19] especially in the "traditional" relationship where the man

[9]Solemnization of Marriage in England and Wales (1973), Law Com. No. 53, Annex, para. 47; Illegitimacy (1982), Law Com. No. 118, paras. 9.15–9.16.

[10]s. 9.

[11](1982) Law Com. No. 118, paras. 9.18–9.20.

[12]*Supra*, para. 3.25.

[13]Review of Child Care Law (1985), para 8.6; the present Schedule does not deal expressly with the position where a child is in compulsory care, whether by virtue of a care order or the assumption of parental rights by resolution, and so the matter obviously requires clarification one way or the other.

[14]Marriage Act 1949, s. 3(1)(b); an application may be made to the High Court, county court or magistrates' court.

[15](1973) Law Com. No. 53, Annex, para. 48; the case of evasion is described in paras. 7–14.

[16]*Ibid.*, paras. 49–53.

[17]Unless in a marriage solemnized after banns, a parent has publicly declared his dissent, Marriage Act 1949, ss. 3(3) and 25(c); however, it is easiest to marry after banns without the parent ever finding out.

[18]Most applications are made to magistrates' courts, with recent outcomes as follows:

%	Withdrawn	Refused	Allowed
1983	48	11	41
1984	31	14	54
1985	42	10	48
1986	39	11	50

(Source: Home Office Statistical Bulletins)

[19]Particularly in respect of the right to occupy the family home and the protection available against violence and molestation.

is the sole or major wage-earner and the property is in his name. In such circumstances, it might well be thought preferable to permit young marriages, even if the number of divorces does also increase, since in that way at least the legal situation on break-up of the relationship can be properly regulated. The marked drop in teenage marriages in recent years[20] may not be entirely beneficial to them or to their children, as there has also been a large increase in births outside marriage.[21]

7.9 The main argument against abolishing the requirement of consent is that more young marriages break down and that the divorce rate might therefore rise. However, although there is a clear association between age at marriage and divorce, there is also a higher risk of divorce where the bride is pregnant, and a higher rate of pregnancy among teenage brides.[22] Further, teenage mothers seem more likely themselves to have come from broken homes.[23] Hence, the inter-relationship between some disruption in home background, early pregnancy, early marriage and a higher rate of divorce is complex. But in any event, the higher divorce rate is no advertisement for the parental consent requirement, given that all but a very few of these marriages have consent. Nevertheless, it is impossible to know how many marriages have *not* taken place because of the requirement or how successful those marriages would have been. It can certainly be argued that the requirement does no more than cause the couple to think again in cases where it is doubtful whether the child is sufficiently mature to make the decision alone. Unfortunately, it may be those children who are most in need of the pause for thought who are least likely to have it required of them.

7.10 There has never been a consent requirement in Scotland and the Kilbrandon Committee on the Marriage Law of Scotland recommended against introducing one.[24] At that time, the divorce rate for marriages in Scotland where both parties were under twenty was roughly half that in England and Wales. Although this could be due to differences in outlook and attitude, it did suggest that "the imposition of a statutory requirement of parental consent does not have any noticeable effect upon the stability of marriages".[25] The dominant factor, in the committee's view, was not the state of the law but the state of public attitudes and that is just as likely to be true today.

7.11 Hence it appears that the present consent requirement is illogical, easily circumvented or surmounted, and of doubtful benefit to the very children whom it is trying to help. We have therefore concluded that, as we cannot support the continuation of the present state of the law, we should recommend, with some reluctance on the part of one of us, that the consent requirement be repealed.

Custody of Children Act 1891

7.12 This Act was passed in response to a number of cases in which parents successfully brought *habeas corpus* proceedings to enforce their right to possession of their children, against the Dr. Barnardo's homes where the children had either been placed or been taken in after being abandoned by their parents.[26] Section 1 provides that if a parent has abandoned or deserted his child or has otherwise behaved in such a manner that the court should refuse to enforce his right to custody of the child, then the court may refuse to do so. Although, in theory, a parent or guardian who is entitled to the custody of a child may apply in the family division for a writ of *habeas corpus* for the production of the child[27] it has been held that this is

[20]Marriages per thousand eligible population:

	1961	*1971*	*1981*	*1985*	*1986*
Marriages of					
Women aged 16–19	76.5	92.4	42.0	28.0	24.4
Men aged 16–19	16.9	26.8	11.6	7.4	6.1

(Source: Social Trends 1988)

[21]In 1975, the outcomes of the 112,000 pregnancies of women under 20 were 31 per cent conceived and born in marriage, 21 per cent born within the first eight months of marriage, 21 per cent born outside marriage (including 8 per cent registered with the name of both mother and father), and 27 per cent legal abortions; in 1985, the comparable percentages of the 119,000 pregnancies were 15 per cent, 11 per cent (a marked drop in "shotgun" marriages), 41 per cent (including 24 per cent registered with both names), and 34 per cent; *Social Trends 1988,* Chart 2.24.

[22]e.g. B. Thornes and J. Collard, *Who Divorces?* (1979), ch. 5; J. Haskey, "Marital Status before Marriage and Age at Marriage: Their Influence on the Chance of Divorce", (1983) 32 Population Trends 4.

[23]M. Simms and C. Smith, *Teenage Mothers and Their Partners* (1979), D.H.S.S. Research Report No. 15, p. 7; other significant differences were in social class, the size of their own families, and the age at which their own mothers started to have children.

[24](1969), Cmnd. 4011, ch. 3.

[25]*Ibid.*, para. 29.

[26]*Barnardo* v. *McHugh* [1891] A.C. 388; *Barnardo* v. *Ford (Gossage's Case)* [1892] A.C. 326.

[27]Supreme Court Act 1981, Sched. 1, para. 3, R.S.C., O.54, r. 11.

the wrong procedure in relation to custody disputes and that the issue would be better dealt with under the wardship jurisdiction.[28] Thus, in practice this section is never invoked. In any event, it has been superseded by section 1 of the Guardianship of Minors Act 1971, first passed in 1925, under which the welfare of the child is always the first and paramount consideration in such cases.[29]

7.13 Section 2 provides that where a child has been brought up by another person, the court which orders his return to his parents can order the parent to pay the whole or part of the cost of bringing him up. Once again, this appears to assume the use of the *habeas corpus* procedure. The power has now been superseded by the provisions governing parental contributions to the maintenance of children in local authority care[30] or the courts' powers to make maintenance orders where children are being cared for by individuals.[31] In practice, if the parents cannot afford to maintain the child while he is away then they are unlikely to be able to afford a capital sum if the child comes home. As with all the Act's provisions, the object was to redress the injustice caused by the parents' near-absolute right to recover the child. Nowadays, that decision will always be governed by what is best for the child.[32]

7.14 Section 3 places upon a parent, who has abandoned or deserted his child, or has allowed another to bring the child up for so long as to show that he is unmindful of his duties, the burden of proving that he is fit to have the child back. Once again, this has been superseded by the rule that the child's welfare is paramount in these cases. As the leading case of *J.* v. *C.*[33] demonstrated, where a child has been brought up by another family for a long time, it is not enough that the parent is fit to have custody. The child's interests may still dictate that he remains where he is. The court must conduct the exercise of balancing the various relevant factors without any presumption either way.

7.15 Section 4 gives the court power to make an order as to the child's religious upbringing so as to secure that the parents' wishes are observed even if the court refuses to give the parent custody. Insofar as this section is couched in terms of an absolute parental right to determine the child's religion it is incompatible with the rule that the child's welfare is paramount in any dispute about his upbringing.[34] Insofar as it reflects the need for a mechanism to resolve disputes about the child's religion, these are amply catered for under the recommended new scheme. Modern child care law requires local authorities to respect the religion "in which he would have been brought up,"[35] rather than the parents' choice as such and it is proposed to preserve this.[36] Implicit in this formulation is the child's right to determine his own religious beliefs as he grows older.

7.16 We conclude, therefore, that as the law has developed and greater recognition been given to the interests of children so the provisions of this statute have gradually been superseded. There is, therefore, no place for the Custody of Children Act 1891 in a modern scheme of child law.

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[28]*Re K.* (1978) 122 S.J. 626.

[29]*Supra*, paras. 3.12 *et seq.*

[30]Child Care Act 1980, ss. 45–48.

[31]Children Act 1975, s. 34; Family Law Reform Act 1969, s. 6; the parents may also be required to reimburse D.H.S.S. for income support paid to people with actual care of the child, Social Security Act 1986, ss. 20 and 24.

[32]*J.* v. *C.* [1970] A.C. 668.

[33]*Ibid.*

[34]See *J.* v. *C.* [1970] A.C.668, *per* Ungoed-Thomas J. at p.801, the House of Lords affirmed the general principle without specific reference to religion and disapproved *Re Carroll (No. 2)* [1931] 1 K.B. 317, which had upheld the parental right to choose.

[35]Child Care Act 1980, ss. 4(3) and 10(3).

[36]Review of Child Care Law (1985), para. 8.8.

PART VIII

COLLECTED RECOMMENDATIONS

8.1 In this Part, we collect the recommendations set out in the earlier parts, but not always in the same order. References are given to the relevant paragraphs of the report where the reasons for them are explained, and the relevant clauses, when these are included in the draft Bill annexed.

Part I—Introduction

A single rationalised system

8.2 The law relating to the care, upbringing and maintenance of children should be brought together in a single, coherent and modernised code, in order to provide a simpler, clearer and fairer system for children and their families. This aim can only be fully achieved if both private and public law are included (paras. 1.5–1.12).

Part II—Parental responsibility

Parenthood and guardianship

8.3 Parenthood should become the primary concept. The rules of common law and statute under which parents are or become guardians of their children, including the rule that the father is sole natural guardian of his legitimate children, should be abolished (paras. 2.2–2.3; clause 2(4)).

Parental responsibility

8.4 The legal status of parents in relation to the care and upbringing of their children should be termed "parental responsibility" (paras. 2.4–2.5; clauses 2 and 3).

8.5 "Parental responsibility" should include all the legal incidents of parenthood which relate to the care and upbringing of a child under 18. It should also include any additional powers possessed at present by a guardian of the child's estate to administer or deal with a child's property (paras. 2.6 and 2.8; clause 3(1)–(3)).

8.6 It should be made clear that "parental responsibility" does not include rights of succession to the child's property or affect the child's rights of succession or to be maintained (paras. 2.7 and 2.9; clause 3(4)).

8.7 Parents (or others) with parental responsibility should have equal status. Each should be able to act independently in carrying out that responsibility, subject to any statutory provision requiring the consent of them all (for example, to adoption) (para. 2.10; clause 2(5), (7)).

8.8 Parents should retain their parental responsibility when another person (such as an unmarried father, guardian or local authority) acquires it, unless the child is adopted or freed for adoption (para. 2.11; see also para. 2.21; clause 2(6)).

8.9 Parents' power to carry out their parental responsibility may be modified or curtailed by court orders as to residence, care or other aspects of upbringing, but parents should only be prevented from acting in ways which are incompatible with the court's order (para. 2.11; see also paras. 4.6 *et seq.;* clause 2(8)).

8.10 The rule that parental responsibility cannot be surrendered or transferred without a court order should be retained (paras. 2.12–2.13; clause 2(9)).

8.11 It should be made clear that parents may arrange for some or all of their responsibilities to be carried out by others, including the other parent, but such arrangements should not be legally binding upon the parents (paras. 2.13–2.15; clause 2(9)–(11)).

8.12 It should be made clear that people without parental responsibility who have actual care of a child may do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare (para. 2.16; clause 3(5)).

Acquisition of parental responsibility by parents

8.13 There should be no change in the present rules for the acquisition of parental responsibility by parents. Where the parents were married to one another at or after the child's conception, each has parental responsibility automatically. Where they were not, only the mother has parental responsibility automatically, but a court may order that the father shall share it with her (paras. 2.17–2.18; clauses 2(1)–(3) and 4(1)(a)).

8.14 Mother and father should also be able to make an agreement that the father shall share responsibility with the mother. The agreement should be made in a prescribed form, to be checked by a county court and preserved in the court records (paras. 2.18–2.19; clause 4(1)(b), (2) and (3)).

8.15 Such agreements should have the same legal effect as orders conferring parental responsibility upon fathers. Hence they may only be brought to an end by court order. The child, as well as either parent, should be able to apply for this but only if the court is satisfied that he has sufficient understanding to do so (para. 2.18; clause 4(4), (5)).

8.16 It should remain possible for the mother to appoint a father who does not already have parental responsibility to be guardian after her death (para. 2.20; see clause 5(2)).

Acquisition of parental responsibility by guardians

8.17 All guardians should have the same parental responsibility as parents, but should not become "liable relatives" under the Social Security Act 1986 or potentially subject to orders for financial provision or property adjustment (paras. 2.23–2.25; clause 5(5)).

8.18 It should no longer be possible to appoint guardians of the child's estate or for a limited purpose (paras. 2.24–2.25; clause 5(17)).

8.19 It should remain possible for each parent with parental responsibility to appoint, jointly if desired, a guardian to act after his death. Guardians should also be able to do so (paras. 2.22 and 2.25; clause 5(2), (3), (16)).

8.20 Appointments of guardians should generally only take effect after the death of any surviving parent with parental responsibility (para. 2.27; clause 5(7)).

8.21 However, if there is a court order that the child should live with the deceased (and not with the surviving parent) the appointment should take immediate effect. The guardian and surviving parent would then share parental responsibility. Any disputes would be resolved in the same way as they are between parents (para. 2.28; clause 5(6), (8)).

8.22 It should be possible to appoint a guardian by any document which is signed and dated and to revoke appointments in the same way or by destroying the document. A later appointment should automatically revoke an earlier one unless it is clearly additional to the earlier (para. 2.29; clause 5(4), (9), (10), (11)).

8.23 Appointments made in wills should be revoked, not only by such documents or later appointments, but also if the will itself is revoked (for example on marriage) (para. 2.29; clause 5(9), (10), (12)).

8.24 Guardians should be able to disclaim their appointments within a reasonable time of these taking effect (para. 2.29; clause 5(13), (14)).

8.25 The courts' powers to appoint guardians should continue to mirror those of parents (para. 2.30; clause 5(1), (8)).

8.26 There should be a general power for all courts to remove guardians whether appointed by a parent or guardian or by the court (para. 2.31; clause 5(15)).

Part III—Principles governing court orders

The need for an order

8.27 Courts should only make orders where this is the most effective means of safeguarding or promoting the child's welfare (paras. 3.2–3.4; clause 1(1)).

The courts' duty in matrimonial proceedings

8.28 In divorce, nullity or judicial separation proceedings, the court should be required to consider the arrangements proposed for the children of the family in order to decide whether to exercise any of its powers under this legislation. In exceptional circumstances, it should have power to direct that a decree of divorce or nullity should not be made absolute or a decree of judicial separation made until further order. The court's duty should be limited to children under 18, and only applied to those of 16 or 17 in exceptional circumstances. Section 41 of the Matrimonial Causes Act 1973 should be amended accordingly (paras. 3.5–3.9 and 3.11; clause 24).

8.29 Rules of court should provide for improved statements of arrangements and their earlier consideration by the court (para. 3.10).

The criterion for deciding upon orders

8.30 When deciding any question arising under this legislation, the welfare of any child likely to be affected by the decision should be the court's only concern (paras. 3.12—3.16; clause 1(2)).

8.31 However, where any court has to determine a question relating to the administration or application of a child's property, the welfare of that child should be its only concern (para. 3.14; clause 1(3)).

A checklist of relevant factors

8.32 To assist the court in applying the welfare principle when deciding a question of residence, contact or upbringing between individuals, there should be a "checklist" of relevant factors, similar to that provided for deciding upon financial provision (paras. 3.17–3.18).

8.33 The checklist should require the court to consider all the circumstances of the case, including:

(a) the ascertainable wishes and feelings of the child (considered in the light of his age and understanding);

(b) his physical, emotional and (where relevant) educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting the child's needs.

(paras. 3.19–3.20; clause 9(4)).

The views of the child

8.34 The views of the child should be included in the checklist of relevant factors; were there not to be such a checklist, the court should be required (as in adoption) to ascertain the child's wishes and feelings and give due consideration to them, having regard to his age and understanding (para. 3.22–3.24).

Part IV—Orders between parents and individuals

8.35 The following more flexible range of orders should replace the courts' present powers to make custody and access orders between individuals:

(a) a "residence order", settling the arrangements as to the person (or persons) with whom the child is to live;

(b) a "contact order", requiring the person with whom the child lives or is to live to allow the child to visit or otherwise have contact with another person;

(c) a "specific issues" order, resolving a dispute about a particular aspect of parental responsibility;

(d) a "prohibited steps" order, that a specified step is not to be taken without the consent of the court.

(paras. 4.2–4.11; clause 7(1)).

8.36 In making any such order the court should also be able:

(a) to include directions about how it is to be carried into effect;

(b) to impose conditions to be complied with by any person with parental responsibility or in whose favour the order is made;

(c) to specify the period for which the order, or any provision in it, is to have effect;

(d) to make such incidental, supplemental or consequential provisions as the court thinks fit.

(para. 4.11; clause 9(8)).

8.37 The power to make such orders should include power to vary or discharge them (para. 4.11; clause 7(2)).

8.38 The same range of orders should be available between parents and non-parents as is available between parents (although the circumstances in which the court has power to make them should be more limited). The legal effect will be different, because a parent will retain parental responsibility (subject to the order) while a non-parent will only acquire the responsibility given by the order for as long as it is in force (paras. 4.25–4.28).

Residence orders

8.39 Residence orders should be flexible enough to cater for a wider variety of arrangements than can some custody orders at present, including cases where the child is to live with two (or more) people who do not themselves live together; the order may then specify the periods during which the child should live in each household (para. 4.12; clause 9(5)).

8.40 Residence orders between parents, as with some custody orders at present, should lapse automatically if the parents live together for a continuous period of more than six months (para. 4.13; clause 9(6)).

8.41 It should be an automatic condition of all residence orders that the child's surname is not to be changed, without either the written consent of each person with parental responsibility or the leave of the court (para. 4.14; clause 21).

8.42 It should also be an automatic condition of all residence orders that the child is not to be taken out of the United Kingdom for longer than one month without either the written consent of each person with parental responsibility or the leave of the court. If required, more specific prohibitions may be made under the court's general powers to attach conditions or prohibit particular steps. The present specific provisions in legislation and rules of court should be repealed (para. 4.15; clause 21).

8.43 Whenever the court makes a residence order in favour of a father who does not already have parental responsibility it should automatically make a parental responsibility order as well. The parental responsibility order should last as long as the residence order and should not end automatically if the residence order is revoked or varied (para. 4.16; clause 10(1), (4)).

8.44 A non-parent in whose favour a residence order is made should also have all parental responsibilities apart from the powers to give or withhold agreement to adoption and to appoint guardians and any others specifically limited to parents or guardians. Unlike that of a parent, his parental responsibility should end when the residence order ends (para. 4.27; clause 10(2), (3)).

Contact orders

8.45 Contact orders should be able to provide for visiting, staying and other forms of contact, such as letters and telephone calls, in general or specific terms. During contact a parent should be able to carry out all his responsibilities provided that this is not incompatible with an order of the court (para. 4.17; see also paras. 2.11 and 4.6).

8.46 A contact order requiring one parent to allow the child to visit the other should lapse automatically if the parents live together for more than six months (para. 4.17; clause 9(7)).

Specific issue and prohibited steps orders

8.47 Specific issue orders may be made to resolve disputes about particular aspects of parental responsibility, either in conjunction with other orders, or on their own (para. 4.18).

8.48 Prohibited steps orders may be made to ensure that specified steps, such as removing the child from the country, are not taken without leave of the court (para. 4.20).

8.49 Neither prohibited steps nor specific issue orders should be used instead of a residence or contact order (paras. 4.19 and 4.20; clause 8(4)).

Supplemental provisions

8.50 The supplemental powers recommended in paragraph 8.36 above should preserve the courts' power in divorce, etc. proceedings to make interim orders, delay implementation or attach other special conditions and replace the more restricted provision for such matters in other proceedings (paras. 4.21–4.24).

Older children

8.51 The orders recommended in paragraph 8.35 above should not be made in respect of a child who has reached 16 unless there are exceptional circumstances and orders made before that age should expire then unless in exceptional circumstances the court orders otherwise (para. 3.25; clauses 8(5) and 23(4)).

Circumstances in which orders may be made

8.52 There should continue to be three ways in which the orders recommended in paragraph 8.35 can be made:

(a) on application in the course of certain family proceedings;

(b) of the court's own motion in the course of those proceedings;

(c) on free-standing application in the absence of any other proceedings.

Wherever possible, preference should be given to hearing the case in the course of existing proceedings (paras. 4.33; clause 8(1) and (2)).

8.53 For this purpose family proceedings should mean (i) any inherent jurisdiction of the High Court in relation to wardship, maintenance or upbringing of children, and (ii) proceedings under the following provisions:

(a) Parts I and II of the amended Bill (including Schedule 1);

(b) the Matrimonial Causes Act 1973;

(c) the Domestic Violence and Matrimonial Proceedings Act 1976;

(d) the Adoption Act 1976;

(e) the Domestic Proceedings and Magistrates' Courts Act 1978;

(f) sections 1 and 9 of the Matrimonial Homes Act 1983;

(g) Part III of the Matrimonial and Family Proceedings Act 1984.

(para. 4.37; clause 7(3), (4)).

8.54 Three categories of people should always be able to apply for any order: these are parents (with or without parental responsibility), guardians, and people in whose favour there is a residence order in force (para. 4.39; clause 8(6)).

8.55 Other people should be able to apply for such orders, but only with leave of the court. In deciding whether to grant leave to anyone other than the child, the court should have regard to (a) the nature of the proposed application, (b) the applicant's connection with the child, (c) any risk of harmful disruption to the child's life because of the application, and (d) where the child is boarded-out with the applicant by a local authority, the local authority's plans for the child's future (paras. 4.42–4.43; clause 8(10)).

8.56 The court should only be able to grant leave to the child to apply for an order if satisfied that he has sufficient understanding to make the proposed application (para. 4.44; clause 8(9)).

8.57 Three categories of people should be able to apply for residence or contact orders without leave:

(a) any person in relation to whom the child has become a "child of the family";

(b) any person with whom the child has lived for a period of at least three years, not necessarily continuous but ending not more than three months before the application is made;

(c) any person who has the consent of each parent with parental responsibility and each guardian; or where there is a residence order in force, each person in whose favour the order is made; or where a care order is in force, the local authority in whose care the child is placed by the order (paras. 4.45–4.49; clause 8 (7)).

8.58 There should be power for rules of court to prescribe additional categories of people who may make applications without leave (para. 4.49; clause 8(8)).

Inter-relationship with care orders

8.59 In accordance with the Government's proposals on child care law, the legal effect upon parental responsibility of care orders should be the same as that of residence orders in favour of non-parents, although statute and regulations may provide in detail for how the local authorities are to carry out their parental responsibilities (para. 4.51; clauses 13 and 21).

8.60 It is also proposed that contact between children in care and members of their families is to be governed by its own rules. Hence, the courts should not have power to make ordinary contact, specific issue and prohibited steps orders while a child is in care under a care order (para. 4.52; clause 8(3)).

8.61 Courts should have power to make residence orders in the circumstances listed above while the child is in care under a care order. A care order should supersede and discharge a residence, contact, specific issue or prohibited steps order, and a residence order should supersede and discharge a care order (along with any associated order about contact) (para. 4.53; clause 22(1), (2)).

A timetable in family proceedings

8.62 When the question of making one of the orders listed in paragraph 8.35 arises, the court should draw up a timetable with a view to determining it without delay, in the light both of the general principle that delay is likely to prejudice the child's welfare and of any more specific provision made by rules of court (paras. 4.54–4.58; clause 9(1)–(3)).

Financial provision and property adjustment for children

8.63 The powers of the courts to make orders for financial provision and property adjustment for or for the benefit of children alone should be assimilated, with such modifications as are needed to conform to the recommendations made above or to remove remaining minor discrimination against the children of unmarried parents. However, where the court also has power to make orders for the benefit of adults, under the Matrimonial Causes Act 1973 or the Domestic Proceedings and Magistrates' Courts Act 1978, it should continue to make orders for children under those Acts (para. 4.59; clause 11 and Schedule 1).

8.64 The courts should have power to make all the same orders as at present, either on application or on making a residence order (para. 4.68).

8.65 Parents, guardians and people with the benefit of a residence order should be able to apply for all types of order (para. 4.62).

8.66 People in relation to whom the child has become a child of the family should be in the same position as parents in all proceedings (para. 4.63).

8.67 The factors to be taken into account should include the manner in which the child was being or was expected to be educated or trained (para. 4.64).

8.68 The present provisions for interim orders should be simplified by removing the time limits and allowing for orders to be renewed (para. 4.65).

8.69 It should not be possible to make a further property adjustment order against the same person in respect of the same child (para. 4.66).

8.70 The same powers should be available of the court's own motion in wardship proceedings (para. 4.69).

Part V—Care, Supervision and Family Assistance Orders in Family Proceedings

Care orders

8.71 Where there are family proceedings on foot in which the courts at present have power to make care orders, it should be possible to make a care application in those proceedings (paras. 5.2–5.3; clause 12).

8.72 Where in such proceedings there are exceptional circumstances in which it appears to the court that a care application may be appropriate, the court should be able to direct the local authority to investigate. The authority should then consider whether or not to make a care application or take any other action and report back to the court (paras. 5.4–5.5; clause 16).

8.73 Where a care application is made or a direction to investigate given in these proceedings, the court should be able to make interim care or supervision orders if the criteria for making such orders in care proceedings are satisfied (para. 5.6; clause 17).

8.74 If a care or interim care order is made in family proceedings, contact with the child should be governed by the special rules relating to contact with children in care (para. 5.7; clause 14).

8.75 The Civil Evidence Acts 1968 and 1972 should be applied to proceedings in magistrates' domestic courts. The procedural protection for parents and children should be as close as possible to that in care proceedings (paras. 5.8 and 5.9).

Supervision orders

8.76 The power to make supervision orders in certain family proceedings should be replaced by two types of order, for supervision or family assistance, reflecting the different purposes for which supervision orders are made at present. Supervision orders, generally in favour of local authorities, should be available in cases involving an element of child protection. The grounds, effects and possible requirements should be the same as in care proceedings. The procedure for making them in family proceedings should be the same as recommended above for care orders (paras. 5.10–5.18; clauses 12, 15, 16, 17, Schedule 2).

Family assistance orders

8.77 It should be possible to make a family assistance order in any family proceedings in which the court has power to make an order listed in paragraph 8.35, even if no such order is made, but only if the circumstances of the child are exceptional. The object is to help the family resolve immediate problems concerning the child which arise from separation or divorce (paras. 5.12 and 5.19; clause 20(1), (3)(a)).

8.78 The order would require a welfare officer (generally a probation officer) to be made available to advise and assist named members of the child's family. It should be possible to name any parent, guardian or person with whom the child is living, and the child. Apart from the child, their consent should be needed. It should be possible to include requirements for them to keep in touch with the welfare officer but not the more extensive requirements permitted under a supervision order (para. 5.19–5.20; clause 20(2), (3)(b), (4)).

8.79 Orders should last for six months or a shorter specified period. If there is an order about the child's residence or upbringing in force the welfare officer should be able to refer to the court the question of whether it should be varied or discharged (para. 5.19; clause 20(5), (6)).

Part VI—Jurisdiction and procedure

Jurisdiction in family proceedings

8.80 The High Court, any county court or any magistrates' domestic court should continue to have jurisdiction to hear free-standing applications for the orders recommended in Parts II and IV above (para. 6.2).

8.81 County courts and domestic courts should have power to remove as well as to appoint guardians (paras. 2.30 and 6.3).

8.82 Domestic courts should regain their power to hear applications from children of 16 or over for the revival of lapsed maintenance orders. Consideration should be given to allowing them to hear applications from children of 18 or over (para. 6.4).

8.83 There should be much more flexibility in the rules allocating applications concerning children to a particular county court or domestic court (para. 6.5).

8.84 Where there are family proceedings on foot in which an application concerning a child can conveniently be heard, the application should be made to the same court (para. 6.6).

8.85 Any court to which an application is made should have power to refuse to hear the case if there are family proceedings on foot in which it could more conveniently be heard. It should, however, be able to make interim or short-term orders in the meantime (para. 6.7).

8.86 Further consideration should be given to enabling one magistrates' court to transfer a case to another in which it could more conveniently be heard (para. 6.8)

8.87 All courts should be able to make orders superseding, varying or discharging orders in another court, but it should be possible for such applications to be made to the original court, and generally required if the earlier proceedings are still on foot (para. 6.9).

8.88 Rules of court should provide for any party to proceedings about a child to inform the court of any other proceedings of which he is aware involving the same child (para. 6.10).

Jurisdiction in care proceedings

8.89 Consideration should be given to making similar provision to that referred to in paragraphs 8.84 to 8.86 for care applications (paras. 6.11–6.12).

8.90 Consideration should also be given to permitting applications for residence orders which would have the effect of discharging a care order to be made to the court which made the care order (para. 6.13).

Welfare officers' reports

8.91 In all cases where orders about a child's upbringing may be made, the court should have power to call for a welfare officer's report on any matter relevant to the child's welfare (paras. 6.14–6.16; clause 6(1)).

8.92 It should be possible in all proceedings to call for a report from a probation officer or an officer of the local social services authority (para. 6.17; clause 6(1), (6)).

8.93 Reports should be made orally or in writing. All courts should be able to take them into account regardless of any rule of the law of evidence which might otherwise prevent this (para. 6.18; clause 6(4), (5)).

8.94 There should be power to specify in regulations or rules of court the particular matters to be covered in any report unless the court orders to the contrary. These should in particular cover applications by non-parents for residence orders (paras. 3.21 and 6.19; clause 6(2), (3)).

8.95 Where a court is considering making a care or supervision order in family proceedings, it should commission a report from a welfare officer or member of the panel of guardians *ad litem* unless it appears unnecessary to do so in order to safeguard the child's interests. The person providing the report should have the same duties to investigate and report as has a guardian *ad litem* in care proceedings (para. 6.20).

Participation of the child

8.96 Consideration should be given to enabling all courts to order that the child be made a party and requiring them to consider this if he is over a certain age. Consideration should also be given to requiring the welfare officer to advise on how the child's interests and views should be represented and whether he should be made a party. Children who are given leave to make their own applications should, of course, be parties (paras. 6.22–6.26).

8.97 Where a court is considering a care or supervision order in family proceedings, it should be required to consider at the outset how the child's interest and views are to be represented and whether the child should be made a party. The person providing the independent report for the court (para. 8.95) should also be required to do so (paras. 6.27–6.28).

Participation by adults

8.99 Participation by adults should continue to be governed by rules of court. Consideration should be given to providing in all proceedings for more limited participation by people with a current interest in the child's welfare who may have something relevant to contribute even though their legal position may not be affected by the proceedings (para. 6.30).

8.100 On disposing of an application for an order under Parts II or IV, the court should have power to prohibit a named person from making a further application without leave of the court (para. 6.31; clause 23(5)).

Part VII—Miscellaneous

8.101 The recommendations made above are in substitution for the following provisions, which should therefore be repealed, so far as they apply to England and Wales; with appropriate consequential amendments and transitional provisions:

(i) the Guardianship of Minors Acts 1971 and 1973;

(ii) sections 42 to 44 of the Matrimonial Causes Act 1973;

(iii) Part II of the Children Act 1975;

(iv) sections 85 to 87 of the Children Act 1975;

(v) sections 8 (apart from section 8(1)) to 15, parts of 19, 21 and parts of 25, 34 and 35 of the Domestic Proceedings and Magistrates' Courts Act 1978;

(vi) sections 3 to 6 and 10 to 16 of the Family Law Reform Act 1987.

(paras. 1.6–1.8, 7.1).

8.102 The power in section 42(3) of the Matrimonial Causes Act 1973 to declare one party unfit to have custody of the children of the family should not be re-enacted (paras. 7.2–7.3).

8.103 Section 38 of the Sexual Offences Act 1956, empowering a criminal court to divest a person of authority over a child on conviction of incest should also be repealed (para. 7.4).

8.104 The requirement of consent to the marriage of 16 and 17 year-olds in section 3 and Schedule 2 to the Marriage Act 1949 should be repealed. Alternatively the present policy of the law should be adapted to the new scheme of orders recommended above (paras. 7.5–7.11).

8.105 The Custody of Children Act 1891 should be repealed (paras. 7.12–7.16).

Conclusion–The legislation required

8.106 The draft Bill annexed as Appendix I contains clauses to give effect to the recommendations made in Parts II to V and paragraphs 6.14 to 6.19 and 6.31 of this report (see paras. 8.3 to 8.74, 8.91 to 8.94 and 8.100 above). These deal with the substance of the private law on parental responsibility, guardianship and the powers of the courts in family proceedings. The draft Bill also contains clauses which illustrate how some of the Government's proposals on the public law might be put into effect. These deal with the grounds and effects of care and supervision orders, contact with children in care under care orders, and the powers of the courts to make residence orders in care proceedings. The object is to demonstrate the advantgages of providing for both private and public law in a single Bill. For that reason the draft Bill is incomplete. There is, however, a table of derivations showing the recommendations from which each of its provisions is derived. From these it is hoped that a single, rationalised system of law relating to the care and upbringing of children can at last be achieved.

(Signed) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
11 July 1988.

APPENDIX I

CHILDREN BILL 1988

TABLE OF DERIVATIONS

This Table shows the recommendation from which each provision is derived. Where the effect is to repeat the substance of the present law, with only minor modifications, the relevant provision is also shown.

Note: The following abbreviations are used in this Table:

Report	= This Report
RCCL	= Review of Child Care Law (1985)
White Paper	= The Law on Child Care and Family Services (1987) Cm. 62
1969	= The Children and Young Persons Act 1969 (c. 54)
1971	= The Guardianship of Minors Act 1971 (c. 3)
1973	= The Guardianship Act 1973 (c. 29)
1975	= The Children Act 1975 (c. 72)
1976	= The Adoption Act 1976 (c. 36)
1977	= The Matrimonial Causes Rules 1977 (SI 344)
1987	= The Family Law Reform Act 1987 (c. 42)

Clause of Bill	*Source*
1 (1)	Report paras. 3.2–3.4, 8.27. White Paper paras. 59–60.
(2)	Report paras. 3.12–3.16, 8.30. 1971 s. 1.
(3)	Report paras. 3.14, 8.31. 1971 s. 1.
2 (1)–(3)	Report paras. 2.17, 8.13. 1973 s. 1 (1).
(4)	Report paras. 2.2–2.3, 8.3. 1975 s. 85 (7).
(5)	Report paras. 2.10, 8.7.
(6)	Report paras. 2.11, 2.21, 8.8.
(7)	Report paras. 2.10, 8.7.
(8)	Report paras. 2.11, 4.6 *et seq*, 8.9.
(9)–(11)	Report paras. 2.12–2.15, 8.10, 8.11.
3 (1)–(3)	Report paras. 2.6, 2.8, 8.5. 1973 s. 7. 1975 s. 85 (1).
(4)	Report paras. 2.7, 2.9, 8.6.
(5)	Report paras. 2.16, 8.12.
4 (1)(a)	1987 s. 4. Report paras. 2.17–2.18, 8.13.
(1)(b)	Report paras. 2.18–2.19, 8.14.
(2) (3)	Report paras. 2.18–2.19, 8.14.
(4)	Report paras. 2.18, 8.15. 1987 s. 4 (3).
(5)	Report paras. 2.18, 8.15.
5 (1)	Report paras. 2.30, 8.25. 1971 ss. 3 (1) (2), 5 (1).
(2)	Report paras. 2.20, 2.22, 8.16, 8.19. 1971 s. 4 (1) (2).
(3)	Report paras. 2.25, 8.19.
(4)	Report paras. 2.29, 8.22.
(5)	Report paras. 2.23–2.25, 8.17.
(6)	Report paras. 2.28, 8.21.
(7)	Report paras. 2.27, 8.20.
(8)	Report paras. 2.28, 8.21.
(9)	Report paras. 2.29, 8.22.
(10)	Report paras. 2.29, 8.22.
(11)	Report paras. 2.29, 8.22–8.23.
(12)	Report paras. 2.29, 8.23.
(13)	Report paras. 2.29, 8.24.
(14)	Report paras. 2.29, 8.24.
(15)	Report paras. 2.31, 8.26.
(16)	Report paras. 2.22, 2.25, 8.19.
(17)	Report paras. 2.24–2.25, 8.18.
6 (1)	Report paras. 6.14–6.17, 8.91, 8.92. 1973 s. 6 (1). 1975 s. 39 (1). 1978 s. 12 (3).
(2) (3)	Report paras. 3.19, 6.19, 8.94.
(4) (5)	Report paras. 6.18, 8.93. 1973 s. 6 (1) (3A). 1975 s. 39 (2). 1978 s. 12 (6).
(6)	Report paras. 6.17, 8.92. 1973 s. 6 (1). 1975 s. 39 (1). 1978 s. 12 (3).

Clause of Bill	*Source*
7 (1)	Report paras. 4.2–4.11, 8.35.
(2)	Report paras. 4.11, 8.37.
(3) (4)	Report paras. 4.37, 8.53.
8 (1) (2)	Report paras. 4.33, 8.52.
(3)	Report paras. 4.52, 8.60.
(4)	Report paras. 4.19–4.20, 8.49.
(5)	Report paras. 3.25, 8.51.
(6)	Report paras. 4.39, 8.54.
(7)	Report paras. 4.45–4.49, 8.57.
(8)	Report paras. 4.49, 8.58.
(9)	Report paras. 4.44, 8.56.
(10)	Report paras. 4.42–4.43, 8.55.
(11)	Report paras. 4.47–4.49.
9 (1)–(3)	Report paras. 4.54–4.58, 8.62.
(4)	Report paras. 3.17–3.20, 8.32, 8.33.
(5)	Report paras. 4.12, 8.39.
(6)	Report paras. 4.13, 8.40. 1973 s. 5A.
(7)	Report paras. 4.17, 8.46.
(8)	Report paras. 4.11, 8.36.
10 (1)	Report paras. 4.16, 8.43.
(2) (3)	Report paras. 4.27, 8.44.
(4)	Report paras.4.16, 8.43.
11	Report paras. 4.59, 8.63. 1971 ss. 11B–13B. 1975 ss. 34–35A.
12 (1)–(8)	RCCL R. 46, R. 118.
(10)–(11)	RCCL paras. 8.20–8.22, 15.25, 15.35–15.37. White Paper paras. 36, 59, 60.
(9)	Report paras. 5.2–5.3, 8.71.
13	RCCL R. 40, paras. 8.20–8.22. White Paper para. 36. Report paras. 4.50–4.51.
14	RCCL paras. 3.49–3.50, 21.13, 21.14, 21.16. White Paper para. 64.
15	RCCL para. 18.16. White Paper para. 62.
16	Report paras. 5.4–5.5, 8.72.
17	RCCL R. 139, R. 146. White Paper para. 61. Report paras. 5.6, 8.73.
18	RCCL R. 163, R. 172, R. 174, paras. 3.42, 18.15. White Paper para. 63.
19	White Paper para. 65. RCCL para. 18.20.
20 (1)	Report paras. 5.12, 5.19, 8.77.
(2)	Report paras. 5.19–5.20, 8.78.
(3)	Report paras. 5.12, 5.19, 8.77, 8.78.
(4)	Report paras. 5.19–5.20, 8.78.
(5) (6)	Report paras. 5.20, 8.79.
21	Report paras. 4.14–4.15, 8.41, 8.42. 1977 r. 92(8).
22 (1) (2)	Report paras. 4.53, 8.59, 8.61. RCCL paras. 8.10, 20.4.
(4)–(6)	1969 s. 21A. 1976 s. 12 (2).
23 (1)–(4)	Report paras. 3.25, 8.51.
(5)	Report paras. 6.31, 8.100.
24	Report paras. 3.5–3.9, 3.11, 8.28.
Sch. 1	Report paras. 4.59–4.69, 8.63. 1971 ss. 11B–13B. 1975 ss. 34–35A.
Sch. 2	RCCL R. 160, R. 168, R. 169, paras. 18.13, 18.21. White Paper para. 62.

ARRANGEMENT OF CLAUSES

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DRAFT

OF A

B I L L

INTITULED

An Act to reform the law relating to children. A.D. 1988.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

GENERAL PRINCIPLES

Welfare of the child.

1.—(1) No court shall make an order under this Act with respect to a child unless it considers that making the order is the most effective way of safeguarding or promoting the child's welfare.

(2) When determining any question under this Act the welfare of any child likely to be affected shall be the court's only concern.

(3) When determining any question, under this or any other enactment, in connection with—

(a) the administration of a child's property; or

(b) the application of any income arising from such property,

the welfare of that child shall be the court's only concern.

Parental responsibility for children.

2.—(1) Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of his birth—

(a) the mother shall have parental responsibility for the child;

(b) the father shall not have parental responsibility for the child, unless he acquires it in accordance with the provisions of this Act.

(3) References in this Act to a child whose father and mother were, or (as the case may be) were not, married to each other at the time of his birth must be read with section 1 of the Family Law Reform Act

PART I

1987 (which extends their meaning).

1987 c.42.

(4) The rule of law that a father is the natural guardian of his legitimate child is hereby abolished.

(5) More than one person may have parental responsibility for a child at the same time.

(6) A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.

(7) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.

(8) The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act.

(9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.

(10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.

(11) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned.

Meaning of "parental responsibility".

3.—(1) In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers and duties which a guardian of the child's estate (appointed, before the commencement of section 5(17), to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive and recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect—

(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property.

(5) A person who—

(a) does not have parental responsibility for a particular child; but

(b) has care of the child,

may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.

Acquisition of parental responsibility by father.

4.—(1) Where a child's father and mother were not married to each other at the time of his birth—

(a) the court may, on the application of the father, order that he shall have parental responsibility for the child; or

(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.

(2) No parental responsibility agreement shall have effect for the purposes of this Act unless, on a joint application made to it by the parties to the agreement, a county court has confirmed that the agreement was made in the prescribed form.

(3) In this section "prescribed" means prescribed by regulations made by the Lord Chancellor.

(4) Subject to section 10(4), an order under subsection (1)(a), or a parental responsibility agreement, may be brought to an end by an order of the court made on the application—

(a) of any person who has parental responsibility for the child; or

(b) with leave of the court, of the child himself.

(5) The court may only grant leave under subsection (4)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

Appointment of guardians.

5.—(1) The court may by order appoint a person to be a child's guardian if—

(a) the child has no parent with parental responsibility for him; or

(b) a residence order has been made with respect to the child in favour of a parent or guardian of his who has died while the order was in force.

(2) A parent who has parental responsibility for his child may appoint another person to be the child's guardian in the event of his death.

(3) A guardian of a child may appoint another person to take his place as the child's guardian in the event of his death.

(4) An appointment under subsection (2) or (3) shall not have effect unless it is made in writing, is dated and is signed by the person making it.

(5) A person appointed as a guardian under this section shall have parental responsibility for the child concerned.

(6) Where, immediately before the death of any person making an appointment under subsection (2) or (3)—

(a) the child concerned had no parent with parental responsibility for him; or

PART I

(b) a residence order in favour of the deceased was in force with respect to the child,

the appointment shall take effect on the death of that person.

(7) Where, immediately before the death of any person making an appointment under subsection (2) or (3)—

(a) the child concerned had one or more parents with parental responsibility for him; and

(b) subsection (6)(b) does not apply,

the appointment shall take effect when the child no longer has a parent who has parental responsibility for him.

(8) Subsections (1) and (6) do not apply if the residence order referred to in paragraph (b) of those subsections was also made in favour of another, surviving, parent of the child.

(9) An appointment under subsection (2) or (3) revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as the result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian.

(10) An appointment under subsection (2) or (3) (including one made in an unrevoked will or codicil) is revoked if the person who made the appointment revokes it by a written and dated instrument which is signed by him.

(11) An appointment under subsection (2) or (3) (other than one made in a will or codicil) is revoked if the person who made the appointment destroys it with the intention of revoking the appointment.

(12) For the avoidance of doubt, an appointment under subsection (2) or (3) made in a will or codicil is revoked if the will or codicil is revoked.

(13) A person who is appointed as a guardian under subsection (2) or (3) may disclaim his appointment by an instrument in writing signed by him and made within a reasonable time of his first knowing that the appointment has taken effect.

(14) No such disclaimer shall have effect unless it is recorded in accordance with the requirements of regulations made by the Lord Chancellor for the purposes of this section.

(15) Any appointment of a guardian under this section may be brought to an end at any time by order of the court.

(16) Nothing in this section shall be taken to prevent an appointment under subsection (2) or (3) being made by two or more persons acting jointly.

(17) A guardian may only be appointed in accordance with the provisions of this section.

Welfare reports.

6.—(1) A court considering any question with respect to a child under this Act may—

(a) ask a probation officer; or

(b) ask a local authority to arrange for an officer of the authority,

to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report.

(2) Regulations may specify matters which, unless the court orders otherwise, must be dealt with in any report under this section.

(3) Different provision may be made in the regulations for different cases or classes of case.

(4) The report may be made in writing, or orally, as the court requires.

(5) Regardless of any enactment or rule of law which would otherwise prevent it from doing so, the court may take account of—

(a) any statement contained in the report; and

(b) any evidence given in respect of the matters referred to in the report,

in so far as the statement or evidence is, in the opinion of the court, relevant to the question which it is considering.

(6) It shall be the duty of the authority or probation officer to comply with any request for a report under this section.

PART II

ORDERS WITH RESPECT TO CHILDREN IN FAMILY AND OTHER PROCEEDINGS

General

Residence, contact and other orders with respect to children.

7.—(1) In this Act —

"a contact order" means an order requiring the person with whom a child lives, or is to live, to allow the child to visit the person named in the order, or for that person and the child otherwise to have contact with each other;

"a prohibited steps order" means an order that, in meeting parental responsibility for a child, no step of a kind specified in the order is to be taken without the consent of the court;

"a residence order" means an order settling the arrangements to be made as to the person with whom a child is to live; and

"a specific issue order" means an order giving directions for the purpose of determining a specific issue which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

(2) In this Act "a section 7 order" means any of the orders mentioned in subsection (1) and any order varying or discharging such an order.

(3) For the purposes of this Part "family proceedings" means any proceedings under any inherent jurisdiction of the High Court in relation to wardship, maintenance or the upbringing of children and any proceedings under the enactments mentioned in subsection (4).

PART II

(4) The enactments are—

(a) Parts I and II of this Act;

1973 c.18. (b) the Matrimonial Causes Act 1973 ;

1976 c.50. (c) the Domestic Violence and Matrimonial Proceedings Act 1976 ;

1976 c.36. (d) the Adoption Act 1976 ;

1978 c.22. (e) the Domestic Proceedings and Magistrates' Courts Act 1978 ;

1983 c.19. (f) sections 1 and 9 of the Matrimonial Homes Act 1983 ;

1984 c.42. (g) Part III of the Matrimonial and Family Proceedings Act 1984 .

Power of court to make orders under section 7.

8.—(1) In any family proceedings in which a question arises with respect to the welfare of any child, the court may make a section 7 order with respect to the child if—

(a) an application for the order has been made by a person who—

(i) is entitled to apply for a section 7 order with respect to the child; or

(ii) has obtained the leave of the court to make the application; or

(b) the court considers that the order should be made even though no such application has been made.

(2) The court may also make a section 7 order with respect to any child on the application of a person who—

(a) is entitled to apply for a section 7 order with respect to the child; or

(b) has obtained the leave of the court to make the application.

(3) No court shall make any section 7 order, other than a residence order, with respect to a child who is in the care of a local authority by virtue of a care order.

(4) No court shall make a specific issue order or a prohibited steps order with a view to achieving a result which could be achieved by a residence or contact order.

(5) No court shall make any section 7 order, other than one varying or discharging such an order, with respect to a child who has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional.

(6) The following persons are entitled to apply to the court for any section 7 order with respect to a child—

(a) any parent or guardian of the child;

(b) any person in whose favour a residence order has been made with respect to the child.

(7) The following persons are entitled to apply for a residence or contact order with respect to a child—

(a) any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family;

(b) any person with whom the child has lived for a period of at least three years;

(c) any person who—

(i) in any case where a residence order is in force with respect to the child, has the consent of each of the persons in whose favour the order was made;

(ii) in any case where the child is in the care of a local authority by virtue of a care order made under this Act, has the consent of that authority; or

(iii) in any other case, has the consent of each of those (if any) who have parental responsibility for the child.

(8) Any person who falls within a category of person prescribed by rules is entitled to apply for any such section 7 order as may be prescribed in relation to that category of person.

(9) Where the person applying for leave to make an application for a section 7 order is the child concerned, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the section 7 order.

(10) Where the person applying for leave to make an application for a section 7 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—

(a) the nature of the proposed application for the section 7 order;

(b) the applicant's connection with the child;

(c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and

(d) where the child is boarded out with the applicant by a local authority, the local authority's plans for the child's future.

(11) The period of three years mentioned in subsection (7)(b) need not be continuous but must not have ended more than three months before the making of the application.

General principles and supplementary provisions.

9.—(1) In proceedings in which there arises—

(a) any question of making a section 7 order; or

(b) any other question with respect to such an order,

the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child concerned.

(2) In proceedings in which such a question arises, the court shall (in the light of any rules made by virtue of subsection (3))—

(a) draw up a timetable with a view to determining the question without delay; and

(b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

(3) Rules of court may—

(a) specify periods within which specified steps must be taken in relation to proceedings in which such questions arise; and

PART II

(b) make other provision with respect to such proceedings for the purpose of ensuring, so far as is reasonably practicable, that such questions are determined without delay.

(4) When determining whether or not to make a section 7 order the court shall have regard to all the circumstances of the case including, in particular—

(a) the ascertainable wishes and feelings of the child (considered in the light of his age and understanding);

(b) his physical, emotional and (where relevant) educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs.

(5) Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned.

(6) Where—

(a) a residence order has been made with respect to a child; and

(b) as a result of the order the child lives, or is to live, with one of two parents who each have parental responsibility for him,

the residence order shall cease to have effect if the parents live together for a continuous period of more than six months.

(7) A contact order which requires the parent with whom a child lives to allow the child to visit, or otherwise have contact with, his other parent shall cease to have effect if the parents live together for a continuous period of more than six months.

(8) A section 7 order may—

(a) contain directions about how it is to be carried into effect;

(b) impose conditions to be complied with by any person —

(i) in whose favour the order is made; or

(ii) who has parental responsibility for the child concerned,

and to whom the conditions are expressed to apply;

(c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;

(d) make such incidental, supplemental or consequential provision as the court thinks fit.

PART II
Residence orders and parental responsibility.

10.—(1) Where the court makes a residence order in favour of the father of a child it shall, if the father would not otherwise have parental responsibility for the child, also make an order under section 4 giving him that responsibility.

(2) Where the court makes a residence order in favour of any person who is not the parent or guardian of the child concerned that person shall, if he would not otherwise have parental responsibility for the child, have that responsibility while the residence order remains in force.

(3) Where a person has parental responsibility for a child as a result of subsection (2), he shall not have the right—

(a) to consent, or refuse to consent, to the making of an application with respect to the child under section 18 of the Adoption Act 1976 or section 18 of the Adoption (Scotland) Act 1978 ; 1976 c.36. 1978 c.28.

(b) to agree, or refuse to agree, to the making of an adoption order, or an order under section 55 of the Act of 1976 or section 49 of the Act of 1978, with respect to the child; or

(c) to appoint a guardian for the child.

(4) Where subsection (1) requires the court to make an order under section 4 in respect of the father of a child, the court shall not bring that order to an end at any time while the residence order concerned remains in force.

Financial relief

Orders for financial relief with respect to children. 1975 c.72. 1987 c.42

11. Schedule 1 makes provision in relation to financial relief for children and consists primarily of the re-enactment, with consequential amendments and minor modifications, of provisions of the Guardianship of Minors Acts 1971 and 1973, the Children Act 1975 and of sections 15 and 16 of the Family Law Reform Act 1987 .

PART III

CARE AND SUPERVISION

General

Care and supervision orders.

12.—(1) On the application of any local authority or authorised person, the court may make an order—

(a) putting the child with respect to whom the application is made into the care of a local authority designated by the order; or

(b) putting him under the supervision of a local authority so designated or of a probation officer.

(2) A court may only make a care order or supervision order if it is satisfied—

(a) that the child concerned has suffered significant harm, or that there is a real risk of his suffering such harm; and

(b) that the harm, or risk of harm, is attributable to—

(i) the standard of care given to the child, or likely to be given to the child if the order were not made, being

PART III

below that which it would be reasonable to expect a parent to give to a similar child; or

(ii) the child's being beyond parental control.

(3) No care order or supervision order may be made in respect of a child who has reached the age of seventeen (or sixteen, in the case of a child who is married).

(4) Where an authorised person proposes to make an application under this section he shall—

(a) if it is reasonably practicable to do so; and

(b) before making the application,

consult the local authority in whose area it appears to him that the child concerned lives.

(5) An application made by an authorised person shall not be entertained by the court if, at the time when it is made, the child concerned—

(a) is the subject of an earlier application for a care order or supervision order which has not been disposed of;

(b) is subject to a care order or supervision order or an order under section 7(7)(a) or (b) of the Children and Young Persons Act 1969 ; or

1969 c.54

(c) is provided with accommodation by or on behalf of a local authority.

(6) A court shall not make a supervision order unless it is satisfied that the child concerned lives, or will live, in the area of a local authority; and that authority shall be named in the order.

(7) In this section—

"authorised person" means a person (other than a local authority) authorised by order of the Secretary of State to bring proceedings under this section and includes any officer of a body which is so authorised;

"harm" means ill-treatment or the impairment of health or development;

"development" means physical, intellectual, emotional, social or behavioural development;

"health" means physical or mental health;

"ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical; and

"a real risk" means a risk that the eventuality anticipated is more likely than not to occur.

(8) In determining whether harm is significant, the court shall measure the harm suffered, or likely to be suffered, by the child against the standard of well-being, health and development that could reasonably be expected of a similar child.

(9) An application under this section may be made separately or in proceedings under—

(a) Parts I and II of this Act;

(b) the Matrimonial Causes Act 1973 ;

(c) the Adoption Act 1976 ; or 1973 c.18.

(d) sections 2, 6 or 7 of the Domestic Proceedings and Magistrates' Courts Act 1978 . 1976 c.36. 1978 c.22.

(10) The local authority designated in a care order must be—

(a) the local authority in whose area it appears to the court that the child resides; or

(b) where it appears to the court that the child does not reside in the area of a local authority, a local authority in whose area it appears to the court that any circumstances arose in consequence of which the order is being made.

(11) In this Act—

"a care order" means an order under subsection (1)(a) and (except where express provision to the contrary is made) includes an interim care order made under section 17; and

"a supervision order" means an order under subsection (1)(b) and (except where express provision to the contrary is made) includes an interim supervision order made under section 17.

Care orders

Effect of care order.

13.—(1) When a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.

(2) Where a care order has been made with respect to a child, any local authority or constable may keep the child until he is received into the care of the authority designated by the order.

(3) While a care order is in force with respect to a child, the local authority designated by the order shall have parental responsibility for him but shall not—

(a) cause the child to be brought up in any religious creed other than that in which he would have been brought up if the order had not been made; or

(b) have the right—

(i) to consent or refuse to consent to the making of an application with respect to the child under section 18 of the Adoption Act 1976 or section 18 of the Adoption (Scotland) Act 1978 ; 1978 c.28.

(ii) to agree or refuse to agree to the making of an adoption order, or an order under section 55 of the Act of 1976 or section 49 of the Act of 1978, with respect to the child; or

(iii) to appoint a guardian for the child.

Parental contact etc. with children in care.

14.—(1) Subject to the provisions of this section, a local authority in whose care a child is placed by a care order shall allow the child reasonable contact with—

PART III

(a) any parent or guardian of his; and

(b) where there was a residence order in force with respect to the child immediately before the care order was made, the person in whose favour the order was made.

(2) Where the court considers that it is necessary to do so in order to safeguard or promote the child's welfare, it may make an order authorising the authority to refuse to allow the child contact with such of the persons mentioned in subsection (1) as may be specified by the order.

(3) The authority may refuse to allow the child contact with any one or more of the persons mentioned in subsection (1) if—

(a) they are satisfied that it is necessary to do so in order to safeguard the child's welfare; and

(b) the refusal is temporary and is decided upon as a matter of urgency.

(4) On the application of the authority, or of the child concerned or of any person mentioned in subsection (1), the court may make an order requiring the authority to allow the applicant—

(a) such contact with the child as may be specified in the order; or

(b) in the case of an application by the child, such contact with the person named in the application (who must be a person mentioned in subsection (1)) as may be so specified.

(5) An order under subsection (4) may impose such conditions as the court considers appropriate.

(6) Regulations may—

(a) make provision with regard to the steps to be taken by a local authority who have exercised their powers under subsection (3), with a view to notifying any person entitled to have reasonable contact with the child concerned;

(b) provide for the circumstances in which, and conditions subject to which, the parties concerned may by agreement depart from the terms of any order made under subsection (4).

(7) On the application of the authority, or of the child concerned or of any person mentioned in subsection (1), the court may vary or discharge any order under this section.

(8) An order under this section may be made either at the same time as the care order itself or later.

Supervision orders

Supervision orders.

15.—(1) While a supervision order is in force it shall be the duty of the supervisor—

(a) to advise, assist and befriend the supervised child;

(b) to take such steps as are reasonably necessary to give effect to the order; and

(c) where the order is not wholly complied with, to consider whether or not to apply to the court for its variation or discharge.

(2) Schedule 2 makes further provision with respect to supervision orders. PART III

Powers of court

Powers of court in certain family proceedings.

16.—(1) Where, in any proceedings to which this subsection applies and in which a question arises with respect to the welfare of any child, it appears to the court—

(a) that the circumstances of the child are exceptional; and

(b) that it might be appropriate for a care or supervision order to be made with respect to him,

the court may direct the authority named in the order to undertake an investigation of those circumstances.

(2) The proceedings to which subsection (1) applies are any proceedings under—

(a) Parts I and II of this Act;

(b) the Matrimonial Causes Act 1973 ; 1973 c.18.

(c) the Adoption Act 1976 ; or 1976 c.36.

(d) sections 2, 6 or 7 of the Domestic Proceedings and Magistrates' Courts Act 1978 . 1978 c.22.

(3) Where the court gives a direction under this section the local authority concerned shall, when undertaking the investigation, consider whether it should—

(a) apply for a care order or for a supervision order with respect to the child;

(b) provide services or assistance for the child and his family; or

(c) take any other action with respect to the child.

(4) Where a local authority undertakes an investigation under this section, and decides not to apply for a care order or supervision order with respect to the child concerned, it shall inform the court of—

(a) its reasons for so deciding;

(b) any assistance which it has given, or intends to give, to the child and his family; and

(c) any other action which it has taken, or proposes to take, with respect to the child.

(5) The information shall be given to the court before the end of the period of eight weeks beginning with the date of the direction, unless the court otherwise directs.

(6) Where a court exercises its powers under this section it may direct that any application by the local authority concerned for a care order or supervision order with respect to the child shall be heard by that court.

(7) The local authority named in a direction under subsection (1) must be—

(a) the local authority in whose area it appears to the court that the child resides; or

(b) where it appears to the court that the child does not reside in the area of a local authority, a local authority in whose area

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it appears to the court that any circumstances arose in consequence of which the direction is being given.

Interim orders.

17.—(1) Where—

(a) in any proceedings on an application for a care order or supervision order, the proceedings are adjourned; or

(b) the court gives a direction under section 16,

the court may make an interim care order, an interim supervision order or a residence order with respect to the child concerned.

(2) A court shall not make an interim care order or interim supervision order under this section unless there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 12(2).

(3) The court may not make a residence order by virtue of this section in favour of anyone other than—

(a) any person who would be entitled under section 8 to apply for a residence order with respect to the child; or

(b) a person with whom the child is living,

unless it is satisfied as mentioned in subsection (2).

(4) Where a court makes a residence order by virtue of this section—

(a) it shall make an interim supervision order with respect to the child, unless it is satisfied that his interests will be satisfactorily safeguarded without such an order being made; and

(b) may make a contact order.

(5) An order made under or by virtue of this section shall be brought to an end on whichever of the following events first occurs—

(a) the expiry of the period of eight weeks beginning with the date on which the order is made;

(b) if the order is the second or subsequent such order made with respect to the same child in the same proceedings, the expiry of the relevant period;

(c) in a case which falls within subsection (1)(a), the resumption of the proceedings;

(d) in a case which falls within subsection (1)(b), on the first hearing of an application for a care order or supervision order made by the authority with respect to the child;

(e) in a case which falls within subsection (1)(b) and in which the court has given a direction under section 16(5), the expiry of the period fixed by that direction.

(6) In subsection (5)(b) "the relevant period" means—

(a) the period of two weeks beginning with the date on which the order in question is made; or

(b) if later, the period of eight weeks beginning with the date on which the first order was made.

(7) No requirements of a kind which may be included in a supervision order by virtue of paragraphs 2 to 5 of Schedule 2 may be

included in an interim supervision order.

(8) Where a court makes an order under or by virtue of this section it shall, in determining the period for which the order is to be in force, consider whether any party who was, or might have been, opposed to the making of the order was in a position to argue his case against the order in full.

Power of court to make section 7 orders in care and supervision proceedings.

18.—(1) This section applies in relation to any application for a care order or supervision order made under this Act, otherwise than in proceedings mentioned in section 12(9).

(2) Where, in proceedings on any such application—

(a) an application for a section 7 order with respect to the child concerned is made to the court by a person who would be entitled to make it under section 8; or

(b) the court considers that such an order should be made,

the court may, in disposing of the proceedings, make the section 7 order applied for or such section 7 order as it thinks fit.

(3) The court shall not make a section 7 order by virtue of this section in favour of a person who (if he were applying for the order under section 8) would require leave, unless it is satisfied that the circumstances with respect to the child are as mentioned in section 12(2).

(4) Where the court—

(a) makes a section 7 order with respect to a child by virtue of this section; and

(b) is satisfied that the circumstances with respect to the child are as mentioned in section 12(2),

it shall, in disposing of the proceedings, make a supervision order with respect to the child unless it is satisfied that it is unnecessary to so do in the particular circumstances of the case.

Discharge and variation etc. of care orders and supervision orders.

19.—(1) A care order may be varied or discharged by the court on the application of—

(a) any person who has parental responsibility for the child;

(b) the child himself; or

(c) the local authority designated by the order.

(2) A supervision order may be varied or discharged by the court on the application of—

(a) any person who is a responsible person in relation to the supervised child;

(b) the child himself; or

(c) the supervisor.

(3) On discharging a care or supervision order the court shall have the same power to make any other order with respect to the child as it had when disposing of the application on which the care order or supervision order was made.

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(4) Where a care order is in force with respect to a child the court may, on the application of any person entitled to apply for the order to be discharged, substitute a supervision order for the care order.

(5) Where a supervision order is in force with respect to a child the court may, on the application of any person entitled to apply for the order to be discharged, substitute a care order for the supervision order.

(6) When considering—

(a) whether or not to substitute one order for another under subsection (4) or (5); or

(b) whether, on discharging a care order or supervision order, to make any other order with respect to the child,

any provision of this Act that would otherwise require section 12(2) to be satisfied at the time when the proposed order is substituted or made shall be disregarded.

PART IV

MISCELLANEOUS AND GENERAL

Family Assistance Orders

Family assistance orders.

20.—(1) Where, in any family proceedings, the court has power to make an order under Part II of this Act with respect to any child, it may (whether or not it makes such an order) make an order requiring—

(a) a probation officer to be made available; or

(b) a local authority to make an officer of the authority available,

to advise, assist and (where appropriate) befriend any person named in the order.

(2) The persons who may be named in an order under this section ("a family assistance order") are—

(a) any parent or guardian of the child;

(b) any person with whom the child is living or in whose favour a contact order has been made with respect to the child;

(c) the child himself.

(3) No court may make a family assistance order unless—

(a) it is satisfied that the circumstances of the case are exceptional; and

(b) it has obtained the consent of every person to be named in the order other than the child.

(4) A family assistance order may direct—

(a) the person named in the order; or

(b) such of the persons named in the order as may be specified in the order,

to take such steps as may be so specified with a view to enabling the officer concerned to be kept informed of the address of any person named in the order and to be allowed to visit any such person.

(5) Unless it specifies a shorter period, a family asistance order shall have effect for a period of six months beginning with the day on which it is made.

(6) Where—

(a) a family assistance order is in force with respect to a child; and

(b) a section 7 order is also in force with respect to the child,

the officer concerned may refer to the court the question whether the section 7 order should be varied or discharged.

Miscellaneous

Change of child's name or removal from jurisdiction.

21.—(1) Where a residence order is in force with respect to a child, or a child is the subject of a care order, no person may—

(a) cause the child to be known by a new surname; or

(b) remove him from the United Kingdom for any continuous period of more than one month;

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(2) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes.

Effect of residence orders, care orders and adoption orders etc. on orders under this Act.

22.—(1) The making of a residence order with respect to a child who is the subject of a care order discharges the care order.

(2) The making of a care order with respect to a child who is the subject of any section 7 order discharges that order.

(3) The following provisions of this section apply in relation to any child with respect to whom an order is in force under this Act.

(4) Where the child is subsequently adopted, the order shall be brought to an end by the adoption taking effect.

(5) Where an order is subsequently made in respect of the child under any of the provisions mentioned in subsection (6), the order under this Act shall be brought to an end by the making of the later order.

(6) The provisions referred to in subsection (5) are—

(a) sections 14 of the Children Act 1975 , 18 of the Adoption Act 1976 and 18 of the Adoption (Scotland) Act 1978 (freeing children for adoption); and

1975 c.72.
1976 c.36.
1978 c.28.

(b) sections 25 of the Act of 1975, 55 of the Act of 1976 and 49 of the Act of 1978 (adoption of children abroad).

(7) Where—

(a) an order in respect of the child is made in—

(i) Northern Ireland;

(ii) the Isle of Man; or

(iii) any of the Channel Islands; and

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(b) that order has a similar effect in relation to the child as an order under section 25 of the Act of 1975 would have,

the order under this Act shall come to an end on the making of the other order.

Duration of orders and prohibition on repeated applications.

23.—(1) No order made with respect to a child under this Act, other than one made under Schedule 1, shall continue in force after the child has reached the age of eighteen.

(2) Any—

(a) agreement under section 4; or

(b) appointment under section 5(2) or (3),

shall continue in force until the child concerned reaches the age of eighteen, unless it is brought to an end earlier.

(3) Any section 7 order—

(a) shall continue in force until the child concerned reaches the age of sixteen, unless it is made at a time when he has reached that age or the court orders otherwise; and

(b) may not be made to have effect beyond that age unless the court is satisfied that the circumstances are exceptional.

(4) On disposing of any application for an order under Part I or II, the court may (whether or not it makes any other order in response to the application) order that no application—

(a) for an order of the kind applied for; or

(b) for any specified kind of order under Part I or II,

may be made with respect to the child concerned by any person named in the order without leave of the court.

(5) Where an application ("the previous application") has been made for—

(a) the discharge of a care order;

(b) the discharge of a supervision order;

(c) the substitution of a care order for a supervision order; or

(d) the substitution of a supervision order for a care order,

no further application of a kind mentioned in paragraphs (a) to (d) may be made with respect to the child concerned, without leave of the court, unless the period between the making of the previous application and the making of the further application exceeds six months.

(6) Subsection (5) does not apply to applications made in relation to interim orders.

Decrees for dissolution, annulment or separation.

24. For section 41 of the Matrimonial Causes Act 1973 (restrictions on decrees for dissolution, annulment or separation affecting children) there shall be substituted—

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"Restrictions on decrees for dissolution, annulment or separation affecting children.

41.—(1) In any proceedings for a decree of divorce or nullity of marriage, or a decree of judicial separation, the court shall consider—

(a) whether there are any children of the family to whom this section applies; and

(b) where there are any such children, whether (in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare) it should exercise any of its powers under the Children Act 1988 with respect to any of them.

(2) Where, in any case to which this section applies, it appears to the court that—

(a) the circumstances of the case require it, or are likely to require it, to exercise one or other of its powers under the Act of 1988 with respect to any such child;

(b) it is not in a position to exercise that power or (as the case may be) those powers without giving further consideration to the case; and

(c) there are exceptional circumstances which make it desirable in the interests of the child that the court should give a direction under this section,

it may direct that the decree of divorce or nullity is not to be made absolute, or that the decree of judicial separation is not to be granted, until the court orders otherwise.

(3) This section applies to—

(a) any child of the family who has not reached the age of sixteen at the date when the court considers the case in accordance with the requirements of this section; and

(b) any child of the family who has reached that age at that date and in relation to whom the court directs that this section shall apply."

General

Interpretation.

25.—(1) In this Act—

"care order" has the meaning given by section 12(11);

"child" means a person under the age of eighteen;

"child of the family", in relation to the parties to a marriage, means—

(a) a child of both of those parties;

(b) any other child, not being a child who is being boarded out with those parties by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family;

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"contact order" has the meaning given by section 7(1);

"family assistance order" means an order under section 20;

"family proceedings" has the meaning given by section 7(3);

"harm" has the same meaning as in section 12(7);

"health service hospital" had the same meaning as in the National Health Service Act 1977 ; 1977 c.49.

"hospital or mental nursing home" has the same meaning as in the Mental Health Act 1983 , except that it does not include a special hospital within the meaning of that Act; 1983 c.20.

"local authority" means the council of a county, a metropolitan district, a London borough or the Common Council of the City of London;

"parental responsibility" has the meaning given in section 3;

"parental responsibility agreement" has the meaning given in section 4(1);

"prohibited steps order" has the meaning given by section 7(1);

"residence order" has the meaning given by section 7(1);

"responsible person", in relation to a supervised child, has the meaning given in paragraph 1 of Schedule 2;

"signed", in relation to any person, includes the making by that person of his mark;

"specific issue order" has the meaning given by section 7(1);

"supervision order" has the meaning given by section 12(11); and "supervised child" and "supervisor", in relation to a supervision order, mean respectively the child placed (or to be placed) under supervision and the person under whose supervision he is placed (or to be placed) by the order;

"upbringing", in relation to any child, includes the care and protection of the child;

"voluntary organisation" means a body (other than a public or local authority) whose activities are not carried on for profit.

(2) References in this Act to a child whose father and mother were, or (as the case may be) were not, married to each other at the time of his birth must be read with section 1 of the Family Law Reform Act 1987 (which extends the meaning of such references). 1987 c.42.

(3) References in this Act to—

(a) a person with whom a child lives, or is to live, as the result of a residence order; or

(b) a person in whose favour a residence order is in force,

shall be construed as references to the person named in the order as the person with whom the child is to live.

Short title, commencement and extent.

26.—(1) This Act may be cited as the Children Act 1988.

(2) This Act shall come into force on such date as may be appointed by order made by the Secretary of State.

(3) Different dates may be appointed for different provisions of this Act and in relation to different cases.

(4) This Act does not extend to Scotland or Northern Ireland. PART IV

SCHEDULES

Section 11(1).

SCHEDULE 1

FINANCIAL PROVISION FOR CHILDREN

Orders for financial relief against parents

1.—(1) On an application made by a parent or guardian of a child, or by any person in whose favour a residence order is in force with respect to a child, the court may-

(a) in the case of an application to the High Court or a county court, make one or more of the orders mentioned in sub-paragraph (2);

(b) in the case of an application to a magistrates' court, make one or both of the orders mentioned in paragaraphs (a) and (c) of that sub-paragraph.

(2) The orders referred to in sub-paragraph (1) are—

(a) an order requiring either or both parents of a child—

(i) to make to the applicant for the benefit of the child; or

(ii) to make to the child himself,

such periodical payments, for such term, as may be specified in the order;

(b) an order requiring either or both parents of a child—

(i) to secure to the applicant for the benefit of the child; or

(ii) to secure to the child himself,

such periodical payments, for such term, as may be so specified;

(c) an order requiring either or both parents of a child—

(i) to pay to the applicant for the benefit of the child; or

(ii) to pay to the child himself,

such lump sum as may be so specified;

(d) an order requiring a settlement to be made for the benefit of the child, and to the satisfaction of the court, of property-

(i) to which either parent is entitled (either in possession or in reversion); and

(ii) which is specified in the order;

(e) an order requiring either or both parents of a child—

(i) to transfer to the applicant, for the benefit of the child; or

(ii) to transfer to the child himself,

such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as may be specified in the order.

(3) The powers conferred by this paragraph may be exercised at any time.

(4) An order under sub-paragraph (2)(a) or (b) may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order.

(5) Where a court makes an order under this paragraph—

(a) it may at any time make a further such order under sub-paragraph (2)(a), (b) or (c) with respect to the child concerned if he has not reached the age of eighteen;

(b) it may not make more than one order under sub-paragraph (2)(d) or (e) against the same person in respect of the same child.

(6) On making, varying or discharging a residence order the court may exercise any of its powers under this Schedule even though no application has been made to it under this Schedule.

Orders for financial relief for persons over eighteen

2.—(1) If, on an application by a person who has reached the age of eighteen, it appears to the High Court or a county court—

(a) that the applicant is, will be or (if an order were made under this paragraph) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) that there are special circumstances which justify the making of an order under this paragraph,

the court may make one or both of the orders mentioned in sub-paragraph (2).

(2) The orders are—

(a) an order requiring either or both of the applicant's parents to pay to the applicant such periodical payments, for such term, as may be specified in the order;

(b) an order requiring either or both of the applicant's parents to pay to the applicant such lump sum as may be so specified.

(3) An application may not be made under this paragraph by any person if, immediately before he attained the age of sixteen, a periodical payments order was in force with respect to him.

(4) No order shall be made under this paragraph at a time when the parents of the applicant are living with each other in the same household.

(5) An order under sub-paragraph (2)(a) may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order.

(6) In sub-paragraph (3) "periodical payments order" means an order made under—

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(a) this Schedule;

1969 c.46. (b) section 6(3) of the Family Law Reform Act 1969 ;

1973.c.18. (c) section 23 or 27 of the Matrimonial Causes Act 1973 ;

(d) Part I of the Domestic Proceedings and Magistrates' Courts Act 1978 c.22. 1978 ,

for the making or securing of periodical payments.

(7) The powers conferred by this paragraph shall be exercisable at any time.

(8) Where the court makes an order under this paragraph it may from time to time while that order remains in force make a further such order.

Duration of orders for financial relief

3.—(1) The term to be specified in an order for periodical payments made under paragraph 1(2)(a) or (b) in favour of a child may begin with the date of the making of an application for the order in question or any later date but—

(a) shall not in the first instance extend beyond the the child's seventeenth birthday unless the court thinks it right in the circumstances of the case to specify a later date; and

(b) shall not in any event extend beyond the child's eighteenth birthday.

(2) Paragraph (b) of sub-paragraph (1) shall not apply in the case of a child if it appears to the court that—

(a) the child is, or will be or (if an order were made without complying with that paragraph) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) there are special circumstances which justify the making of an order without complying with that paragraph.

(3) An order for periodical payments made under paragraph 1(2)(a) or 2(2)(a) shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order.

(4) Where an order is made under paragraph 1(2)(a) or (b) requiring periodical payments to be made or secured to the parent of a child, the order shall cease to have effect if the parents of the child live together for a period of more than six months.

Matters to which court is to have regard in making orders for financial relief

4.—(1) In deciding whether to exercise its powers under paragraph 1 or 2, and if so in what manner, the court shall have regard to all the circumstances including—

(a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (3) has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (3) has or is likely to have in the foreseeable future;

(c) the financial needs of the child;

(d) the income, earning capacity (if any), property and other financial resources of the child;

(e) any physical or mental disability of the child;

(f) the manner in which the child was being, or was expected to be, educated or trained.

(2) In deciding whether to exercise its powers under paragraph 1 or 2 against a person who is not the mother or father of the child, and if so in what manner, the court shall in addition have regard to—

(a) whether that person had assumed responsibility for the maintenance of the child and, if so, the extent to which and basis on which he assumed that responsibility and the length of the period during which he met that responsibility;

(b) whether he did so knowing that the child was not his child;

(c) the liability of any other person to maintain the child.

(3) The persons mentioned in sub-paragraph (1) are—

(a) any parent of the child;

(b) the applicant for the order;

(c) any other person in whose favour the court proposes to make the order.

Provisions relating to lump sums

5.—(1) Without prejudice to the generality of paragraph 1, an order under that paragraph for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses—

(a) incurred in connection with the birth of the child or in maintaining the child; and

(b) reasonably incurred before the making of the order,

to be met.

(2) The amount of any lump sum required to be paid by an order made by a magistrates' court under paragraph 1 or 2 shall not exceed £500 or such larger amount as the Secretary of State may from time to time by order fix for the purposes of this sub-paragraph.

Any order made by the Secretary of State under this sub-paragraph shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) The power of the court under paragraph 1 or 2 to vary or discharge an order for the making or securing of periodical payments by a parent shall include power to make an order under that provision for the payment of a lump sum by that parent.

(4) The amount of any lump sum which a parent may be required to pay by virtue of sub-paragraph (3) shall not, in the case of an order made by a magistrates' court, exceed the maximum amount that may at the time of the making of the order be required to be paid

SCH. 1

under sub-paragraph (2), but a magistrates' court may make an order for the payment of a lump sum not exceeding that amount even though the parent was required to pay a lump sum by a previous order under this Act.

(5) An order made under paragraph 1 or 2 for the payment of a lump sum may provide for the payment of that sum by instalments.

(6) Where the court provides for the payment of a lump sum by instalments the court, on an application made either by the person liable to pay or the person entitled to receive that sum, shall have power to vary that order by varying—

(a) the number of instalments payable;

(b) the amount of any instalment payable;

(c) the date on which any instalment becomes payable.

Variation etc. of orders for periodical payments

6.—(1) In exercising its powers under paragraph 1 or 2 to vary or discharge an order for the making or securing of periodical payments the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order.

(2) The power of the court under paragraph 1 or 2 to vary an order for the making or securing of periodical payments shall include power to suspend any provision of the order temporarily and to revive any provision so suspended.

(3) Where on an application under paragraph 1 or 2 for the variation or discharge of an order for the making or securing of periodical payments the court varies the payments required to be made under that order, the court may provide that the payments as so varied shall be made from such date as the court may specify, not being earlier than the date of the making of the application.

(4) An application for the variation of an order made under paragraph 1 for the making or securing of periodical payments to or for the benefit of a child may, if the child has attained the age of sixteen, be made by the child himself.

(5) Where an order for the making or securing of periodical payments made under paragraph 1 ceases to have effect on the date on which the child attains the age of sixteen, or at any time after that date but before or on the date on which he attains the age of eighteen, the child may apply to the court which made the order for an order for its revival.

(6) If on such an application it appears to the court that—

(a) the child is, will be or (if an order were made under this sub-paragraph) would be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not while in gainful employment; or

(b) there are special circumstances which justify the making of an order under this paragraph,

the court shall have power by order to revive the order from such date as the court may specify, not being earlier than the date of the making of the application.

(7) Any order which is revived by an order under sub-paragraph (5) may be varied or discharged under that provision, on the application of any person by whom or to whom payments are required to be made under the revived order.

(8) An order for the making or securing of periodical payments made under paragraph 1 or 2 may be varied or discharged, after the death of either parent, on the application of a guardian of the child concerned.

Variation of orders for secured periodical payments after death of parent

7.—(1) Where the parent liable to make payments under a secured periodical payments order has died, the persons who may apply for the variation or discharge of the order shall include the personal representatives of the deceased parent.

(2) No application for the variation of the order shall, except with the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of that parent is first taken out.

(3) The personal representatives of a deceased person against whom a secured periodical payments order was made shall not be liable for having distributed any part of the estate of the deceased after the end of the period of six months referred to in sub-paragraph (2) on the ground that they ought to have taken into account the possibility that the court might permit an application for variation to be made after that period by the person entitled to payments under the order.

(4) Sub-paragraph (3) shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the variation of an order in accordance with this paragraph.

(5) Where an application to vary a secured periodical payments order is made after the death of the parent liable to make payments under the order, the circumstances to which the court is required to have regard under paragraph 6(1) shall include the changed circumstances resulting from the death of the parent.

(6) In considering for the purposes of sub-paragraph (2) the question when representation was first taken out, a grant limited to settled land or to trust property shall be left out of account and a grant limited to real estate or or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

(7) In this paragraph "secured periodical payments order" means an order for secured periodical payments under paragraph 1(2)(b).

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Financial relief under other enactments

8.—(1) This paragraph applies where a residence order is made with respect to a child at a time when there is in force an order ("the financial relief order") made under any enactment other than this Act and requiring a person to contribute to the child's maintenance.

(2) Where this paragraph applies, the court may, on the application of—

(a) any person required by the financial relief order to contribute to the child's maintenance; or

(b) any person in whose favour a residence order with respect to the child is in force,

make an order revoking the financial relief order, or varying it by altering the amount of any sum payable under that order or by substituting the applicant for the person to whom any such sum is otherwise payable under that order.

Interim orders

9.—(1) Where an application is made under paragraph 1 or 2 the court may, at any time before it disposes of the application, make an interim order—

(a) requiring either or both parents to make such periodical payments, at such times and for such term as the court thinks fit; and

(b) giving any direction which the court thinks fit.

(2) An interim order made under this paragraph may provide for payments to be made from such date as the court may specify, not being earlier than the date of the making of the application under paragraph 1 or 2.

(3) An interim order made under this paragraph shall cease to have effect when the application is disposed of or, if earlier, on the date specified for the purposes of this paragraph in the interim order.

(4) An interim order in which a date has been specified for the purposes of sub-paragraph (3) may be varied by substituting a later date.

Alteration of maintenance agreements

10.—(1) In this paragraph and in paragraph 11 "maintenance agreement" means any agreement in writing made with respect to a child, whether before or after the commencement of this paragraph, which—

(a) is or was made between the father and mother of the child; and

(b) contains provision with respect to the making or securing of payments, or the disposition or use of any property, for the maintenance or education of the child,

and any such provisions are in this paragraph, and paragraph 11, referred to as "financial arrangements".

(2) Where a maintenance agreement is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled or resident in England and Wales, then, either party may apply to the High Court, a county court or a magistrates'court for an order under this paragraph.

(3) If the court to which the application is made is satisfied either—

(a) that, by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different financial arrangements; or

(b) that the agreement does not contain proper financial arrangements with respect to the child,

then that court may by order make such alterations in the agreement by varying or revoking any financial arrangements contained in it as may appear to it to be just having regard to all the circumstances.

(4) If the maintenance agreement is altered by an order under this paragraph, the agreement shall have effect thereafter as if the alteration had been made by agreement between the parties and for valuable consideration.

(5) Where a court decides to make an order under this paragraph altering the maintenance agreement—

(a) by inserting provision for the making or securing by one of the parties to the agreement of periodical payments for the maintenance of the child; or

(b) by increasing the rate of periodical payments required to be made or secured by one of the parties for the maintenance of the child,

then, in deciding the term for which under the agreement as altered by the order the payments or (as the case may be) the additional payments attributable to the increase are to be made or secured for the benefit of the child, the court shall apply the provisions of sub-paragraphs (1) and (2) of paragraph 3 as if the order were an order under paragraph 1(2)(a) or (b).

(6) A magistrates' court shall not entertain an application under sub-paragraph (2) unless both the parties to the agreement are resident in England and Wales and at least one of the parties is resident in the commission area (within the meaning of the Justices of the Peace Act 1979) for which the court is appointed, and shall not have power to make any order on such an application except— 1979 c.55.

(a) in a case where the agreement contains no provision for periodical payments by either of the parties, an order inserting provision for the making by one of the parties of periodical payments for the maintenance of the child;

(b) in a case where the agreement includes provision for the making by one of the parties of periodical payments, an order increasing or reducing the rate of, or terminating, any of those payments.

SCH. 1

(7) For the avoidance of doubt it is hereby declared that nothing in this paragraph affects any power of a court before which any proceedings between the parties to a maintenance agreement are brought under any other enactment to make an order containing financial arrangements or any right of either party to apply for such an order in such proceedings.

11.—(1) Where a maintenance agreement provides for the continuation, after the death of one of the parties, of payments for the maintenance of a child and that party dies domiciled in England and Wales, the surviving party or the personal representatives of the deceased party may apply to the High Court or a county court for an order under paragraph 10.

(2) If a maintenance agreement is altered by a court on an application under this paragraph, the agreement shall have effect thereafter as if the alteration had been made, immediately before the death, by agreement between the parties and for valuable consideration.

(3) An application under this paragraph shall not, except with leave of the High Court or a county court, be made after the end of the period of six months beginning with the day on which representation in regard to the estate of the deceased is first taken out.

(4) In considering for the purposes of sub-paragraph (3) the question when representation was first taken out, a grant limited to settled land or to trust property shall be left out of account and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

(5) A county court shall not entertain an application under this paragraph, or an application for leave to make an application under this paragraph, unless it would have jurisdiction to hear and determine proceedings for an order under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975 in relation to the deceased's estate by virtue of section 25 of the County Courts Act 1984 (jurisdiction under the Act of 1975).

1975 c.63.

1984 c.28.

(6) The provisions of this paragraph shall not render the personal representatives of the deceased liable for having distributed any part of the estate of the deceased after the expiry of the period of six months referred to in sub-paragraph (3) on the ground that they ought to have taken into account the possibility that a court might grant leave for an application by virtue of this paragraph to be made by the surviving party after that period.

(7) Sub-paragraph (6) shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the making of an order in pursuance of this paragraph.

Enforcement of orders for maintenance

12.—(1) Any person for the time being under an obligation to make payments in pursuance of any order for the payment of money made by a magistrates' court under this Act shall give notice of any change of address to such person (if any) as may be specified in the order.

(2) Any person failing without reasonable excuse to give such a notice shall be liable on summary conviction to a fine not exceeding level 2 on the standard scale.

(3) An order for the payment of money made by a magistrates' court under this Act shall be enforceable as a magistrates' court maintenance order within the meaning of section 150(1) of the Magistrates' Courts Act 1980 . 1980 c.43.

Direction for settlement of instrument by conveyancing counsel

13. Where the High Court or a county court decides to make an order under this Act for the securing of periodical payments or for the transfer or settlement of property, it may direct that the matter be referred to one of the conveyancing counsel of the court to settle a proper instrument to be executed by all necessary parties.

Financial provision for child resident in country outside England and Wales

14.—(1) Where one parent of a child lives in England and Wales and the child lives outside England and Wales with—

(a) the other parent;

(b) a guardian of his; or

(c) a person in whose favour a residence order is in force with respect to the child,

the court shall have power, on an application made by any of the persons mentioned in paragraphs (a) to (c), to make one or both of the orders mentioned in paragraph 1(2)(a) and (b) against the parent living in England and Wales.

(2) Any reference in this Act to the powers of the court under paragraph 1(2) or to an order made under paragraph 1(2) shall include a reference to the powers which the court has by virtue of sub-paragraph (1) above or (as the case may be) to an order made by virtue of sub-paragraph (1) above.

Local authority contribution to child's maintenance

15.—(1) Where a child lives, or is to live, with a person as the result of a residence order, a local authority may make contributions to that person towards the cost of the accomodation and maintenance of a child.

(2) Sub-paragraph (1) does not apply where the person with whom the child lives, or is to live, is a parent of the child or the husband or wife of a parent of the child.

SCH. 1

Interpretation

16. In this Schedule—

"child" includes, in any case where an application is made under paragraph 2 or 6 in relation to a person who has reached the age of eighteen, that person; and

"parent" includes any party to a marriage (whether or not subsisting) in relation to whom the child concerned is a child of the family.

Section 15.

SCHEDULE 2

SUPERVISION ORDERS

PART I

GENERAL

Meaning of "responsible person"

1. In this Schedule, "the responsible person", in relation to a supervised child means—

(a) any person who has parental responsibility for the child; and

(b) any other person with whom the child is living.

PART II

CONTENT OF SUPERVISION ORDERS

Power of supervisor to give directions to supervised child

2.—(1) A supervision order may require the supervised child to comply with any directions given from time to time by the supervisor and requiring him to do all or any of the following things—

(a) to live at a place or places specified in the directions for a period or periods so specified;

(b) to present himself to a person or persons specified in the directions at a place or places and on a day or days so specified;

(c) to participate in activities specified in the directions on a day or days so specified.

(2) It shall be for the supervisor to decide whether, and to what extent, he exercises his power to give directions and to decide the form of any directions which he gives.

(3) Sub-paragraph (1) does not confer on a supervisor power to give directions in respect of any medical or psychiatric examination or treatment (which are matters dealt with in paragraphs 4 and 5).

Imposition of obligations on responsible person SCH. 2

3.—(1) With the consent of any responsible person, a supervision order may include a requirement—

(a) that he take all reasonable steps to ensure that the supervised child complies with any requirement imposed by the supervisor under paragraph 2;

(b) that he comply with any directions given by the supervisor obliging him to attend at a place specified in the directions for the purpose of taking part in activities so specified.

(2) A direction given under sub-paragraph (1)(b) may specify the time at which the responsible person is to attend and whether or not the supervised child is required to attend with him.

(3) A supervision order may require any person who is a responsible person in relation to the supervised child to keep the supervisor informed of his address, if it is different to the child's.

Psychiatric and medical examinations

4.—(1) A supervision order may require the supervised child—

(a) to submit to a medical or psychiatric examination; or

(b) to submit to any such examination from time to time as directed by the supervisor.

(2) Any such examination shall be required to be conducted—

(a) by, or under the direction of, such registered medical practitioner as may be specified in the order;

(b) at a place which is specified in the order and at which the supervised child is a non-resident patient; or

(c) while the supervised child is a resident patient in—

(i) a health service hospital; or

(ii) in the case of a psychiatric examination, a hospital or mental nursing home.

(3) A requirement of a kind mentioned in sub-paragraph (2)(c) shall not be included unless the court is satisfied, on the evidence of a registered medical practitioner, that—

(a) the child may be suffering from a physical or mental condition that requires, and may be susceptible to, treatment; and

(b) a period as a resident patient is necessary if the examination is to be carried out properly.

(4) A requirement shall not be included under this paragraph—

(a) in any case, unless the court is satisfied that satisfactory arrangements have been, or can be, made for the examination; and

(b) in the case of an order made in respect of a child who has reached the age of fourteen, unless he consents to its inclusion.

SCH. 2 *Psychiatric and medical treatment*

5.—(1) Where a court which proposes to make or vary a supervision order is satisfied, on the evidence of a registered medical practitioner approved for the purposes of section 12 of the Mental Health Act 1983 c.20. 1983 , that the mental condition of the supervised child—

(a) is such as requires, and may be susceptible to, treatment; but

(b) is not such as to warrant his detention in pursuance of a hospital order under Part III of that Act,

the court may include in the order a requirement that the supervised child shall, for a period specified in the order, submit to such treatment as is so specified.

(2) The treatment specified in accordance with subsection (1) must be of one of the following kinds—

(a) treatment by, or under the direction of, such registered medical practitioner as may be specified in the order;

(b) treatment as a non-resident patient at such a place as may be so specified; or

(c) treatment as a resident patient in a hospital or mental nursing home.

(3) Where a court which proposes to make or vary a supervision order is satisfied, on the evidence of a registered medical practitioner, that the physical condition of the supervised child is such as requires, and may be susceptible to, treatment, the court may include in the order a requirement that the supervised child shall, for a period specified in the order, submit to such treatment as is so specified.

(4) The treatment specified in accordance with sub-paragraph (3) must be of one of the following kinds—

(a) treatment by, or under the direction of, such registered medical practitioner as may be specified in the order;

(b) treatment as a non-resident patient at such place as may be so specified; or

(c) treatment as a resident patient in a health service hospital.

(5) A requirement shall not be included under this paragraph—

(a) in any case, unless the court is satisfied that satisfactory arrangements have been, or can be, made for the treatment; and

(b) in the case of an order in respect of a child who has reached the age of fourteen, unless he consents to its inclusion.

(6) If a medical practitioner by whom or under whose direction a supervised person is being treated in pursuance of a requirement included in a supervision order by virtue of this paragraph is unwilling to continue to treat or direct the treatment of the supervised child or is of the opinion—

(a) that the treatment should be continued beyond the period specified in the order;

(b) that the supervised child needs different treatment;

(c) that he is not susceptible to treatment; or

(d) that he does not require further treatment,

the practitioner shall make a report in writing to that effect to the supervisor.

(7) On receiving a report under this paragraph the supervisor shall refer it to the court, and on such a reference the court may make an order cancelling or varying the requirement.

PART III

MISCELLANEOUS

Life of supervision order

6.—(1) Subject to sub-paragraph (2) and section 23(2), a supervision order shall cease to have effect at the end of the period of one year beginning with the date on which it was made.

(2) Where the supervisor applies to the court to extend, or further extend, a supervision order the court may extend the order for such period as it may specify.

(3) A supervision order may not be extended so as to run beyond the end of the period of three years beginning with the date on which it was made.

Limited life of directions

7.—(1) The total number of days in respect of which a supervised child or (as the case may be) responsible person may be required to comply with directions given under paragraph 2 or 3 shall not exceed 90 or such lesser number (if any) as the supervision order may specify.

(2) For the purpose of calculating that total number of days, the supervisor may disregard any day in respect of which directions previously given in pursuance of the order were not complied with.

Information to be given to supervisor etc.

8.—(1) A supervision order may require the supervised child—

(a) to keep the supervisor informed of any change in his address; and

(b) to allow the supervisor to visit him at the place where he is living.

(2) The responsible person in relation to any child with respect to whom a supervision order is made shall—

(a) if asked by the supervisor, inform him of the child's address (if it is known to him); and

(b) if he is living with the child, allow the supervisor reasonable contact with the child.

SCH. 2

Selection of supervisor

9.—(1) A supervision order shall not designate a local authority as the supervisor unless—

(a) the authority agrees; or

(b) it appears to the court that the supervised child resides or will reside in its area.

(2) A court shall not place a child under the supervision of a probation officer unless—

(a) the appropriate authority so requests; and

(b) a probation officer is already exercising or has exercised, in relation to another member of the household to which the child belongs, duties imposed on probation officers—

(i) by paragraph 8 of Schedule 3 to the Powers of Criminal Courts Act 1973 ; or

1973 c 62.

(ii) by rules under paragraph 18(1)(b) of that Schedule.

(3) In sub-paragraph (2) "the appropriate authority" means the local authority appearing to the court to be the authority in whose area the supervised child lives or will live.

(4) Where a supervision order places a person under the supervision of a probation officer, he shall be a probation officer—

(a) appointed for, or assigned to, the appropriate petty sessions area; and

(b) selected under arrangements made by the probation committee;

(5) If the selected probation officer dies or is unable to carry out his duties, another probation officer shall be selected in the same manner.

Effect of supervision order on earlier orders

10.—(1) The making of a supervision order with respect to any child brings to an end any earlier care or supervision order which—

(a) was made with respect to that child (under this or any other enactment); and

(b) would otherwise continue in force.

Local authority functions and expenditure

11.—(1) The Secretary of State may make regulations with respect to the exercise by a local authority of their functions where a child has been placed under their supervision by a supervision order.

(2) Where a supervision order requires compliance with directions given by virtue of this section, any expenditure incurred by the supervisor for the purposes of the directions shall be defrayed by the local authority named in the order in accordance with section 12(6).

APPENDIX 2

LIST OF NATIONAL ORGANISATIONS WHO SENT COMMENTS ON WORKING PAPER NOS. 91, 96 AND 100

Association of British Adoption and Fostering Agencies (96, 100)
Association of County Councils (91, 96 and 100)
Association of County Court and District Registrars (96, 100)
Association of Chief Education Social Workers (100)
Association of Chief Officers of Probation (96)
Association of Directors of Social Services (96)
Association of Women Solicitors (91)
Central Council of Probation Committees (100)
Children's Legal Centre (91, 96 and 100)
The Children's Society (91, 96 and 100)
Council of H.M. Circuit Judges (96)
Department of Health and Social Security (96, 100)
Dr Barnardo's (91, 96 and 100)
Family Division Judges (91, 96 and 100)
Family Forum (96)
Family Law Bar Association (91, 96 and 100)
Families Need Fathers (91, 96 and 100)
Family Rights Group (96, 100)
Family Welfare Association (96, 100)
Gingerbread (91, 96 and 100)
Home Office (100)
The Institute of Legal Executives (91, 96 and 100)
Justice (91)
The Law Society (91, 96 and 100)
Lord Chancellor's Department (91, 96 and 100)
Magistrates' Association (91, 96 and 100)
Mothers' Union (91, 96)
National Board of Catholic Women (96, 100)
National Children's Bureau (96, 100)
National Children's Home (91, 96)
National Council for One-Parent Families (91, 96 and 100)
National Council of Women (96, 100)
National Family Conciliation Council (100)
National Federation of Women's Institutes (96, 100)
National Foster Care Association (96, 100)
National Society for the Prevention of Cruelty to Children (91, 96 and 100)
National Stepfamily Association (91)
Rights Of Women (96)
Royal College of Psychiatrists (96)
Scottish Education Department, Social Work Services Group (100)
Solicitors' Family Law Association (96, 100)
Standing Conference of Women's Organisations (96)

LIST OF LOCAL ORGANISATIONS WHO SENT COMMENTS ON WORKING PAPER NOS. 91, 96 AND 100

Atherton and Tyldesley Gingerbread Group (91)
Basingstoke Mothers' Union (96)
Bedlow Women's Institute (96)
Bury St Edmunds Women's Aid Centre (96)
Carlisle Mothers' Union (96)
Caynsham-Ashford Women's Institute (96)
Coventry Family Conciliation Service (96)
The Divorce Conciliation and Advisory Service (96)
Dorset Divorce Court Welfare Service (96)
Down and Dromore Mothers' Union (96)
Essex Divorce Court Welfare Service (96)
Guildford Mothers' Union (96)
Holborn Law Society (91, 96)
Leicestershire Court Welfare Service (96)
Leicestershire and Rutland Federation of Women's Institutes (96)
Leigh Gingerbread (96)
Northampton Club-Programme Action Committee (96)
Northumbria Divorce Court Welfare Service (96)
North Yorkshire Probation Service (96)
Old Arlesford Mothers' Union (96)
Ripon Mothers' Union (96)
Salisbury Women's Institute (96)
Senior Divorce Court Welfare Officers (Midlands Region) (100)
Senior Divorce Court Welfare Officers (S.W. Region) (96, 100)
Southend Gingerbread (96)
Truro Gingerbread (96)
Wakefield Mothers' Union (96)
Walkden Gingerbread (96)
West Midlands Civil Court Welfare Service (96, 100)
Wiltshire Divorce Court Welfare Service (96, 100)

LIST OF INDIVIDUALS WHO RESPONDED TO WORKING PAPER NOS. 91, 96 AND 100

Mr. R. Aitken (91, 96 and 100)
Mr. N. F. Allen (91, 96)
Miss G. Anderssohn (96)
Mr. D. J. Bagwell (96)
Mr. A. Bainham (91, 96)
Mr. D. J. Barker (96)
Mrs. F. Baxter (96)
Mr. J. G. Bazeley (91)
Mr. G. G. Beeson (96)
Mr. F. Bennion (96)
Professor A. Bissett-Johnson (91, 96)
The Honourable Mrs. Justice Booth (96)
Mr. G. Brogden (96, 100)
Mr. E. Burgin (91, 96)
Mr. P. N. Campbell (96)
Mr. D. J. Cannon (96)
Mr. G. Chapman (100)
Ms. J. Chow (96)
Mr. J. Cohen (96)
Mr. N. Collins (96)
Mrs. J. Collinson (96)
Professor S. M. Cretney (91, 96)
Mr. J. Dewar (96)
Dr. R. W. J. Dingwall (91, 100)
Mr. M. D. Dodds (96, 100)
Ms. P. Dunnett (96)
Mr. J. Eekelaar (96, 100)
Mr. & Mrs. C. M. Farrell (91)
Mrs. A. Ferrada (96)
Dr. J. Fielding (96)
Ms. A. Flath (96, 100)
Mrs. J. Forbes (96)
Mrs. D. J. Foreman (91)
Ms. J. Freen (91)
Mr. F. D. Fuchs (96)
Mr. R. George (100)
Mr. D. E. Giles (96)
Mr. S. Goode (100)
Mr. J. Hall (91, 96)
His Honour Judge Heald (96)
Mr. W. J. Hockin (91)
The Honourable Mr. Justice Hollings (96, 100)
Mr. M. F. Hunt (96)
Mr. R. Ingleby (96, 100)
Mr. T. D. James (96)
Mrs. E. Kendal (91)
Ms. M. Kilner (96, 100)
Mr. M. King (96)
Mr. S. G. Linstead (96)
Ms. A. Lovell (96)
His Honour Judge MacNair (96)
Mr. D. J. Mahoney (96)
Dr. J. Masson (91)
Mrs. M. McAndrew (96)
Mr. P. McLaughlin (96)
Mrs. A. Milner (96)
Mrs. A. Mitchell (96)
Mr. J. Montgomery (96)
Mrs. M. R. North (91)
Ms. L. Parkinson (96, 100)
Mr. P. Parkinson (91)
Mr. B. Parnell (91)

Mr. M. L. Parry (91, 96)
His Honour Judge Paterson (96)
Dr. M. J. Pelling (96)
Mrs. M. Pennock (96)
Dr. S. M. Poulter (91)
Mr. R. Poynder (96)
Mrs. J. Price (96)
Mrs. S. M. Quemby (91)
Mrs. S. Quinnell (91)
Ms. P. J. Raby (100)
Mrs. P. Reidy (91)
Mrs. E. A. Ribbands (91)
Mrs. M. Richards (91)
Dr. M. P. M. Richards (91, 96)
Mr. M. Rogers (96)
Mr. G. G. I. Rose (100)
Mr. A. Samuels (91, 96)
Mrs. E. Smallwood (91)
Mrs. T. Squires (96)
His Honour Judge Stephenson (96)
Mrs. M. Swinton (91)
Mrs. G. Tennant (96)
Mr. Registrar Tickle, Senior Registrar of the Family Division (100)
Mrs. M. Towers (96)
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