
# The Law Commission

(LAW COM. No. 117)

## FAMILY LAW
## FINANCIAL RELIEF AFTER FOREIGN DIVORCE

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

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*Ordered by* The House of Commons *to be printed 20 October 1982*

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*LONDON*
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 promoting the reform of the law.

The Commissioners are——

The Honourable Mr. Justice Ralph Gibson, *Chairman*.
Mr. Stephen M. Cretney.
Mr. Brian J. Davenport, Q.C.
Mr. Stephen Edell.
Dr. Peter North.

The Secretary of the Law Commission is Mr. R. H. Streeten and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

# FINANCIAL RELIEF AFTER FOREIGN DIVORCE

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# THE LAW COMMISSION

## FAMILY LAW
*(Item XIX of the Second Programme)*

## FINANCIAL RELIEF AFTER FOREIGN DIVORCE

*To the Right Honourable The Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain.*

## PART I
## INTRODUCTION

### (i) The background

1.1 Where a marriage is terminated by foreign proceedings in which no financial order is made, a court in this country has no power to grant financial relief. In recent years there has been a steady stream of cases coming before the courts which has both highlighted this gap in the law and illustrated the hardship to which it may give rise.[1] The view that the law is in need of reform has been widely expressed.[2]

1.2 The problems exposed by these cases can be illustrated by a hypothetical, and to some extent exaggerated, case.[3] Suppose an English woman marries a wealthy Ruritanian, and they establish the matrimonial home here in a house owned by the husband. In due course, the husband divorces her in Ruritania perhaps by pronouncing the word "*talaq*" three times (as is permitted by the law in many countries).[4] No financial order is made in Ruritania. The Ruritanian divorce is recognized in this country as effective to terminate the parties' marriage.[5] The wife then has no right to apply to the court here for financial provision: she will have ceased to be the husband's wife, so that he is no longer under a legal liability to maintain her.[6] She cannot invoke the powers of the divorce court to make financial provision or property adjustment orders because the court only has such powers if it grants a decree[7] and it cannot do this because there is no longer a marriage to

[1] *Turczak* v. *Turczak* [1970] P. 198; *Torok* v. *Torok* [1973] 1 W.L.R. 1066; *Newmarch* v. *Newmarch* [1978] Fam. 79; *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93; *Quazi* v. *Quazi* [1980] A.C. 744; *Viswalingham* v. *Viswalingham* (1979) 123 S.J. 604; and see also *Shemshadfard* v. *Shemshadfard* [1981] 1 All E.R. 726.

[2] See particularly *Quazi* v. *Quazi* [1980] A.C. 744, 785, 810, 819, *per* Ormrod L.J., Viscount Dilhorne, and Lord Scarman. There has been considerable academic support for change in the law: I.G.F. Karsten (1970) 33 M.L.R. 205, (1972) 35 M.L.R. 299 and (1980) 43 M.L.R. 202; J.A. Wade (1974) 23 I.C.L.Q. 461; D. Pearl [1974] C.L.J. 77; R.L. Waters (1978) 122 S.J. 326; J.G. Miller (1979) 123 S.J. 4, 26; M.L. Parry (1979) 9 Fam. Law 12; J.H.C. Morris, *The Conflict of Laws* (2nd ed., 1980) p. 172; S.B. Dickson (1980) 43 M.L.R. 81; S.M. Nott (1980) 10 Fam. Law 13. The need for legislation was also suggested by Edward Lyons M.P. during the debate on the Bill leading to the Recognition of Divorces and Legal Separations Act 1971: see *Hansard* (H.C.), 5 May 1971, vol. 816, col. 1562.

[3] Taken from Financial Relief After Foreign Divorce (1980) Working Paper No. 77, para. 2. This Working Paper is referred to hereafter as "the Working Paper".

[4] See P.M. North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977) pp. 218–19.

[5] Under s. 3 of the Recognition of Divorces and Legal Separations Act 1971.

[6] See e.g. *Turczak* v. *Turczak* [1970] P.198.

[7] Matrimonial Causes Act 1973, ss. 23(1), 24(1) ["On granting a decree... or at any time thereafter..."]; *Moore* v. *Bull* [1891]P.279.

dissolve.[8] She cannot enforce any foreign financial order, because no such order exists. Even the statutory right conferred by English law[9] on a married woman not to be evicted from the matrimonial home without leave of the court will have come to an end with the ending of the marriage.[10] Such a woman may thus face destitution, and her only source of financial support may be supplementary benefit; and if benefit is paid to her, the supplementary benefits authorities will have no legal right to recover the sums paid from the husband, since he will no longer be a "liable relative".[11] The fact that the husband lives in this country and has substantial assets here makes no difference to the legal position. If he dies, the wife will have no entitlement to share in his intestacy;[12] she will not even have the right given to wives and former wives by the Inheritance (Provision for Family and Dependants) Act 1975[13] to apply to the court for reasonable financial provision to be made for her out of his estate, because she has ceased to be a wife, and does not fall within the Act's definition[14] of "former wife" (which is limited to persons whose marriages have been dissolved or annulled by decree of an English court).

1.3 Serious though this hardship is, there are formidable problems in formulating satisfactory proposals for reform. The advantage of giving a person who has been divorced abroad a right to apply to the English court for financial relief has to be balanced against two different kinds of risks.[15] First, to confer such a power on the courts would, in the absence of sufficient guidance as to the principles to be applied, pose problems which it might be difficult for them to resolve; secondly, serious injustice might be caused to persons who reasonably assumed that the financial consequences of divorce had been conclusively regulated according to the law of a foreign country if the other party were able to re-open the matter here—all the more so if the parties had very little or no real connection with this country.

1.4 Accordingly, we decided to carry out, under Item XIX of our Second Programme of Law Reform,[16] an examination of the law relating to the provision of financial relief after a foreign divorce, annulment or legal

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[8]See *Torok* v. *Torok* [1973] 1 W.L.R. 1066; *Quazi* v. *Quazi* [1980] A.C. 744. It should also be noted that the wife would have no right to bring proceedings under s. 37 of the Matrimonial Causes Act 1973, to avoid transactions by the husband intended to defeat her claim for financial relief or to frustrate or impede the enforcement of any order. To take advantage of this section there must be a subsisting claim for financial relief: see *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93, 112. Hence the court would lack power to prevent a husband disposing of his share of jointly owned property (such as the matrimonial home).

[9]Matrimonial Homes Act 1967, s. 1 (1).

[10]*Ibid.*, s. 2 (2).

[11]See Supplementary Benefits Act 1976, ss. 17(1) (a), 18.

[12]Since she will no longer be a "surviving wife" for the purposes of the Administration of Estates Act 1925, s. 46(1)(i).

[13]Sects. 1, 2. Whether or not there has been a divorce the deceased must have been domiciled in England and Wales at the time of death for the court to have jurisdiction under this Act: *ibid.*, s. 1(1).

[14]Sect. 25(1).

[15]See the discussion in Financial Relief After Foreign Divorce (1980) Working Paper No. 77 at para. 22.

[16]Item XIX of our Second Programme of Law Reform requires us to undertake a comprehensive examination of family law with a view to its systematic reform and eventual codification.

separation.[17] In November 1980 we published a Working Paper,[18] setting out the results of this examination and making provisional proposals for reform. In accordance with our usual practice when considering proposals for law reform, we circulated copies of the Working Paper to Government Departments, members of the judiciary and members of the legal profession and to organisations and groups concerned with various aspects of marriage as well as to a number of individuals.[19] We also discussed the Working Paper with the Scottish Law Commission, who issued their own consultative paper. We understand that the Scottish Law Commission expect to publish a Report containing recommendations for reform on this subject in the near future.

1.5 The scheme which we put forward in the Working Paper was in essence that English courts should have power to entertain applications for financial provision notwithstanding the existence of a prior foreign divorce. In order to meet the difficulties to which we have referred above, it was proposed that an applicant should only be entitled to proceed with the application if he first of all obtained the leave of a High Court judge, who would need to be satisfied that in all the circumstances the case was a proper one to be heard here. Detailed guidelines were proposed to assist the court in the exercise of its discretion to grant leave.

1.6 Consultation on the Working Paper revealed a general consensus on the need for reform; and the majority of commentators agreed that a solution along the lines proposed in the Working Paper would be satisfactory. Inevitably there were some divergences of view. On the whole, those who criticised the scheme did so on the basis that it was too restricted either in general or in some particular. (For example, the view was expressed to us that the court should be given a virtually unfettered discretion to review financial arrangements after any foreign divorce. It was also said that the rules proposed for jurisdiction were too complex.) We have carefully considered these views. However, for the reasons set out in the Working Paper, we believe that it is right to adopt a cautious approach to the resolution of this problem, all the more so in view of the difficulties to which we have referred, and the dangers (explored in the Working Paper) that such a jurisdiction might be abused.

1.7 The subject matter of this Report is complex and technical. The problems were fully ventilated in the Working Paper, which is set out in an Appendix[20] to this Report. In the Report itself discussion is limited to a number of matters on which the scheme embodied in the draft legislation appended[21] differs from that set out in the Working Paper.

1.8 In deciding to adopt this unusual form for our Report, we have been influenced by the announcement[22] that the Government intend, when an

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[17]Unless an indication is given to the contrary, references in this Report to "divorce" are intended to extend to nullity and legal separation.

[18]A summary of the Working Paper and Questionnaire was also published.

[19]A list of those who commented on the Working Paper appears in Appendix B to this Report.

[20]Appendix C.

[21]Appendix A.

[22]*Hansard* (H.C.), 26 January 1982, vol. 16 Written Answers, *col.* 322.

opportunity occurs, to bring forward legislation to implement recommendations for amendment of the Matrimonial Causes Act 1973, proposed by us in our Report on The Financial Consequences of Divorce.[23] We hope that it will be helpful to make this Report available for consideration at the same time.

### (ii) Arrangement of the Report

1.9 The three principal matters which we consider are as follows:

(i) the "filter" procedure, designed to ensure that orders are only made where it would be appropriate to do so and that potential respondents are protected from harassment by claims for the making of which there is no substantial ground;[24]

(ii) our proposals for rules governing the circumstances in which the court should have jurisdiction to entertain claims. In this context we also refer to the implications of the Civil Jurisdiction and Judgments Act 1982 (which gives effect to the European Judgments Convention);[25]

(iii) provisions to prevent or avoid transactions intended to defeat applications under the scheme.[26]

The Report deals with these matters in that order. We then deal with a number of comparatively minor points in respect of which we propose changes to the Working Paper scheme.[27] Finally we provide a summary of the recommendations to which effect is given in the draft Bill annexed to this Report. The draft Bill is accompanied by full explanatory notes.

## PART II
## THE PROVISION OF FINANCIAL RELIEF AFTER FOREIGN DIVORCE—AMENDMENTS TO THE WORKING PAPER PROPOSALS

### (i) The "filter" mechanism

2.1 The essence of the scheme put forward in the Working Paper was that the court should have power, in appropriate cases, to make orders for financial relief in favour of a party to a marriage and any children of the family notwithstanding the existence of a prior foreign divorce. The most difficult aspect of the problem is to provide workable rules for ensuring that relief is confined to those cases in which it is appropriate for the English court to intervene. In the Working Paper we pointed out that the traditional way of ensuring that only those persons whose case has a sufficient connection with this country are entitled to invoke its legal process is by means of jurisdictional rules;[28] but we came to the conclusion that rules wide enough to allow

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[23](1981) Law Com. No. 112.
[24]Paras. 2.1–2.6.
[25]Paras. 2.7–2.13.
[26]Paras. 2.14–2.15.
[27]Paras. 2.16–2.22.
[28]Para. 31.

deserving applicants to have access to the English courts would, in the absence of some further "filter", permit applications to be made in circumstances which might well be thought to be wholly inappropriate.[29] We therefore proposed that the leave of a judge should be required for an application to be allowed to proceed; and we set out guidelines designed to assist the court in exercising this discretion.[30]

2.2 The response to the Working Paper has led us to the view that a solution along these lines would be a satisfactory way of resolving the difficult problems considered in the Working Paper. We think that laying down guidelines for the exercise of the court's powers minimises the objections to the uncertainty necessarily involved in the exercise of a judicial discretion.[31] We have given further consideration to the procedural aspects of the matter in an attempt to ensure, not only that the court's powers are only exercised in appropriate cases, but also that potential respondents are adequately protected. We believe that unless such protection is available, the mere fact of issuing proceedings could confront the respondent with an acute dilemma: he might well be satisfied that he had a strong defence to the application, yet to defend it would necessarily involve him in substantial expense—particularly if (as would often be the case) he was resident abroad. We believe it to be right to provide some measure of protection against the possibility of applications under the proposed legislation being used to exert improper pressure on respondents to settle in order to avoid the expense of contesting an application.

2.3 Effect is given to this proposal in the draft Bill annexed to this Report by providing that no application for an order for financial relief shall be made under the Bill unless leave of the High Court has first been obtained; and that the court shall not grant leave to make such an application unless it considers that there is substantial ground for the making of the application for financial relief.[32] Because proceedings should not be started (and thus served on the respondent) without the leave of the court the application will have to be made *ex parte*. The details of the necesary procedure will be a matter for the Matrimonial Causes Rule Committee but we would envisage that the applicant would have to set out fully all the facts and matters relied upon in support of the application for relief. Since the application would be *ex parte*, it would follow that the applicant would be under an obligation to be full and frank towards the court in setting out all relevant matters, even if some of them were detrimental to the case being made.[33] It may be that Rules of Court will provide that the application will not require a hearing before the court, although (in the normal way) the court in such a case could always require a hearing. Rules of Court could also provide that the application should be made to a judge rather than to a registrar. This would facilitate a consistent

[29]Para. 47.
[30]Para. 52.
[31]*Ibid.*
[32]The draft Bill also specifically empowers the court to grant leave subject to such conditions as it thinks fit. The court might, for example, wish to impose a condition that the applicant should give an undertaking not to enforce a foreign court order until the substantive application has been heard.
[33]See *R.* v. *Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 504, *per* Lord Cozens-Hardy M.R.

exercise of this new discretion conferred upon the court and, as experience of the workings of the Act increased, the power to grant applications could be extended to registrars by amending the Rules of Court. If it was considered necessary, such Rules could also specify the circumstances in which a respondent could object to the granting of the application, whether before the application was actually granted (assuming that the respondent learnt that an application was going to be made) or after the proceedings had been served upon him.

2.4 We also propose[34] that on granting leave the court should be empowered to make interim orders for maintenance, in favour of the applicant or any child of the family where they are in immediate need of financial assistance. Any such orders would cease to be effective not later than the date on which the full application for relief is finally determined. There should also be power to make an interim order subject to conditions.[35]

2.5 The issue before the court on the hearing of an application for leave will be whether the applicant has established a substantial ground for the making of the application. Essentially this will involve the court in estimating, on the basis of the applicant's uncontroverted statements, his prospects of success in satisfying the court that it would be appropriate for an order for financial relief to be made. The essential difference between the application for leave and the hearing of the substantive application will be two-fold. First, on the application for leave the court will normally only have one side of the story before it, and will have to proceed on the basis of the applicant's evidence alone; on the hearing of the substantive application the court will hear both sides (unless the respondent decides not to attend). Secondly, the burden on the applicant will inevitably be somewhat lower at the stage of the application for leave than will be the case on the hearing of the substantive application. At the first stage the applicant will merely have to satisfy the court that there is "substantial ground" for making the application; at the final stage he will have to satisfy the court that it is in all the circumstances appropriate that an order be made.

2.6 Even after he has obtained leave, the applicant still has to satisfy the court that it is appropriate to make an order. The test of "appropriateness" is necessarily an imprecise one. The suggestions which we made in the Working Paper[36] about the circumstances to which the court's attention should be specifically directed in the legislation were widely supported on consultation, and are substantially embodied in the draft Bill annexed to this Report.[37] We believe that they will provide an adequate framework for the exercise of what must inevitably be a somewhat difficult jurisdiction.

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[34]Clause 3.
[35]Clause 3(3).
[36]Para. 52.
[37]See clause 5 (2). The only change of any substance from the Working Paper proposals is that the circumstances specified in the draft Bill include, not only the connection which the parties to the marriage have with England and Wales and the country in which the marriage was dissolved, but also the connection which they have with any other country outside England and Wales.

**(ii) Rules of jurisdiction**

*(a) Cases in which the court should be able to entertain applications*

2.7 In the Working Paper we said[38] that the policy to be pursued in formulating jurisdictional rules was, on the one hand, to prevent persons whose marriage was insufficiently connected with this country from being able to invoke the court's powers to adjudicate on financial matters, whilst on the other, not making the criteria so strict that meritorious cases would be excluded. Reference should be made to the Working Paper[39] for a full discussion of these problems and of the considerations which led us to propose that the most appropriate analogy would be with the jurisdictional rules governing divorce proceedings. We now propose that the courts should have jurisdiction to entertain an application if:

(*a*) either of the parties to the marriage was domiciled in England and Wales on the date of the application for leave to institute proceedings or was so domiciled on the date on which the divorce obtained overseas took effect in that country; or

(*b*) either of the parties to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave to institute proceedings or was so resident throughout the period of one year ending with the date on which the divorce took effect in that country.

2.8 These proposals attracted significant comment which is not easy to summarise, apart from saying that on the one hand there were those who thought the proposed rules were too lax, and on the other there were those who thought they were too strict or technical. We have given considerable thought to all the arguments which were put forward, and have come to the conclusion that the Working Paper proposals (as, indeed, the majority of commentators agreed) strike the right balance. Nevertheless, we now think that in one respect the rules of jurisdiction should be extended, and that the court should also have jurisdiction in cases where either or both of the parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling-house situated in England and Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.

2.9 We are influenced, in making this further proposal, by the fact that it would give the court jurisdiction to deal with a situation which we understand to be by no means uncommon—that is to say, where both parties live abroad after the foreign divorce, but have in fact lived here, perhaps for a substantial period during the marriage and the only substantial asset is the matrimonial home in this country. We have come to the view (contrary to that which we tentatively expressed in the Working Paper[40]) that it might well be unrealistic to expect a wife in such a case to establish habitual residence here if she was to be able to seek leave to make an application for a share in the property. We believe that the problem of defining a "matrimonial home", about which we

[38]Para. 31.
[39]Paras. 31–46.
[40]Para. 45.

expressed concern in the Working Paper,[41] can adequately be dealt with by following the precedent which has been on the statute book since 1967 without giving rise to problems;[42] provision for this is made in the draft Bill annexed.[43]

2.10 There remains, however, the problem that such a wide jurisdictional rule would allow parties with very little connection with this country—who (as we put it in the Working Paper[44]) were perhaps "little more than 'birds of passage' "—to invoke the court's jurisdiction. This difficulty has, however, to be balanced against the dangers of hardship being caused if the court lacked jurisdiction to deal with what is manifestly a proper case. We believe that it would be right to allow the court—always assuming that the application is not excluded by the "filter" mechanism—to exercise its redistributive powers, in the cases referred to below, over what is most obviously connected with this country, namely the matrimonial home itself. However, we still think that it would be wrong to allow applications in respect of other assets in those cases where the only connection with this country is the fact that there has at some time been a matrimonial home here. We do not think it would be wholly satisfactory to rely exclusively on the "filter" to deal with such cases, since the potential for exercising, perhaps improper, pressure on a former spouse—notwithstanding the precautions which we are suggesting—would be great. (For example, a former wife could otherwise put the whole of her former spouse's substantial assets at risk merely because they had a flat in Mayfair in which they had been accustomed to spend two or three weeks each year.) We therefore propose that where jurisdiction is founded solely on the fact that there has been a matrimonial home in this country the court's powers should be restricted to making orders dealing with that property, or with the proceeds of its sale.[45]

(b) *The effect of the Civil Jurisdiction and Judgments Act 1982*

2.11 Since the publication of the Working Paper[46] the Civil Jurisdiction and Judgments Act 1982 has given effect in this country to the European Judgments Convention.[47] This Act makes provision for the jurisdiction of courts in the United Kingdom in civil proceedings and for the recognition and enforcement in the United Kingdom of judgments given in the Contracting States (that is all the Member States of the EEC except Greece). The general

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[41]Para. 44.

[42]Sect. 1(7) of the Matrimonial Homes Act 1967 defines the expression "dwelling house" as including "...any building or part thereof which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to the dwelling house and occupied therewith"; it does not define the expression "matrimonial home" but provides that the Act shall not apply to a dwelling house which has at no time been a matrimonial home: s.1(8). See also ss.1 and 4(2) of the Domestic Violence and Matrimonial Proceedings Act 1976.

[43]See clause 19(1).

[44]Para. 44.

[45]The court's powers in such a case are set out in clause 8 of the draft Bill. It should be noted that the court will have no power to make interim maintenance orders where jurisdiction is assumed solely on this basis. Reference should be made to the notes on clauses for a full explanation of the details of the provisions.

[46]The Working Paper was completed for publication on 15 July 1980.

[47]The EEC Convention on jurisdiction and the enforcement of judgments in civil and commercial matters was signed at Brussels on 27 September 1968. It is printed, as amended by the 1978 Convention on the accession thereto of Denmark, the Republic of Ireland and the United Kingdom, as Schedule 1 to the Civil Jurisdiction and Judgments Act, which provides (s.2) that it shall have the force of law in this country.

jurisdictional rule laid down by the Convention[48] is that the Convention only applies in cases in which the defendant is domiciled in a Contracting State but the defendant is only to be sued in the courts of that state whatever may be his nationality. However, in "matters relating to maintenance"[49] a person who is domiciled in one Contracting State may be sued in the courts of the place where the "maintenance creditor" is domiciled or habitually resident[50] or (if the matter is ancillary to divorce or similar proceedings) in the courts of the country which by its own law has jurisdiction to entertain the divorce etc., proceedings.[51] The Civil Jurisdiction and Judgments Act provides[52] that an individual is, for the purposes of that Act, domiciled in a part of the United Kingdom if he is resident in that part and the nature and circumstances of his residence indicate that he has a substantial connection with that part. A person who has been resident in any part of the United Kingdom for three months or more is presumed to have a substantial connection with that part.

2.12 As has been mentioned the Convention only applies where the respondent is domiciled in a Contracting State[53] so that it will have no application where, for example, a respondent against whom a periodical payments order is claimed is domiciled in an Eastern country in which extra-judicial divorce is common. Moreover, the rules laid down in the Convention do not apply to "rights in property arising out of a matrimonial relationship",[54] an expression the meaning of which is not altogether clear.[55]

2.13 It is, however, clear that the rules laid down by the Convention will have to apply in cases governed by the Convention; and clause 14 of the draft Bill contains a saving provision to that effect. In other cases, however, the rules to which we have referred above, which have been specifically formulated to deal with applications under this legislation, will apply. In practice it may well be that comparatively few applications will be found to be governed by the rules laid down in the Civil Jurisdiction and Judgments Act 1982.

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[48]Article 2. There are also certain exclusive grounds of jurisdiction, not dependent on domicile, which are to be found in Article 16; and Articles 17 and 18 provide for jurisdiction to be conferred by an agreement either in writing or evidenced in writing, or by submission to the jurisdiction.

[49]No definition of "maintenance" is provided in the Convention. It is not clear, for example, whether property adjustment orders, as well as lump sum orders can be classed as maintenance; see the Report on the 1978 Convention by Professor Peter Schlosser, *Official Journal of the European Communities* 1979, No. C59/71, 102. Nor, indeed, is it clear whether the relief falling within our proposals in this Report would be regarded as "maintenance" by the European Court of Justice, given that it is first granted after the marrige has been dissolved.

[50]Article 5(2).

[51]*Ibid.*

[52]Sect. 41.

[53]Certain exceptional cases are referred to in n.48, above.

[54]Article 1(1).

[55]See *De Cavel* v. *De Cavel* [1980] E.C.R. 731. For a full discussion of the problem see the Report by Mr. P. Jenard on the 1968 Convention, *Official Journal of the European Communities* 1979 No.C59/1, 10–11. The Act provides that this Report (and a further Report by Mr. Jenard on the 1971 Protocol on the interpretation of the 1968 Convention by the European Court of Justice *(Official Journal of the European Communities*, 1979 No. C59/66) together with the Report by Professor Peter Schlosser (referred to in n.49, above) may be considered in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances: s. 3(3). Ultimately, however, the interpretation of the Convention is a matter for the European Court of Justice: s.3(1).

### (iii) Avoidance of transactions

2.14 It is clearly desirable that the court should have powers to restrain one party from disposing of property or transferring it out of the jurisdiction in order to defeat a potential claim. The Family Division has the same power as any other division of the High Court to grant injunctions, and in a proper case this power may be exercised to grant a so-called *Mareva*[56] injunction,[57] freezing specified assets of a potential respondent. Moreover the Matrimonial Causes Act 1973 contains specific powers enabling the court not only to restrain the making of a disposition or transfer intended to defeat a claim for financial relief, but also to set aside any such disposition made in favour of a person other than a *bona fide* purchaser for value.[58] The draft legislation annexed to this Report contains provisions designed to give the court the same powers on applications for relief after a foreign divorce.[59]

2.15 It has been necessary to make special provision to cover the case where the applicant cannot yet establish jurisdiction on the basis of which the court could make the order he seeks, for example, because he has not been habitually resident in this country for one year. Clause 12 of the draft Bill is intended to deal with this situation. It specifically empowers the court to make orders restraining dispositions of property (but not orders setting aside dispositions already made[60]) if a *prima facie* case is made out that:

(*a*) there has been a foreign divorce which is entitled to recognition in this country;[61] and

(*b*) the applicant intends[62] to apply for leave to make an application for a substantive order as soon as he or she has been habitually resident here for one year; and

(*c*) the respondent is about to make a disposition etc., with the intention of defeating an application for such an order.

### (iv) Other matters

(*a*) *Should jurisdiction to hear applications be confined exclusive to the High Court?*

2.16 In the Working Paper we tentatively proposed[63] that jurisdiction to hear applications under the proposed legislation, and to make financial

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[56]*Mareva Compania Naviera S.A.* v. *International Bulk Carriers S.A.*; *The Mareva* (Note) (1975) [1980] 1 All E.R. 213. The court's powers in this respect have now been given statutory recognition in the Supreme Court Act 1981, s.37(3).

[57]See *Z. Ltd.* v. *A.–Z. and AA.–LL.* [1982] 2 W.L.R. 288, 305, *per* Kerr L.J.

[58]Sect. 37.

[59]Clauses 11 and 12.

[60]It will be possible to make such an order once the application for leave has been made. *Cf.* the view of Lord Denning M.R. in *Chief Constable of Kent* v. *Another, The Times,* 14 May 1982.

[61]The need for the applicant to establish the validity of the foreign divorce will of course give the respondent an opportunity to put the matter in issue. However, the question whether the divorce is entitled to be recognised (so that the applicant's financial remedy will be under our proposed legislation) or is not entitled to be recognised (so that her remedy will be to petition for divorce and ancillary financial orders) will rarely have much bearing on the overall financial orders made. Hence the incentive to attack the validity of the foreign divorce will not often be great: see para. 59 of the Working Paper.

[62]It will be necessary for steps to be taken to ensure that the application is made promptly once jurisdiction exists.

[63]Para. 54.

provision and property adjustment orders thereunder, should remain exclusively within the proviince of judges of the Family Division of the High Court. This was because we thought it important that the practice of the courts in administering a new and unusual discretion should develop in a consistent and uniform fashion; and that this objective was most likely to be attained if the discretion were vested in a comparatively small number of judges who would acquire expereience in dealing with what may well be only a small number of applications.

2.17 On the other hand, it has to be remembered that only modest sums of money may be involved in applications for relief under the proposed legislation,[64] and that many circuit judges are very experienced in the wide range of matrimonial business which now comes before the county court. These factors make us think that, once some experience has been gained by practitioners and judges of the working of the legislation, it might very well be thought appropriate to extend the jurisdiction so that it would no longer be necessary for all applications to come to the High Court. In all the circumstances, it seems to us that the right course is that the draft Bill should confine jurisdiction to the High Court at first, but empower the Lord Chancellor to designate any county court or class of county courts (for example, divorce county courts) to exercise all the powers of the High Court. Clause 15 of the draft Bill gives effect to this recommendation. It also empowers the Lord Chancellor to designate specified classes of applications as being within the jurisdiction of the county court.

(*b*) *Should a person divorced abroad have the same rights as a person divorced here to apply for relief under the Inheritance (Provision for Family and Dependants) Act 1975 and the Matrimonial Homes Act 1967?*

2.18 A person who is divorced abroad does not fall within the definition of a "former spouse" for the purposes of the Inheritance (Provision for Family and Dependants) Act 1975.[65] Hence he or she has no right to apply to the court for reasonable financial provision from the estate of a deceased former spouse who was domiciled in England and Wales at the date of his death. The response to consultation confirmed us in our provisional view that this rule should be changed to enable a person divorced[66] abroad to apply for relief under that Act on the same terms as a person divorced in this country. The policy that the court should only deal with "English" cases under that Act is, in our view, adequately preserved by the requirement that the deceased should have died domiciled here.[67] The financial position for the former spouse as a result of the foreign divorce will of course be a relevant factor in determining the application.[68]

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[64]As in *Quazi* v. *Quazi* itself: [1980] A.C. 744, 819, *per* Lord Scarman.

[65]Inheritance (Provision for Family and Dependants) Act 1975, ss. 1(1) (*b*) and 25.

[66]In this case, the expression "divorced" extends to persons whose marriage has been terminated by divorce, or whose marriage has been annulled; it does not extend to a person legally separated from his spouse, since such a person is already eligible to apply under the 1975 Act.

[67]Sect. 1(1).

[68]See Inheritance (Provision for Family and Dependants) Act 1975, s. 3(1).

2.19 Although, for reasons set out in the Working Paper,[69] the general principle which we have adopted is that only a person divorced outside the British Isles should be entitled to apply to the court for relief under the proposed legislation, we do not think the same considerations apply to applications under the 1975 Act. As we have seen,[70] the appropriate connecting factor with this country is found in such cases in the rule that *the deceased* must have been domiciled here; it is thus unnecessary, and possibly productive of hardship, to exclude a person who has been divorced, for example, in Scotland or one of the Channel Islands, from the right to apply for reasonable financial provision under the 1975 Act. Clause 13 of the draft Bill accordingly extends the definition of "former spouse" to a person divorced anywhere outside England and Wales.

2.20 We expressed the view in the Working Paper[71] that amendment of the Matrimonial Homes Act 1967 might be appropriate, but that the legislation to give effect to such a proposal might be considered excessively complex in view of the fact that the court would usually have adequate powers to protect the former wife's position under the other provisions of the legislation now proposed. Since publication of the Working Paper, the provisions of the Matrimonial Homes Act 1967 have been amended[72] and it has proved possible to draft a further amendment[73] to give the court the same power under our draft Bill to make an order transferring protected, statutory or secure tenancies as it has after a decree of divorce in England.

(*c*) *Enforcement*

2.21 There may be significant advantages in being able to register[74] a maintenance order for enforcement in a magistrates' court. A corollary of such registration is normally that the magistrates' court is entitled to vary the order. In view of the very special nature of the discretion to make orders under the proposed scheme, however, we do not think it would be right to enable magistrates' courts to vary[75] orders which have been made under it. Variation applications will accordingly have to be made to the High Court. Clause 18 of the Bill gives effect to this recommendation.

2.22 Since orders under the legislation which we propose would closely correspond to financial orders made in divorce proceedings, we think it desirable that the existing arrangements for the enforcement of such orders outside the jurisdiction should be extended accordingly. It also follows from our proposals that analogous orders made in other jurisdictions should be enforceable in England and Wales on the same principles as financial orders on divorce in those other jurisdictions. Arrangements for the reciprocal

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[69]Paras. 65–66.
[70]Para. 2.18, above.
[71]Para. 62.
[72]By the Matrimonial Homes and Property Act 1981, giving effect to recommendations made in the Law Commission's Third Report on Family Property: The Matrimonial Home (Co-Ownership and Occupation Rights) and Household Goods (1978) (Law Com. No. 86), Book 2.
[73]Clause 10.
[74]Under the provisions of the Maintenance Orders Act 1958.
[75]The magistrates' court will, however, have power to remit arrears: see Magistrates' Courts Act 1980, s.95.

enforcement of maintenance and similar orders cover enforcement as between different parts of the United Kingdom[76] and as between the United Kingdom and many overseas territories.[77] We have not included any provision for these matters in our draft Bill: questions of reciprocal enforcement inevitably invovle policy decisions affecting other countries, and these questions will require consideration by government departments, whose attention we have drawn to the issues of principle and detail which we think need to be resolved. If necessary, however, these amendments could be provided for by including in the Bill a power to make them by statutory instrument.[78]

## PART III
## SUMMARY OF RECOMMENDATIONS

In this part of the Report we summarise the conclusions and recommendations set out in the Working Paper and in the earlier parts of this Report. References are given to the relevant passages in the Working Paper and Report; and the relevant clauses of the draft Bill annexed are identified.

(1) The High Court should have power to entertain applications for financial provision and property adjustment orders notwithstanding the existence of a prior foreign divorce, annulment, or legal separation.
(Working Paper, para. 22; Report, para. 1.6; draft Bill, clause 1)

(2) A person seeking an order must first apply to the High Court for leave to make the application; and the court is only to grant the application if it considers that there is "substantial ground" for the making of the application for financial relief.
(Report, paras. 2.1–2.3; draft Bill, clause 2)

(3) The High Court may grant such leave whether or not a foreign court has made a financial order. However, its powers are only to be exercisable if the foreign divorce etc. is entitled to be recognised in this country.
(Working Paper, paras. 28–30, 59; draft Bill, clauses 2(2), 1(1) (b))

(4) The High Court may grant leave subject to such terms and conditions as it thinks fit.
(Report, para. 2.3; draft Bill, clause 2(3))

(5) On granting leave, the court may make an interim order for maintenance if the applicant or any child of the family is in immediate need of financial assistance.
(Report, para. 2.4; draft Bill, clause 3)

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[76]Under Part II of the Maintenance Orders Act 1950.

[77]Notably under the Maintenance Orders (Facilities for Enforcement) Act 1920 and the Maintenance Orders (Reciprocal Enforcement) Act 1972. See the Appendix to the Working Paper. Special arrangements as between the United Kingdom and other EEC countries are now also included in the Civil Jurisdiction and Judgments Act 1982, discussed at paras. 2.11–2.13, above.

[78]Powers of this nature are already contained in s.40 of the Maintenance Orders (Reciprocal Enforcement) Act 1972. For an example of the exercise of the powers under that section, see the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order (S.I. 1979, No. 1317), which contains extensive amendments of the 1972 Act.

(6) The High Court should have jurisdiction to entertain applications in the following circumstances:

(i) In cases *not* falling within the provisions of the European Judgments Convention, if:

(*a*) a party to the marriage was domiciled in England and Wales *either* at the date of the application for leave to institute proceedings *or* on the date on which the divorce obtained overseas took effect in that country;

(*b*) a party to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with the date when the foreign divorce became effective; *or*

(*c*) a party to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling house situated in England and Wales which was at some time during the marriage a matrimonial home of the parties.

(ii) In cases falling within the scope of the European Judgments Convention, the jurisdictional rules therein contained will apply to the exclusion of the above.
(Working Paper, paras. 45–46; Report, paras. 2.7–2.13; draft Bill, clauses 4, 14)

(7) Where jurisdiction can be assumed only on the ground referred to in paragraph (6) (c) above, the court's powers should be limited, in effect, to making orders in respect of the matrimonial home in question (or the proceeds of its sale).
(Report, para. 2.10; draft Bill, clause 8)

(8) The court should not make an order for financial relief unless it is satisfied that it would be appropriate in all the circumstances of the case to do so. The draft Bill specifies matters (such as the connection which the parties to the marriage have with this country) which are to be included among the circumstances which the court is required to consider.
(Working Paper, paras. 49–55; Report, para. 2.6; draft Bill, clause 5)

(9) Subject to paragraph (7) above, the court should have all the powers to make orders for sale, financial provision or property adjustment which are contained in the Matrimonial Causes Act 1973 (as amended). (Working Paper, para. 57; draft Bill, clause 6). English law should govern the principles on which the court grants financial relief. (Working Paper, para. 56; draft Bill, clauses 7 and 9). The court should also have power under the Matrimonial Homes Act 1967 (as amended) to make orders transferring protected, statutory or secure tenancies.
(Working Paper, para. 62; Report, para. 2.20; draft Bill, clause 19)

(10) Orders for periodical or other payments should be capable of registration and enforcement in magistrates' courts under the Maintenance Orders Act 1958; but such orders should only be capable of being varied by the court originally making the order.
(Report, para. 2.21; draft Bill, clause 8)

(11) It is desirable that the existing arrangements with other countries for the reciprocal enforcement of maintenance orders should be applied, with any necessary modifications, to orders under the proposed legislation.
(Report, para. 2.22)

(12) Anti-avoidance provisions similar to those contained in section 37 of the Matrimonial Causes Act 1973 should be attracted to applications under the proposed legislation. The court should have power to restrain dispositions where it is satisfied that the applicant will seek financial relief as soon as he or she has been habitually resident in this country for one year.
(Working Paper, para. 57; Report, paras. 2.14–2.15; draft Bill, clauses 11 and 12)

(13) Jurisdiction under the Act should be exercised by the Family Division of the High Court. However, provision is made for the Lord Chancellor by order to designate any county court or class of county courts to hear any class of applications as may be prescribed.
(Working Paper, paras. 53–54; Report, paras. 2.16–2.17; draft Bill, clauses 15, 16)

(14) Applications for financial relief under the Act should only be permitted in cases of *foreign* divorces, annulments and legal separations; and for this purpose "foreign"means "obtained outside the British Isles".
(Working Paper, para. 66; draft Bill, clause 19(1) )

(15) The Inheritance (Provision for Family and Dependants) Act 1975 should be amended, so that a person whose marriage has been terminated by a foreign divorce or annulment will be eligible to apply as a "former spouse". This rule will apply irrespective of whether the "foreign" decree has been made overseas or elsewhere in the British Isles.
(Working Paper, para. 61; Report, paras. 2.18–2.19; draft Bill, clause 13)

*(Signed)* RALPH GIBSON, *Chairman*
STEPHEN M. CRETNEY
BRIAN DAVENPORT
STEPHEN EDELL
PETER NORTH

R. H. STREETEN, *Secretary*
30 *July* 1982

APPENDIX A

# Draft

# Overseas Divorces (Financial Relief) Bill

## ARRANGEMENT OF CLAUSES

*Applications for financial relief*

*Clause*


1. Applications for financial relief after overseas divorce etc.
2. Leave of High Court required for applications for financial relief.
3. Interim orders for maintenance.
4. Jurisdiction of High Court.
5. Duty of High Court to consider whether England and Wales is appropriate venue for application.

*Orders for financial provision and property adjustment*

6. Orders for financial provision and property adjustment.
7. Matters to which court is to have regard in exercising its powers under s.6.
8. Restriction on powers of court where jurisdiction depends on matrimonial home in England and Wales.
9. Application to orders under ss.3 and 6 of certain provisions of Part II of Matrimonial Causes Act 1973.

*Orders for transfer of tenancies*

10. Powers of court in relation to certain tenancies of dwelling-houses.

*Avoidance of transactions intended to prevent or reduce financial relief*

11. Avoidance of transactions intended to defeat applications for which leave granted under s.2.
12. Prevention of transactions intended to defeat prospective applications for financial relief.

*Financial provision out of estate of deceased party to marriage*

13. Extension of powers under Inheritance (Provision for Family and Dependants) Act 1975 in respect of former spouses.

*Supplementary provisions*

14. Saving for provisions of Civil Jurisdiction and Judgments Act 1982.
15. Provisions as to county courts.
16. Assignment of applications for financial relief to Family Division of High Court.
17. Amendments of Part IV of Matrimonial Causes Act 1973.
18. Registration of certain orders in magistrates' courts.
19. Interpretation.
20. Short title, extent and commencement.

DRAFT
OF A

# BILL

TO

Provide for the making by a party to a marriage of provision for the other party to the marriage or a child of the family after the marriage has been dissolved or annulled, or the parties have been legally separated, in a country outside the British Isles; to amend section 25 of the Inheritance (Provision for Family and Dependants) Act 1975; and for matters connected therewith.

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:—

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Applications for financial relief after overseas divorce etc.

*Applications for financial relief*

**1.**—(1) Where—

(*a*) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and

(*b*) the divorce, annulment or legal separation is entitled to be recognised as valid in England and Wales,

either party to the marriage may apply to the High Court in the manner prescribed by rules of court for an order for financial relief under this Act.

(2) A party to a marriage which has been dissolved or annulled in an overseas country shall not be entitled to make an application under subsection (1) above in relation to that marriage if he or she has re-married.

## EXPLANATORY NOTES

*The Bill generally*

1. The broad objective of the Bill is to empower the English court to order financial relief in appropriate cases where a marriage has been terminated outside the British Isles. The Bill attracts relevant provisions of the Matrimonial Causes Act 1973 governing financial relief which is ancillary to divorce, nullity or judicial separation in England and Wales. The Bill also extends certain provisions of the Maintenance Orders Act 1958, the Matrimonial Homes Act 1967 and the Inheritance (Provision for Family and Dependants) Act 1975 in relation to cases of foreign divorce, etc.

*Clause 1: Applications for financial relief after overseas divorce etc.*

1. This clause, which implements the recommendation in paragraph 1.6 of the Report, provides for applications to be made to the High Court for orders for financial relief after an overseas divorce (as to which see clauses 6 and 10, below). The leave of the court is required for the making of an application under the Bill: see clause 2, below. In these notes "divorce" includes nullity and legal separation except where the contrary is stated.

*Subsection (1)*

2. This subsection provides that where there is an overseas divorce which is recognised as valid in England and Wales an application for an order may be made. ("Overseas" means outside the British Isles: see clause 19(1), below.) The reference to "judicial or other proceedings" covers cases where the marriage has been terminated extra-judicially (for example by *talaq*): cf. Recognition of Divorces and Legal Separations Act 1972, s.2(*a*). The criteria for recognition of divorce and legal separation are to be found in the Recognition of Divorces and Legal Separations Act 1971, ss. 2 to 6 and are broadly based on the nationality, domicile or habitual residence of either spouse; the criteria for foreign annulments are based on common law rules (broadly of domicile, residence, or substantial connection): see Dicey and Morris, *Conflict of Laws* (10th ed., 1980) pp. 379–387.

3. Applications are to be made to "the High Court" and are assigned to the Family Division: see clause 16, below. As to the power to designate county courts to deal with applications, see clause 15, below.

*Subsection (2)*

4. This subsection, which prevents applications under the Bill after the applicant has remarried, corresponds to a similar restriction where there have been divorce proceedings in this country (Matrimonial Causes Act 1973, s.28(3)).

Leave of High Court required for applications for financial relief.

**2.**—(1) No application for an order for financial relief shall be made under this Act unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that there is substantial ground for the making under this Act of an application for financial relief.

(2) The High Court may grant leave under subsection (1) above notwithstanding that an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property to the applicant or a child of the family.

(3) The High Court may grant leave under subsection (1) above subject to such conditions as it thinks fit.

*Clause 2: Leave of High Court required for applications for financial relief*

1. This clause, which gives effect to the recommendation in paragraph 2.3 of the Report, requires the leave of the High Court to be obtained to make an application for financial relief under this Bill. (Financial relief is defined in clause 19, below).

*Subsection (1)*

2. This subsection requires that the leave of the High Court be obtained to make an application for relief under the clause and that leave should only be granted when the court considers that the applicant has shown that there is substantial ground for the making of an application for financial relief under the Bill. The procedure for obtaining leave will be a matter for Rules; as explained in paragraph 2.3 of the Report, it is intended that an application for leave should be an *ex parte* application for leave to issue process.

*Subsection (2)*

3. This subsection makes it clear that the existence of a financial or property adjustment order made in any country outside England and Wales is not, in itself, a bar to the granting of leave under this clause. As to the relevance of a foreign order see clauses 5(2) (*e*) and 7(3), below.

*Subsection (3)*

4. This subsection enables the court to impose conditons on the granting of leave, as, for example, a condition that the applicant should seek to have a foreign order discharged or undertake not to enforce a foreign order.

Interim orders for maintenance.

**3.**—(1) Where leave is granted for the making of an application for an order for financial relief and it appears to the High Court that the applicant or any child of the family is in immediate need of financial assistance, the court may make an interim order for maintenance, that is to say, an order requiring the other party to the marriage to make to the applicant such periodical payments, and for such term, being a term beginning not earlier than the date of the grant of leave and ending with the date of the determination of the application for an order for financial relief, as the court thinks reasonable.

(2) If it appears to the High Court that the court has jurisdiction to entertain the application for an order for financial relief by reason only of paragraph (*c*) of section 4 of this Act, the court shall not make an interim order under this section.

(3) Any interim order under subsection (1) above may be made subject to such conditions as the court thinks fit.

*Clause 3: Interim orders for maintenance*

*Subsections (1) and (2)*

1. These subsections, which give effect to the recommendation in paragraph 2.4 of the Report, provide for interim orders for periodical payments in cases where leave has been granted under clause 2, above and the applicant or a child of the family is in immediate need of financial assistance. (An analogous provision is section 27(5) of the Matrimonial Causes Act 1973: interim orders in cases of failure to maintain.) Cases where jurisdiction is only exercisable on the basis of a matrimonial home in England and Wales (clauses 4 (*c*) and 8, below) are excluded.

*Subsection (3)*

2. This subsection, which allows the court to impose conditions when making an interim order for maintenance, is similar to clause 2(3), above.

Jurisdiction of High Court.

**4.** Subject to section 14 of this Act, the High Court shall have jurisdiction to entertain an application for an order for financial relief under this Act if (and only if)—

(*a*) either of the parties to the marriage was domiciled in England and Wales on the date of the application for leave under section 2 of this Act or was so domiciled on the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or

(*b*) either of the parties to the marriage was habitually resident in England and Wales throughout the period of one year ending with the date of the application for leave or was so resident throughout the period of one year ending with the date on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; or

(*c*) either or both of the parties to the marriage had at the date of the application for leave a beneficial interest in possession in a dwelling-house situated in England and Wales which was at some time during the marriage a matrimonial home of the parties to the marriage.

*Clause 4: Jurisdiction of High Court*

1. This clause, which gives effect to the recommendation in paragraphs 2.7–2.8 of the Report, sets out the jurisdictional criteria which must be satisfied before an application can be made for leave. Under paragraphs (*a*) and (*b*), the court's jurisdiction is based on the domicile or on 12 months' habitual residence, or either party, in England and Wales at either of two alternative dates: the date of the application for leave or the date when the overseas divorce took effect in the foreign country. Paragraph (*c*) provides alternatively for jurisdiction on the basis of the presence of a matrimonial home in England and Wales, which may be owned by either or both of the parties to the marriage; for restrictions as to the kind of order which can be made when the only basis of jurisdiction is that under paragraph (*c*), see clause 8, below. A "beneficial interest in possession" includes the right to receive rents: see clause 19(1), below. One of the parties to the marriage must still have an interest in the former matrimonial home at the date of the application for leave; the existence of proceeds of sale of the property will be insufficient to confer jurisdiction.

2. These rules of jurisdiction do not apply to cases governed by the Civil Jurisdiction and Judgments Act 1982 (clause 14, below). As for the special case of "anti-avoidance" injuctions made *before* the grant of leave, see clause 12, below.

Duty of High Court to consider whether England and Wales is appropriate venue for application.

**5.**—(1) Before making an order for financial relief on an application under this Act the High Court shall consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, the court shall dismiss the application.

(2) The following matters shall be included among the circumstances which the court is required to consider under subsection (1) above, that is to say—

(*a*) the connection which the parties to the marriage have with England and Wales;

(*b*) the connection which those parties have with the country in which the marriage was dissolved or annulled or in which they were legally separated;

(*c*) the connection which those parties have with any other country outside England and Wales;

(*d*) any financial benefit which the applicant or a child of the family has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England and Wales;

(*e*) in a case where an order has been made by a court in a country outside England and Wales requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with;

*Clause 5: Duty of High Court to consider whether England and Wales is appropriate venue for application*

1. This clause, which gives effect to the recommendation in paragraph 2.6 of the Report, provides that the court is to decide, before making an order for financial relief, whether it is appropriate for the English court to make such an order. The court will already have considered these matters to some extent in giving leave under clause 2. It is intended that it should be possible to raise the issue of "appropriateness" of the English court separately from, or together with, the matters relevant to the exercise of the court's discretion in deciding whether to exercise its powers and if so in what way (see clause 7, below). This will be a matter for Rules. Appropriateness is to be considered having regard (among other circumstances) to the circumstances specifically mentioned in *subsection (2)*.

*Subsection (1)*

2. This subsection sets out a requirement that the question of appropriateness must be considered by the court before it can make an order; if it is not satisfied that it would be appropriate to do so, the application must be dismissed.

*Subsection (2)*

3. This subsection provides that the court is to have regard to all the circumstances of the case, including certain specified circumstances, in deciding whether it is appropriate for the English court to make an order.

4. The particular circumstances to which the court is to have regard are set out in paragraphs (*a*) to (*i*). Paragraphs (*a*) to (*c*) refer to the parties' connections and are self-explanatory. Paragraph (*d*) refers to rights which a party (or a child of the family) may have under any agreement or arrangement under the law of another country (such as a right to take property under a community of property régime) including a right which is conferred upon marriage but comes into being on divorce (such as deferred dower). Paragraph (*e*), which refers to cases where a financial or property adjustment order has been made in a country outside England and Wales, provides that the amount of the order and the fact of its having been, or the likelihood of its being, complied with is to be a relevant circumstance; this is because the making of an English order is less likely to be appropriate in such a case. Paragraph (*f*)

(*f*) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and Wales and if the applicant has omitted to exercise that right the reason for that ommission;

(*g*) the availability in England and Wales of any property in respect of which an order under this Act in favour of the applicant could be made;

(*h*) the extent to which any order made under this Act is likely to be enforceable;

(*i*) the length of time which has elapsed since the date of the divorce, annulment or legal separation.

*Clause 5 (continued)*

refers to any right on the part of the applicant to claim financial relief under the law of the country of the divorce, or any other country outside England and Wales and, if he or she has lost that right (because of delay, for example), the reason for the loss. Paragraph (*g*) deals with the availability of property in this country which might be the subject of a property adjustment order or which might be ordered to be sold (as to which see clause 6(2), below) or used as security for secured periodical payments; the presence of such property may be relevant not only as to the likely enforceability of an order but also as demonstrating a connection of the parties with this country. Paragraph (*h*) refers to the likely enforceability of orders. Enforceability might be determined by such factors as the presence in this country of the person ordered to make payments or transfer property, or the existence here of assets belonging to such a person. Paragraph (*i*) refers to the lapse of time since the foreign divorce; the reasons for any delay will, of course, be relevant.

*Orders for financial provision and property adjustment*

Orders for financial provision and property adjustment.

**6.**—(1) Subject to section 8 of this Act, the High Court, on an application made by a party to a marriage for an order for financial relief, shall have power to make any one or more of the orders which it would have power to make under the 1973 Act if a decree of divorce, a decree of nullity of marriage or a decree of judicial separation in respect of the marriage had been granted in England and Wales, that is to say—

(*a*) any order mentioned in section 23(1) of the 1973 Act (financial provision orders);

(*b*) any order mentioned in section 24(1) of that Act (property adjustment orders).

(2) Subject to section 8 of this Act, where the court makes a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order under subsection (1) above, then, on making that order or at any time thereafter, the court may make any order mentioned in section 24A(1) of the 1973 Act (orders for sale of property) which the court would have power to make if the order under subsection (1) above had been made under the 1973 Act.

*Clause 6: Orders for financial provision and property adjustment*

1. This clause (together with clause 10, below) sets out the powers to award financial relief under this Bill. The powers are exercisable if leave has been granted (clause 1) and if the English court is satisfied that it is appropriate for it to make an order (clause 5). The financial relief corresponds to that contained in sections 23, 24 and 24A of the Matrimonial Causes Act 1973 (see notes to *subsections* (*1*) and (*2*), below). (The reference to section 8 is to the restricted powers of the court where the sole ground of jurisdiction is the presence of a former matrimonial home in England and Wales: see notes to clause 8, below.)

*Subsection (1)*

2. This subsection gives the High Court power, after an overseas divorce, etc., to make any financial provision or property adjustment order which it could have made after a decree in England and Wales. The financial provision orders (paragraph (*a*)) are, in relation to the other party to the marriage or a child of the family,

(*a*) a periodical payments order (Matrimonial Causes Act 1973, s. 23(1)(*a*) and (*d*), respectively);

(*b*) a secured periodical payments order (*ibid.*, s.23(1)(*b*) and (*e*), respectively);

(*c*) a lump sum order (*ibid.*, s.23(1)(*c*) and (*f*), respectively).

The property adjustment orders (paragraph (*b*)) are, in relation to the other party to the marriage or a child of the family:

(i) a transfer of property order (*ibid.*, s.24(1)(*a*));

(ii) a settlement of property order (*ibid.*, s.24(1)(*b*));

(iii) an order varying an ante-nuptial or post-nuptial settlement or extinguishing or reducing the interest of a party to the marriage under such a settlement (*ibid.*, s.24(1)(*c*) and (*d*)).

*Subsection (2)*

3. This subsection provides for the making of an order for the sale of property under section 24A of the Matrimonial Causes Act 1973 (added by section 7 of the Matrimonial Homes and Property Act 1981) when the court makes an order for secured periodical payments, a lump sum payment or property adjustment.

Matters to which court is to have regard in exercising its powers under s.6.

**7.**—(1) In deciding whether to exercise its powers under section 6 of this Act in relation to a party to the marriage and, if so, in what manner, the court shall have regard to all the circumstances of the case including the matters mentioned in paragraphs (*a*) to (*g*) of subsection (1) of section 25 of the 1973 Act, and the court shall exercise those powers in the manner in which it would be required to exercise them under that subsection if the application for an order for financial relief under this Act were an application for an order under section 23(1)(*a*), (*b*) or (*c*) or 24 of the 1973 Act.

(2) In deciding whether to exercise its powers under section 6 of this Act in relation to a child of the family and, if so, in what manner, the court shall have regard to all the circumstances of the case including the matters mentioned in paragraphs (*a*) to (*e*) of subsection (2) of section 25 of the 1973 Act and, in the case of a child of the family who is not the child of the party against whom those powers are to be exercised, the matters mentioned in paragraphs (*a*) to (*c*) of subsection (3) of that section, and the court shall exercise its powers in the manner in which it would be required to exercise them under subsection (2) of that section if the application for an order for financial relief under this Act were an application for an order under section 23(1) (*d*), (*e*) or (*f*) or 24 of the 1973 Act.

(3) Without prejudice to the generality of subsections (1) and (2) above, in a case where an order has been made by a court outside England and Wales for the making of payments or the transfer of property by a party to the marriage, the court in considering for the purposes of those subsections the financial resources of the other party to the marriage or a child of the family shall have regard to the extent to which that order has been complied with or is likely to be complied with.

*Clause 7: Matters to which court is to have regard in exercising its powers under s.6*

1. This clause applies the "guidelines" of section 25 of the Matrimonial Causes Act 1973 to orders for financial provision, property adjustment and sale of property made under this clause.

*Subsection (1)*

2. This subsection applies the same criteria (set out in section 25(1) of the Matrimonial Causes Act 1973) as are applicable to applications made by a party to the marriage on an English divorce, to applications made by such a party after a foreign divorce.

That subsection provides:

"It shall be the duty of the court... to have regard to all the circumstances of the case including the following matters, that is to say—

(*a*) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(*b*) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(*c*) the standard of living enjoyed by the family before the breakdown of the marriage;

(*d*) the age of each party to the marriage and the duration of the marriage;

(*e*) any physical or mental disability of either of the parties to the marriage;

(*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(*g*) in the case of proceedings for divorce or nullity or marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

In our Report on the Financial Consequences of Divorce ((1982) Law Com. No. 112) we recommended that the provisions of section 25 of the Matrimonial Causes Act 1973 should be amended in the following respects:

*Clause 7 (continued)*

(i) to seek to place the parties in the financial position in which they would have been had the marriage not broken down should no longer be the statutory objective.

(ii) the guidelines contained in section 25(1) of the Matrimonial Causes Act 1973 should be revised, to give greater emphasis to the following matters:

(*a*) the provision of adequate financial support for children should be an overriding priority. (Administrative steps should also be taken to ensure that the courts have adequate and reliable information about the current cost of maintaining children);

(*b*) the importance of each party doing everything possible to become self-sufficient should be formulated in terms of a positive principle; and weight should be given to the view that, in appropriate cases, periodical financial provision should be primarily concerned to secure a smooth transition from the status of marriage to the status of independence.

*Subsection (2)*

3. This subsection applies the same criteria (set out in section 25(2) and (3) of the Matrimonial Causes Act 1973) as are applicable to applications made in relation to a child of the family after an English divorce, to applications made in relation to such a child after a foreign divorce. Those subsections provide:

"(2) Without prejudice to subsection (3) below, it shall be the duty of the court... to have regard to all the circumstances of the case including the following matters, that is to say—

(*a*) the financial needs of the child;

(*b*) the income, earning capacity (if any), property and other financial resources of the child;

(*c*) any physical or mental disability of the child;

(*d*) the standard of living enjoyed by the family before the breakdown of the marriage;

(*e*) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraph (*a*) and (*b*) of subsection (1) above, just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.

*Clause 7 (continued)*

(3) It shall be the duty of the court in deciding whether to exercise its powers... against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case)—

(*a*) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(*b*) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(*c*) to the liability of any other person to maintain the child.".

*Subsection (3)*

4. This subsection directs the court specifically to have regard to the fact of any order for financial relief made outside England and Wales having been complied with, or the likelihood of its being complied with, in considering the financial resources of the applicant or a child of the family.

Restriction of powers of court where jurisdiction depends on matrimonial home in England and Wales.

**8.**—(1) Where the High Court has jurisdiction to entertain an application for an order for financial relief by reason only of paragraph (*c*) of section 4 of this Act, the court shall have power under section 6 of this Act to make any one or more of the following orders (but no other)—

(*a*) an order that either party to the marriage shall pay to the other such lump sum as may be specified in the order;

(*b*) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of a child of the family, or to such a child, such lump sum as may be so specified;

(*c*) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be so specified for the benefit of such a child, the interest of the first-mentioned party in the dwelling-house concerned, or such part of that interest as may be so specified;

(*d*) an order that a settlement of the interest of a party to the marriage in the dwelling-house concerned, or such part of that interest as may be so specified, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;

(*e*) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage so far as that settlement relates to an interest in the dwelling-house concerned;

(*f*) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement so far as that interest is an interest in the dwelling-house concerned;

(*g*) an order for the sale of the interest of a party to the marriage in the dwelling-house concerned.

*Clause 8: Restriction of powers of court where jurisdiction depends on matrimonial home in England and Wales*

1. This clause, which gives effect to the recommendation in paragraph 2.10 of the Report, provides for a restricted range of powers where the only basis of jurisdiction is the presence in England and Wales of a matrimonial home (as to which see clause 4(2) (*c*), above).

*Subsection (1)*

2. Paragraphs (*a*) and (*b*) provide for orders for lump sums to be paid by one party to the marriage in favour of the other or in favour of a child of the family respectively. As to the limits to lump sum orders, see *subsection (2)*, below.

3. Paragraph (*c*) provides for an order transferring the interest in the matrimonial home and corresponds with a transfer of property order under section 24(1)(*a*) of the Matrimonial Causes Act 1973.

4. Paragraph (*d*) provides for a settlement order in respect of the interest in the matrimonial home and corresponds with a settlement of property order under section 24(1)(*b*) of the 1973 Act.

5. Paragraphs (*e*) and (*f*) provide respectively for orders varying an ante-nuptial or post-nuptial settlement relating to a party's interest in the matrimonial home and extinguishing or reducing such an interest under any such settlement and correspond with orders under section 24(1)(*c*) and (*d*) of the 1973 Act.

6. Paragraph (*g*) provides for orders for the sale of a party's interest in the dwelling-house.

(2) Where, in the circumstances mentioned in subsection (1) above, the court makes an order for the payment of a lump sum by a party to the marriage, the amount of the lump sum shall not exceed, or where more than one such order is made the total amount of the lump sums shall not exceed in aggregate, the following amount, that is to say—

(*a*) if the interest of that party in the dwelling-house concerned is sold in pursuance of an order made under paragraph (*g*) of that subsection, the amount of the proceeds of the sale of that interest after deducting therefrom any costs incurred in the sale thereof;

(*b*) if the interest of that party is not so sold, the amount which in the opinion of the court represents the value of that interest.

(3) Where the interest of a party to the marriage in the dwelling-house concerned is held jointly or in common with any other person or persons—

(*a*) the reference in paragraph (*g*) of subsection (1) above to the interest of a party to the marriage shall be construed as including a reference to the interest of that other person, or the interest of those other persons, in the dwelling-house, and

(*b*) the reference in paragraph (*a*) of subsection (2) above to the amount of the proceeds of a sale ordered under the said paragraph (*g*) shall be construed as a reference to that part of those proceeds which is attributable to the interest of that party to the marriage in the dwelling house.

*Clause 8 (continued)*

*Subsection (2)*

7. This subsection provides that the total amount of any lump sum order or orders (as where orders are made both in favour of a party to the marriage and a child of the family) is not to exceed the respondent's share of the proceeds of the sale pursuant to an order for sale or, if there is no such sale, the respondent's share of the value of the dwelling-house. This is to ensure that the relief is limited to the value of the interest in the dwelling-house in a case where this head of jurisdiction is relied on.

*Subsection (3)*

8. This subsection, which is consequential on *subsection (1) (g)* above, allows for the sale of the interest of a third party in the dwelling-house where that third party and a party to the marriage have shares in the dwelling-house. As to the court's duty to receive representations from such third parties before making such an order, see section 25(4) of the Matrimonial Causes Act 1973, applied by clause 9(*c*), below. Paragraph (*b*) ensures that the amount of the proceeds of sale which forms the ceiling for a lump sum is calculated on the basis of the interest of the party to the marriage; the amount of a third party's interest in the proceeds of sale is disregarded for that purpose.

Application to orders under ss.3 and 6 of certain provisions of Part II of Matrimonial Causes Act 1973.

**9.** The following provisions of Part II of the 1973 Act (financial relief for parties to marriage and children of family) shall apply in relation to an order made under section 3 or 6 of this Act as they apply in relation to a like order made under that Part of that Act, that is to say—

(*a*) section 23(3) (provisions as to lump sums);

(*b*) section 24A(2),(4) and (5) (provisions as to orders for sale);

(*c*) section 25(4) (provisions as to orders for sale);

(*d*) section 28 (duration of continuing financial provision orders in favour of party to marriage, and effect of remarriage), except subsection (3);

(*e*) section 29 (duration of continuing financial provision orders in favour of children, and age limit on making certain orders in their favour);

(*f*) section 30 (direction for settlement of instrument for securing payments or effecting property adjustment), except paragraph (*b*);

(*g*) section 31 (variation, discharge etc. of certain orders for financial relief), except subsection (2)(*e*) and subsection (4);

(*h*) section 32 (payment of certain arrears unenforceable without the leave of the court);

*Clause 9: Application to orders under ss. 3 and 6 of certain provisions of Part II of the Matrimonial Causes Act 1973*

1. This clause applies the various provisions of Part II of the Matrimonial Causes Act 1973 to interim maintenance, financial provision, property adjustment and sale of property orders made under this Bill so that similar consequences apply as if the orders had been ancillary to divorce proceedings in this country.

2. Paragraph (*a*) applies section 23(3) of the Act which provides for lump sum orders to be made to meet earlier liabilities or expenses and for such orders to be payable by instalments.

3. Paragraph (*b*) applies the provisions of section 24A of the Act (added by section 7 of the Matrimonial Homes and Property Act 1981) which deal with consequential provisions in sale of property orders, postponed or conditional orders for sale and the effect of remarriage.

4. Paragraph (*c*) applies section 25(4) of the Act (added by section 8(1) of the Matrimonial Homes and Property Act 1981) which deals with sale of property orders and requires a third party who has an interest in the property to be given an opportunity to make representations with respect to the order.

5. Paragraph (*d*) applies section 28 of the Act (except for subsection (3), the effect of which is reproduced in clause 1(5), above). That section provides for the duration of financial provision orders until death or remarriage.

6. Paragraph (*e*) applies section 29 of the Act which provides for the duration of financial provision orders for children, age limits on making orders and the effect of educational or special circumstances on orders in favour of children.

7. Paragraph (*f*) applies section 30 of the Act which provides for the settlement of instruments for securing payments or effecting property adjustment. (Section 30, paragraph (*b*) provides that the grant of a decree may be deferred pending the execution of such an instrument and is not applied to orders under this Bill.)

8. Paragraph (*g*) applies section 31 of the Act (except for subsection (2) (*e*) and subsection (4)). That section provides for variation or discharge of orders (and suspension and revival of provisions therein).

9. Paragraph (*h*) applies section 32 of the Act which imposes a bar (subject to leave of the court) on recovery of arrears of maintenance which go back for more than 12 months.

(*i*) section 33 (orders for repayment of sums paid under certain orders);

(*j*) section 38 (orders for repayment of sums paid after cessation of order by reason of remarriage);

(*k*) section 39 (settlements etc. made in compliance with a property adjustment order may be avoided on bankruptcy of settlor); and

(*l*) section 40 (payments etc. under order made in favour of person suffering from mental disorder).

*Clause 9 (continued)*

10. Paragraph (*i*) applies section 33 of the Act which provides for repayment of certain sums where changed circumstances render that course of action just.

11. Paragraph (*j*) applies section 38 of the Act which provides for repayment of sums where after the remarriage of the person entitled to payments the person who was liable to make payments continues mistakenly to do so.

12. Paragraph (*k*) is self-explanatory.

13. Paragraph (*l*) applies section 40 of the Act which provides that where the payee under a financial or property order is mentally disordered payments etc., may be made to persons who have charge of him.

*Orders for transfer of tenancies*

Powers of court in relation to certain tenancies of dwelling-houses. 1967 c.75.

**10.** Where an application is made by a party to a marriage for an order for financial relief, then, if—

(*a*) one of the parties to the marriage is entitled, either in his or her own right or jointly with the other party, to occupy a dwelling-house by virtue of such a tenancy as is mentioned in paragraph 1(1) of Schedule 2 to the Matrimonial Homes Act 1967, and

(*b*) the dwelling-house has at some time during the marriage been a matrimonial home of the parties to the marriage,

the High Court shall have power to make in relation to that dwelling-house any order which it would have power to make under Part II of that Schedule if a decree of divorce, a decree of nullity of marriage or a decree of judicial separation in respect of the marriage had been granted in England and Wales; and the provisions of Part III of that Schedule (except paragraphs 6 and 7 and sub-paragraphs (2), (3) and (4) of paragraph 8) shall apply in relation to any order made under Part II of that Schedule by virtue of this section.

*Clause 10: Powers of court in relation to certain tenancies of dwelling-houses.*

1. This clause provides that where leave is granted to apply for financial relief after an overseas divorce the court will have the same power to make an order transferring to the applicant a protected, statutory or secure tenancy (Matrimonial Homes Act 1967, Schedule 2, paragraph 1(1), inserted by Schedule 2 to the Matrimonial Homes and Property Act 1981) as it has after a decree of divorce in England and Wales. The applicant must, as under section 1(8) of the Matrimonial Homes Act 1967, establish that the dwelling-house has been a matrimonial home of the parties.

2. The reference to Part III of Schedule 2 to the 1967 Act is consequential; Part III makes supplementary provision as to the date when orders are to take effect, the right of the landlord to be heard, the effect of remarriage and so on. The excepted provisions relate to matters connected with English decrees of divorce.

*Avoidance of transactions intended to prevent or reduce financial relief*

Avoidance of transactions intended to defeat applications for which leave granted under s.2.

**11.**—(1) Where leave is granted under section 2 of this Act for the making by a party to a marriage of an application for an order for financial relief, the High Court shall have power, on an application made by that party, to make any order which it would have power to make under section 37 of the 1973 Act (avoidance of transactions intended to prevent or reduce financial relief) if the definition of "financial relief" in subsection (1) of that section included a reference to relief under any of the provisions of sections 3 and 6 of this Act.

(2) Where the High Court has jurisdiction to entertain the application for an order for financial relief by reason only of paragraph (*c*) of section 4 of this Act, the court shall not by virtue of subsection (1) above make an order in respect of any property other than the dwelling-house concerned.

(3) The preceding provisions of this section are without prejudice to any power of the High Court to grant injunctions under section 37 of the Supreme Court Act 1981.

1981 c.54.

*Clause 11: Avoidance of transactions intended to defeat applications for which leave granted under s.2*

1. This clause which, together with clause 12 below, gives effect to the recommendations in paragraph 2.14 of the Report, provides for the making of orders setting aside dealings with property intended to prevent or reduce financial relief and orders restraining a party to the marriage from so dealing with property. This clause deals with orders made after leave to apply for financial relief has been granted; clause 12 below deals with orders made before the grant of leave.

*Subsection (1)*

2. This subsection applies section 37 of the Matrimonial Causes Act 1973 so as to enable an anti-avoidance order to be made where the court has given leave to issue proceedings. The anti-avoidance orders provided for in section 37(2) of the Act are:

(*a*) an order restraining a party from making a disposition or transfer out of the jurisdiction or otherwise dealing with property where that party is about to do so with the intention of defeating a claim by the applicant for financial relief;

(*b*) an order setting aside any such disposition as has already been made where, if the disposition were set aside, financial relief or different financial relief would be granted to the applicant;

(*c*) an order setting aside any such disposition made after an order for financial relief has been made in England and Wales.

3. "Financial relief" under this subsection means an order for interim maintenance under clause 3 above or an order for financial provision, property adjustment or sale of property under clause 6, above.

*Subsection (2)*

4. This subsection makes it clear that where the only ground of jurisdiction to grant relief is the presence of a former matrimonial home in this country (clause 4(2)(*c*), above) the court can make an anti-avoidance order only in respect of that dwelling-house.

*Subsection (3)*

5. This subsection makes it clear that the power of the court to grant *Mareva* injunctions (see *Mareva Campania Naviera S.A.* v. *International Bulk Carriers S.A., the Mareva* (Note) (1975) [1980] 1 All E.R. 213), now in statutory form under section 37(3) of the Supreme Court Act 1981, remains unaltered by this clause.

Prevention of transactions intended to defeat prospective applications for financial relief.

**12.**—(1) Where, on an application by a party to a marriage, it appears to the High Court—

(*a*) that the marriage has been dissolved or annulled, or that the parties to the marriage have ben legally separated, by means of judicial or other proceedings in an overseas country; and

(*b*) that the applicant intends to apply for leave to make an application for an order for financial relief as soon as he or she has been habitually resident in England and Wales for a period of one year; and

(*c*) that the other party to the marriage is, with the intention of defeating such an application, about to make any disposition or to transfer out of the jurisiction or otherwise deal with any property,

the court may make such order as it thinks fit for restraining the other party to the marriage from taking such action as is mentioned in paragraph (*c*) above.

(2) Subsections (5) and (6) of section 37 of the 1973 Act shall apply for the purposes of an application under subsection (1) above as they apply for the purposes of an application under subsection (2) (*a*) of that section.

(3) The preceding provisions of this section are without prejudice to any power of the High Court to grant injunctions under section 37 of the Supreme Court Act 1981.

1981 c.54.

*Clause 12: Prevention of transactions intended to defeat prospective applications for financial relief*

*Subsection (1)*

1. This subsection provides for the special case, discussed in paragraph 2.15 of the Report, where an order restraining a respondent from disposing of or removing assets is sought but the applicant is not yet able to satisfy any of the jurisdictional citeria for obtaining leave to apply for a substantive order. The court is accordingly empowered under this subsection to make an order restraining such dealings with property if it appears to the court a *prima facie* case is made out that:

(*a*) there has been a foreign divorce which is entitled to recognition in this country; and

(*b*) the applicant intends to apply for leave for a substantive order as soon as he or she has been habitually resident here for one year; and

(*c*) the respondent is about to make a disposition etc., with the intention of defeating an application for such an order.

2. No order setting aside a disposition can be obtained under this subsection as the substantive relief will not at this stage be available. If the English court has jurisdiction to entertain an application, the applicant requiring an anti-avoidance order can apply for an order under section 37 of the 1973 Act (clause 11(1), above).

*Subsection (2)*

3. This subsection applies two provisions of section 37 of the 1973 Act to applications under *subsection (1)*, as if such applications had been brought under s.37(2)(*a*) of the 1973 Act (which provides for preventive injunctions: see note 2(*a*) to clause 11, above):

(*a*) section 37(5) of the 1973 Act provides (for the purposes of preventive injunctions) that if an imminent disposition will have the effect of defeating the applicant's claim for financial relief it will be presumed, unless the contrary is shown, that the disposition is about to be made with that intention. Thus the applicant in such a case only has to prove the effect of the likely disposition, whereupon the burden shifts to the respondent to prove a lack of intention to bring about that effect;

(*b*) section 37(6) of the 1973 Act defines "disposition" and includes any conveyance, assurance or gift of property except for a provision contained in a will or codicil.

*Subsection (3)*

4. This is a saving provision which corresponds with clause 11(3), above.

Extension of powers under Inheritance (Provision for Family and Dependants) Act 1975 in respect of former spouses. 1975 c.63.

**13.**—(1) In section 25(1) of the Inheritance (Provision for Family and Dependants) Act 1975 for the definition of "former wife" and "former husband" (which definition restricts the meaning of those expressions to a person whose marriage with the deceased was terminated by a decree of divorce or a decree of annulment granted under the Matrimonial Causes Act 1973) there shall be substituted the following definition—

" 'former wife' or 'former husband' means a person whose marriage with the deceased was during the lifetime of the deceased either—

(*a*) dissolved or annulled by a decree of divorce or a decree of nullity of marriage granted under the law of any part of the British Isles, or

(*b*) dissolved or annulled in any country or territory outside the British Isles by a divorce or annulment which is entitled to be recognised as valid by the law of England and Wales;"

and after the definition of "beneficiary" there shall be inserted the following definition—

" 'British Isles' means the United Kingdom, the Channel Islands and the Isle of Man."

(2) On making an order under section 6 of this Act, the High Court may, if it considers it just to do so and the parties to the marriage agree, order that a party to the marriage shall not be entitled on the death of the other party to apply for an order under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975.

(3) Where an order under subsection (2) above is made with respect to a party to a marriage after the marriage has been dissolved or annulled, then, on the death of the other party to that marriage, the court shall not entertain an application under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975 made by the first mentioned party.

(4) Where an order under subsection (2) above is made with respect to a party to a marriage after the parties have been legally separated, then, if the other party to the marriage dies while the legal separation is in force, the court shall not entertain an application under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975 made by the first mentioned party.

*Clause 13: Extension of powers under Inheritance (Provision for Family and Dependants) Act 1975 in respect of former spouses*

1. This clause, unlike the other clauses of the Bill, applies also to cases where the divorce or annulment was granted elsewhere in the British Isles; this is for the reasons given in paragraph 2.19 of the Report. The deceased must, however, have been domiciled in England and Wales at death: section 1(1) of the 1975 Act.

2. For the definition of "British Isles" see clause 19(1), below.

*Subsection (1)*

3. This subsection, which gives effect to the recommendations in paragraphs 2.18–2.19 of the Report, provides that a surviving former spouse whose marriage was dissolved or annulled outside England and Wales will be able to make a claim for reasonable financial provision (under section 1(1)(*b*) and (2)(*b*) of the Inheritance (Provision for Family and Dependents) Act 1975), from the estate of the deceased former spouse.

*Subsection (2)*

4. This subsection corresponds with section 15(1) of the Inheritance (Provision for Family and Dependants) Act 1975. It is designed to ensure that, in cases where the parties agree, the former spouse's claims are dealt with once and for all on divorce and that no further claim will arise on the death of either former spouse.

*Subsections (3) and (4)*

5. These subsections are consequential on *subsection (2)* and correspond with section 15(3) and (4) of the 1975 Act. A bar is placed on any application under that Act where a court order under *subsection (2)* of this clause has been made with both parties' agreement.

6. Subsections (2) to (4) will not apply in cases where there was a divorce elsewhere in the British Isles because there is no power to make a financial relief order in such cases, and therefore no power to make an order under *subsection (2)* above.

*Supplementary provisions*

Saving for provisions of Civil Jurisdiction and Judgments Act 1982.

1982 c.27.

**14.** Where the subject-matter of an application under this Act and the other circumstances of the case are such that the jurisdiction of a court in England and Wales to entertain the application is determined by the Civil Jurisdiction and Judgments Act 1982, then, notwithstanding anything in section 4 or 12(1) of this Act, a court in England and Wales shall have jurisdiction to entertain that application if (and only if) it has jurisdiction by virtue of that Act.

*Clause 14: Saving for provisions of Civil Jurisdiction and Judgments Act 1982*

1. This clause, which gives effect to the recommendation in paragraph 2.13 of the Report, is a saving provision which takes account of the Civil Jurisdiction and Judgments Act 1982 (hereafter referred to in these notes as "the 1982 Act"). The 1982 Act implements in the United Kingdom the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (including the Protocol annexed to that Convention) signed at Brussels on 27 September 1968 and amended by the Accession Convention signed by the United Kingdom (among others) on 9 October 1978. Under the 1982 Act the jurisdiction of the English court for various proceedings is, generally, subject to certain areas of "special jurisdiction", limited to cases where the respondent is domiciled in England and Wales. The "special jurisdiction" which may be relevant to this Bill is in "matters relating to maintenance" (section 2 of the 1982 Act and Article 5 of the Convention which is set out in Schedule 1 to the 1982 Act); a person domiciled in any other Contracting State may be sued in the courts of the Contracting State where the "maintenance creditor" is domiciled or habitually resident (or, if the matter is ancillary to divorce, etc., proceedings, in the courts of the country which by its own law has jurisdiction to entertain those divorce proceedings). It might also be the case that, under the 1982 Act, a court in this country could take jurisdiction to make orders for relief discussed in the Report on the basis of the presence of immovable property here (Article 16), the agreement of the parties (Article 17) or submission to the jurisdiction (Article 18). This clause provides that the 1982 Act's rules of jurisdiction are to apply where relevant to proceedings under this Bill despite the different and generally wider rules of jurisdiction provides under clauses 4 and 12(1), above.

2. The "subject matter of the application" within the scope of the Convention relevant to this clause may be a matter relating to maintenance (Article 5(2)) or possibly rights *in rem* in, or tenancies of, immovable property (Article 16(1), which gives exclusive jurisdiction to the courts of the country where the property is situated). The status of a person and any "rights in property arising out of a matrimonial relationship" are specifically excluded from the Convention: Article 1(1). The "circumstances of the case" mentioned in this clause will cover not only the domicile of the respondent but also cases where Articles 16(1) (immovable property), 17 (agreement) or 18 (submission to the jurisdiction) are held to apply: see para. 2.11 of the Report.

Provisions as to county courts.

**15.**—(1) If it appears to the Lord Chancellor that any county court or any class of county courts should have jurisdiction to hear applications under this Act, or any class of such applications, he may by order made by statutory instrument designate that court or class of courts as a court or class of courts which, as from such date as may be specified in the order, shall have jurisdiction to hear and determine applications under this Act or, as the case may be, such class of those applications as may be specified in the order.

(2) Any reference in this Act to the High Court shall be construed as including a reference to any county court designated by the Lord Chancellor under this section.

*Clause 15: Provisions as to county courts*

*Subsection (1)*

1. This subsection, which gives effect to the recommendation contained in paragraph 2.17 of the Report, provides for the designation of any county court or class of county courts (such as divorce county courts) by the Lord Chancellor if it appears desirable to extend jurisdiction beyond the High Court, which is initially given exclusive jurisdiction in relation to all the matters covered in this Bill. The designating power extends to a power to designate a class of applications (such as those with a financial limit: cf., for example, section 22(1) of the Inheritance (Provision for Family and Dependents) Act 1975.

*Subsection (2)*

2. This subsection is consequential on *subsection (1)*, above and gives a designated county court all the powers of the High Court.

Assignment of applications for financial relief to Family Division of High Court. 1981 c.54.

**16.** In paragraph 3 of Schedule 1 to the Supreme Court Act 1981 (which specifies the business which is assigned to the Family Division of the High Court) there shall be added at the end the following paragraph—

"(*e*) applications under the Overseas Divorces (Financial Relief) Act 1982".

*Clause 16: Assignment of applications for financial relief to Family Division of High Court*

This clause assigns applications under this Bill to the Family Division of the High Court.

Amendments of Part IV of Matrimonial Causes Act 1973.

**17.**—(1) In section 47(2) of the 1973 Act (which defines the matrimonial relief which may be granted in respect of polygamous marriages) there shall be added at the end the following paragraph—

"(*f*) an order under the Overseas Divorces (Financial Relief) Act 1982".

(2) In section 50(1) of the 1973 Act (matrimonial causes rules)—

(*a*) in paragraph (*a*) there shall be added at the end the words "and sections 3, 6, 11 and 12 of the Overseas Divorces (Financial Relief) Act 1982"; and

(*b*) for paragraph (*b*) there shall be substituted the following paragraph—

"(*b*) proceedings in the High Court or a county court for an order under Part II of Schedule 2 to the Matrimonial Homes Act 1967 (transfer of protected, statutory or secure tenancies after dissolution or annulment of marriage) including proceedings for such an order by virtue of section 10 of the Overseas Divorces (Financial Relief) Act 1982."

1967c.75.

*Clause 17: Amendments of Part IV of the Matrimonial Causes Act 1973*

1. This clause makes consequential amendments to the provisions of Part IV of the Matrimonial Causes Act 1973 relating to polygamous marriages and those relating to the matrimonial causes rule-making body.

*Subsection (1)*

2. Section 47 of the 1973 Act makes it clear that the English court may grant matrimonial relief in relation to polygamous marriages. This subsection extends the definition of "matrimonial relief" set out in section 47(2) of the 1973 Act to include orders made pursuant to this Bill for interim maintenance (clause 3), financial provision, property adjustment and sale of property (clause 6) and anti-avoidance orders (clauses 11 and 12).

*Subsection (2)*

3. This subsection consequentially amends section 15 of the 1973 Act by bringing within the reach of the rule-making body for the making of matrimonial causes rules—

(*a*) proceedings under clauses 3, 6, 11 or 12 of this Bill (see the previous note, above);

(*b*) proceedings for the transfer of tenancies: see Matrimonial Homes Act 1967, Schedule 2, Part II and clause 10, above.

Registration of certain orders in magistrates' courts. 1970 c.31.

**18.**—(1) In Schedule 8 to the Administration of Justice Act 1970 (which specifies the orders which are "maintenance orders" for the purposes of the Maintenance Orders Act 1958) there shall be added at the end the following paragraph—

"14. An order for periodical or other payments made under the Overseas Divorces (Financial Relief) Act 1982".

1968 c.39.

(2) The provisions of section 4 of the Maintenance Orders Act 1958 (variation of orders registered in magistrates' courts) shall not apply in relation to an order made under this Act which is registered in a magistrates' court in accordance with the provisions of that Act.

*Clause 18: Registration of certain orders in magistrates' courts*

1. This clause provides that orders for periodical or other payments made under the Bill are to be variable only in the High Court but are to be registrable and enforceable in the magistrates' court.

*Subsection (1)*

2. This subsection adds to the list of orders which are "maintenance orders" capable of registration and enforcement in magistrates' courts under the Maintenance Orders Act 1958. It corresponds with paragraph 10(2) of Schedule 2 to the Matrimonial Causes Act 1973.

*Subsection (2)*

3. This subsection provides that orders made under this Bill are not variable in the magistrates' court: see paragraph 2.21 of the Report. Such orders will be variable only in the court which made the order.

Interpretation. 1973 c.18.

**19.**—(1) In this Act—

"the 1973 Act" means the Matrimonial Causes Act 1973; "British Isles" means the United Kingdom, the Channel Islands and the Isle of Man;

"child of the family" has the same meaning as in section 52(1) of the 1973 Act;

"dwelling-house" includes any building or part thereof which is occupied as a dwelling, and any yard, garden, garage or outhouse belonging to the dwelling-house and occupied therewith;

"order for financial relief", in relation to an application under this Act, means any such order as is mentioned in section 6 or 10 of this Act;

"overseas country" means a country or territory outside the British Isles;

"possession" includes receipt of, or the right to receive, rents and profits; "property adjustment order" means such an order as is mentioned in section 24(1) (*a*), (*b*), (*c*) or (*d*) of the 1973 Act;

"rent" does not include mortgage interest;

"secured periodical payments order" means such an order as is mentioned in section 23(1) (*b*) or (*e*) of the 1973 Act.

(2) For the removal of doubt it is hereby declared that the reference in section 1(2) of this Act to remarriage includes a reference to a marriage which is by law void or voidable.

*Clause 19: Interpretation*

*Subsection (1)*

1. This is the interpretation provision. The terms not explained below are explained in the earlier notes or are self-explanatory.

2. The definition of "British Isles" is the same as that contained in section 10(2) of the Recognition of Divorces and Legal Separations Act 1971. The words "British Islands", which appear in the Interpretation Act 1978, are not used in this Bill. This is to achieve consistency with the terminology used in the Recognition of Divorces and Legal Separations Act 1971.

3. The term "child of the family" under section 52(1) of the 1973 Act means, in relation to the parties to a marriage:

(*a*) a child of both those parties; and

(*b*) any other child, not being a child who has been 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.

4. The definition of "dwelling-house" is identical with that given in section 1(7) of the Matrimonial Homes Act 1967.

*Subsection (2)*

5. This subsection corresponds with section 52(3) of the Matrimonial Causes Act 1973.

Short title, extent and commencement.

**20.**—(1) This Act may be cited as the Overseas Divorces (Financial Relief) Act 1982.

(2) This Act does not extend to Scotland or to Northern Ireland.

(3) This Act shall come into force at the end of the period of three months beginning with the day on which it is passed.

*Clause 20: Short title, extent and commencement*

1. *Subsections* (*1*) and (*2*) are self-explanatory.

2. The commencement provision in *subsection (3)* is designed to provide a readily ascertainable date for commencement.

## APPENDIX B

**List of persons and organisations who commented on Working Paper No. 77.**

The Right Honourable Sir John Arnold, President of the Family Division
The Association of County Court and District Registrars
The Honourable Mr. Justice Balcombe
R. L. Bayne-Powell, Senior Registrar of the Family Division
Godfrey Cole, Esq.
Department of Health and Social Security (Northern Ireland)
S. B. Dickson, Esq.
The Family Law Bar Association
Federation of Bangladeshi Organisations
Gary Flather, Esq.
Mrs. Shreela Flather
Foreign and Commonwealth Office
Government Office, Isle of Man
Professor L. C. B. Gower
The Honourable Mr. Justice Hollings, M.C.
Home Office
G. B. Hough, Esq.
the Institute of Legal Executives
R. L. Jones, Esq.
Justice
I. G. F. Karsten, Esq.
The Law Society, Family Law Sub-Committee
Office of the Lieutenant Governor, Guernsey
Mr. Registrar D. E. Morris
Dr. J. H. C. Morris
National Association for Asian Youth
The National Council of Women of Great Britain
Ms. Susan M. Nott
R. D. Oughton, Esq.
M. L. Parry, Esq.
Sebastian Poulter, Esq.
Mr. Registrar D. Price
The Honourable Mr. Justice Reeve
The Society of Conservative Lawyers
Dr. Lucy Carroll Stout
A. D. Thomas, Esq.
D. Tolstoy, Q.C.

Union of Muslim Organisations of U.K. and Eire
United Kingdom Federation of Business and Professional Women
Professor P. R. H. Webb
Women's National Commission
The Honourable Mr. Justice Wood, M.C.

## APPENDIX C

# FINANCIAL RELIEF AFTER FOREIGN DIVORCE

### (1980) WORKING PAPER NO. 77

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# THE LAW COMMISSION

## FAMILY LAW[1]

## FINANCIAL RELIEF AFTER FOREIGN DIVORCE

## PART I: INTRODUCTION

1. A man is legally liable to maintain his wife,[2] but in the absence of a court order he is under no obligation to maintain a *former* wife.[3] In most cases this gives rise to no practical problems, since the courts in this country have extensive powers on granting decrees of divorce (or nullity) or at any time thereafter to make financial provision and property adjustment orders.[4] Even if the marriage is dissolved or annulled abroad, it may well be that a maintenance order made by the foreign court would be enforceable here.[5] Nevertheless, there is a gap in the law where the marriage is terminated by foreign proceedings in which no financial order is made, since our courts have no power to grant financial relief in such a case.

2. This gap can perhaps best be illustrated by a hypothetical, and to some extent exaggerated, case. Suppose an English woman marries a wealthy Ruritanian, and they establish the matrimonial home here in a house owned by the husband. In due course, the husband divorces her in Ruritania perhaps by pronouncing the word "*talaq*" three times (as is permitted by the law in many countries).[6] No financial order is made in Ruritania. If the Ruritanian divorce is recognised in this country as effective to terminate the parties' marriage (as may well be the case)[7] the wife will have no right to apply to the court here for financial provision: she will have ceased to be the husband's wife, so that he is no longer under a legal liability to maintain her.[8] She cannot invoke the powers of the divorce court to make financial provision or property adjustment orders because the court only has such power if it grants a decree,[9] and it cannot do

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[1]Item XIX of the Second Programme.

[2]Such an obligation exists at common law: see P.M. Bromley, *Family Law*, 5th ed., (1976) pp.496–9. In practice, however, statutory obligations are now more important: see Matrimonial Causes Act 1973, s.27 (as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s.63(1); Supplementary Benefits Act 1976, ss. 17, 18; Domestic Proceedings and Magistrates' Courts Act 1978, s.1 (*a*).)

[3]Throughout this paper we shall for convenience refer to a "wife" who will normally be the party requiring financial provision. In appropriate cases, however, the husband may be the party who is in that position and accordingly the reference to "wife" should be taken to include a "husband" in such a case.

[4]Matrimonial Causes Act 1973, ss.23, 24.

[5]See para. 21 below and the Appendix to this paper.

[6]See n.62, below.

[7]Under s.3 of the Recognition of Divorces and Legal Separations Act 1971; see para. 7 below.

[8]See e.g. *Turczak* v. *Turczak* [1970] P.198.

[9]Matrimonial Causes Act 1973, ss. 23(1), 24(1) ("On granting a decree... or at any time thereafter..."); *Moore* v. *Bull* [1891] P.279.

this because there is no longer a marriage to dissolve.[10] She cannot enforce any foreign financial order, because no such order exists. Even the statutory right conferred by English law[11] on a married woman not to be evicted from the matrimonial home without leave of the court will have come to an end with the ending of the marriage.[12] Such a woman may thus face destitution, and her only source of financial support may be supplementary benefit; and if benefit is paid to her, the Supplementary Benefits Commission will have no legal right to recover the sums paid from the husband, since he will no longer be a "liable relative".[13] The fact that the husband lives in this country and has substantial assets here makes no difference to the legal position. If he dies, the wife will have no entitlement to share in his intestacy;[14] she will not even have the right given to wives and former wives by the Inheritance (Provision for Family and Dependants) Act 1975[15] to apply to the court for reasonable financial provision to be made for her out of his estate because she has ceased to be a wife, and does not fall within that Act's definition[16] of "former wife" (which is limited to persons whose marriages have been dissolved or annulled by decree of an English court).

3. Two factors have exacerbated the problem: first, the greater readiness of English law to recognize the validity of foreign divorces[17] and, secondly, the greater geographical mobility which has led to a growth in the number of cases where one spouse has a sufficient connection with a foreign country to confer such jurisdiction (according to English law) as will enable him to bring divorce proceedings in that country.[18] In recent years there has been a steady stream of cases coming before the courts which has highlighted this gap in the law.[19] In most of the cases, the wife has sought to deny the validity of the foreign divorce, so that the English court would be able to hear her petition for divorce, and make financial provision and property adjustment orders in her

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[10]See *Torok* v. *Torok* [1973] 1 W.L.R. 1066; *Quazi* v. *Quazi* [1979] 3 W.L.R. 833. It should also be noted that the wife would have no right to bring proceedings under s.37 of the Matrimonial Causes Act 1973, to avoid transactions by the husband intended to defeat her claim for financial relief or to frustrate or impede the enforcement of any order. To take advantage of this section there must be a subsisting claim for financial relief: see *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93, 112. Hence the court would lack power to prevent a husband disposing of his share of jointly owned property (such as the matrimonial home); if he did sell his interest in the property so that a purchaser became entitled jointly with the wife the court, exercising its discretion under s.30 of the Law of Property Act 1925 might well, on the application of the purchaser, order a sale of the property with the result that the wife would be left with her share of the proceeds of sale, but no house, and no realistic possibility of providing herself with housing: *Jackson* v. *Jackson* [1971] 1 W.L.R. 1539; *Re Bailey (A Bankrupt)* [1977] 1 W.L.R. 278; cf. *Williams (J.W.)* v. *Williams (M.A.)* [1976] Ch. 278.

[11]Matrimonial Homes Act 1967, s.1 (1).

[12]*Ibid.*, s.2(2).

[13]See Supplementary Benefits Act 1976, ss.17(1)(*a*), 18.

[14]Since she will no longer be a "surviving wife" for the purposes of the Administration of Estates Act 1925, s.46(1)(i).

[15]Sects.1, 2. Whether or not there has been a divorce the deceased must have been domiciled in England and Wales at the time of death for the court to have jurisdiction under this Act: *ibid.*, s.1(1).

[16]Sect.25(1).

[17]See paras. 6–13, below.

[18]*Quazi* v. *Quazi* [1979] 3 W.L.R. 833, 836 *per* Lord Diplock.

[19]*Turczak* v. *Turczak* [1970] P.198; *Torok* v. *Torok* [1973] 1 W.L.R. 1066; *Newmarch* v. *Newmarch* [1978] Fam. 79; *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93; *Quazi* v. *Quazi* [1979] 3 W.L.R. 833 (H.L.); *Viswalingham* v. *Viswalingham* (1979) 123 S.J. 604.

favour. In the most recent of these cases, *Quazi* v. *Quazi*, Ormrod L. J. in the Court of Appeal summed up the problem in these words:[20]

> "This litigation has been going on since December 1974, and has occupied no less than 14 working days in the court below and 7 days in this court. It has involved five experts in foreign law, three in Thai law, and two in Pakistani law, and a number of English lawyers. It has led to the expenditure, mostly out of the legal aid fund, of very large sums of money and to a disproportionate amount of intellectual effort to resolve one practical question: is there jurisdiction in the English court to dissolve this marriage, and make consequential orders relating to the ownership or occupation of the house in Wimbledon belonging to the husband in which the wife is, and has been, living with the son of the marriage, since June 1974, and for their financial support? These heavy and expensive labours have had to be undertaken because there is no statutory provision to enable the courts in this country to deal with ancillary relief after divorce unless a decree is granted in this country, notwithstanding that the persons concerned and the property are within the territorial jurisdiction. So it becomes necessary to investigate whether there is a subsisting marriage which the courts can dissolve and thereafter exercise the powers conferred by the Matrimonial Causes Act 1973. This involves long and complicated inquiries into the validity of overseas divorces and their recognition in this country. The costs of this case far exceed the value of the house in question and will fall on the British public. The position urgently requires the attention of Parliament with a view to giving power to the court to deal, much more simply, with such situations. We would draw attention to the judgment in *Torok* v. *Torok* [1973] 1 W.L.R. 1066 in the hope that something will now be done to avoid such situations in the future."

In the House of Lords, Lord Scarman said:[21]

> "This complex, laborious, and expensive lawsuit has been almost totally financed from public funds. Legal aid alone has made it possible; and the costs borne by the public are out of all proportion to the modest prize at stake. While it is legitimate to take pride in our legal system which assures to the poor the same right of access to our courts for the resolution of their disputes as is enjoyed at their own expense by the wealthy (indeed, only the wealthy and the poor can find the finance for such a dispute as this) one must ask oneself whether there are not better and cheaper ways of doing justice. I agree with the Court of Appeal that the reform needed is one whereby a resident in the United Kingdom whose overseas divorce (or legal separation) is recognised by our law as valid, should be able, like one who has obtained a divorce or separation in this country, to claim a property adjustment or other financial order under the Matrimonial Causes Act 1973. In expressing the hope that the problem may be referred to the two Law Commissions, I would comment that such a reform should achieve not only a greater measure

[20] [1979] 3 W.L.R. 402, 405.

[21] [1979] 3 W.L.R. 833, 850. Viscount Dilhorne also agreed that a United Kingdom resident whose divorce abroad is recognised here should not be debarred from obtaining financial relief in this country: *ibid.*, at p.841.

of justice for first-generation immigrant families but a considerable saving for the Legal Aid Fund. The incentive to challenge the foreign divorce would have gone: and the court could deal with the property and financial problems of the parties upon their merits."

4. Item XIX of our Second Programme of Law Reform constitutes a standing reference to us of Family Law matters, and accordingly no specific reference of this problem to us was required to enable us to undertake an examination of the present situation. We have no doubt that the law is at present unsatisfactory; most people would, we think, agree that the wife in the hypothetical example that we have given earlier should have some legal redress in this country.[22] Nevertheless, there are some formidable problems[23] to be solved if the courts are to be given power to make orders in such cases.

5. Because it is the recognition of a foreign decree[24] (and the English court's consequent inability to grant a decree terminating a status which no longer exists) which is at the root of the problem, we put the matter in context by first setting out the present law in more detail under two heads:

(i) Under what circumstances will a foreign decree of divorce[25] be recognised in this country?

(ii) If such a decree is recognized, what are the consequences in relation to property and financial matters? In this context we examine, first, the extent to which such a decree affects the rights of the parties to have recourse to the English courts; and, secondly, the extent to which any foreign order will be enforceable here.

We then turn to consider the difficulties which arise in the search for a solution to the problem we have discussed, and finally we set out our provisional proposals for reform.

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[22]There has been considerable academic support for change in the law: I.G.F. Karsten (1970) 33 M.L.R. 205, (1972) 35 M.L.R. 299 and (1980) 43 M.L.R. 202; J.A. Wade (1974) 23 I.C.L.Q. 461; D. Pearl [1974] C.L.J. 77; R.L. Waters (1978) 122 S.J. 326; J.G. Miller (1979) 123 S.J. 4, 26; M.L. Parry (1979) 9 Fam. Law 12; J.H.C. Morris, *The Conflict of Laws* (2nd ed., 1980) p.172; S.B. Dickson (1980) 43 M.L.R. 81; S.M. Nott (1980) 10 Fam. Law 13. The need for legislation was also suggested by Edward Lyons M.P. during the debate on the Bill leading to the Recognition of Divorces and Legal Separations Act 1971: see *Hansard* (H.C.) 5 May 1971, vol. 816 col. 1562.

[23]These are discussed in paras. 22–27 below.

[24]We are aware that in cases of extra-judicial divorce there is no "decree" but we use the word in this paper as a convenient way to denote the step which is effective to terminate the marriage according to the local law.

[25]Unless otherwise indicated references in this Working Paper to "divorce" are intended to extend to nullity and judicial separation. We deal with the special questions relating to foreign nullity decrees at paras. 14–16 and 63 below and foreign legal separation decrees at para. 64 below.

## PART II: THE PRESENT LAW

### (1) Recognition of foreign divorce and nullity

6. Recognition of foreign[26] decrees of divorce and of legal separation is now governed by the Recognition of Divorces and Legal Separations Act 1971 (to which we shall refer as "the 1971 Act") while recognition of foreign decrees of nullity is still governed by the common law.

*(a) The recognition of divorces and legal separations under the 1971 Act*

7. This Act gave effect[27] to the Hague Convention on the Recognition of Divorces and Legal Separations of 1970.[28] The mischief which the Convention was designed to cure was that of the "limping marriage", that is "marriages that were recognised in some jurisdictions as having been validly dissolved, but in other jurisdictions as still subsisting".[29] In fact the English legislation, in its concern to put an end to the "scandal which arises when a man and woman are held to be man and wife in one country and strangers in another"[30] goes much further than was required under the Convention,[31] and lays down rules for recognition which are "simpler and more generous"[32] than the Convention required. The main principle of the Act is that an overseas[33] divorce or legal separation[34] is to be recognised in this country if, at the date of the institution of the proceedings in the country in which it was obtained—(*a*) either spouse was habitually resident[35] in that country; or (*b*) either spouse was a national of that country,[36] or (*c*) where the law of that country used domicile as a ground of jurisdiction in divorce, either spouse was (in the foreign sense of the term) domiciled there.[37] There is also a requirement that the divorce must have been obtained by "judicial or other proceedings"[38] which is of some importance in relation to the recognition of extra-judicial divorces (such as the Islamic *talaq*, or the Jewish *gett*); we return to the recognition of such divorces below.[39]

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[26]Unless otherwise indicated, this expression refers to all courts outside England and Wales: courts in Scotland, Northern Ireland, the Isle of Man and the Channel Islands are for this purpose "foreign" courts. However there are specially favourable rules for recognition of British Isles decrees: see n.33 below.

[27]See *Quazi* v. *Quazi* [1979] 3 W.L.R. 833, 836, 840 *per* Lord Diplock. The Act was based on recommendations of the Law Commission and the Scottish Law Commission: see the *Report on The Hague Convention on Recognition of Divorces and Legal Separations* (1970) Law Com. No.34; Scot. Law Com. No. 16; Cmnd. 4542.

[28]Cmnd. 6248. For a full analysis of the Act, see Cheshire and North, *Private International Law*, 10th ed., (1979) pp.371–389.

[29]*Quazi* v. *Quazi* [1979] 3 W.L.R. 833, 836 *per* Lord Diplock.

[30]*Wilson* v. *Wilson* (1872) L.R. 2 P. & D. 435, 442 *per* Lord Penzance.

[31]For reasons set out in (1970) Law Com. No.34, section V: see n.27, above.

[32]I.G.F. Karsten (1972) 35 M.L.R. 299, 305.

[33]All decrees granted under the law of any part of the British Isles (i.e. England and Wales, Scotland, Northern Ireland, the Channel Isles or the Isle of Man) on or after 1 January 1972 (1 January 1974 in the case of Northern Ireland) will be recognised throughout the United Kingdom: s.1, as amended by the Domicile and Matrimonial Proceedings Act 1973, s.15(2).

[34]Defined by s.2 of the Act as "divorces and legal separations which:—(*a*) have been obtained by means of judicial or other proceedings in any country outside the British Isles; and (*b*) are effective under the law of that country". On the meaning of "judicial or other proceedings" see *Quazi* v. *Quazi* (above); para. 11, below.

[35]Sect. 3(1) (*a*).

[36]Sect. 3(1) (*b*).

[37]Sect. 3(2); see e.g. *Messina* v. *Smith* [1971] P.322.

[38]Sect. 2; see n.34, above.

[39]At para. 11.

8. The Act expressly preserves[40] one common law recognition rule.[41] A divorce is entitled to recognition if it was obtained in the country of the spouses'[42] domicile,[43] or if it was obtained elsewhere but was recognised as valid in the country of the spouses' domicile.[44] In this case the Act does not impose any requirement that the divorce should have been obtained in "judicial or other proceedings". Consequently, the validity of certain informal extra-judicial divorces obtained in the country of the spouses' domicile (or obtained elsewhere but recognized there) will continue to be recognised here, since their validity would have been recognised at common law.[45] By contrast such informal extra-judicial divorces would not be recognised if obtained in a country with which the spouses' only connection was nationality or habitual residence because recognition of their validity in this country would depend on the provision of the Act[46] which stipulates that the divorce should have been obtained "by means of judicial or other proceedings".

9. If the jurisdictional conditions set out above are satisfied the foreign divorce must be recognised[47] unless—

"(*a*) it was obtained by one spouse—

(i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

(ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given; or

(*b*) its recognition would manifestly be contrary to public policy".[48]

If any of these grounds is made out the court has a discretion whether or not to refuse recognition to the foreign divorce.[49]

10. The "breadth and liberality"[50] of the jurisdictional rules contained in the Act, coupled with the traditional tendency of the English court to confine

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[40]Sect. 6 as substituted by the Domicile and Matrimonial Proceedings Act 1973, s.2(2).

[41]Sect.6(5) of the Act (as substituted) preserves the statutory recognition of certain divorces granted outside the British Isles under e.g. the Indian Divorces (Validity) Act 1921, and the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926 to 1950.

[42]I.e. the domicile of each spouse (where the domiciles are different). Sect. 6 of the 1971 Act was amended by s.2(2) of the Domicile and Matrimonial Proceedings Act to take account of the possibility that spouses might thenceforth have different domiciles. The resultant rules are somewhat complex, but it remains the case that a divorce will not be entitled to recognition under the rule as preserved unless *each* spouse was domiciled in a country which would recognize the validity of such a divorce.

[43]*Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.

[44]*Armitage* v. *Att.-Gen.* [1906] P.135.

[45]*Qureshi* v. *Qureshi* [1972] Fam.173; and see *Quazi* v. *Quazi* [1979] 3 W.L.R. 833, 852 *per* Lord Lord Scarman.

[46]Sect 2.

[47]Unless, according to English law, including its rules of private international law, there was at the time of the foreign decree no marriage to be dissolved (for instance, because it had already been effectively dissolved elsewhere): s.8(1). In such a case recognition must be refused: *ibid.*

[48]Sect.8(2).

[49]*Kendall* v.*Kendall* [1977] Fam. 208; *Newmarch* v. *Newmarch* [1978] Fam.79.

[50]Cheshire and North, *Private International Law,* 10th ed. (1979) p.376.

within narrow limits the grounds on which it will refuse recognition to a foreign decree granted by a court with jurisdiction,[51] has greatly facilitated the recognition of foreign divorces. For example, in *Torok* v. *Torok*,[52] the parties were Hungarians who fled to England as refugees in 1956. They married in Scotland in 1957, became naturalised British subjects, and lived together, mainly in England, until 1967. In that year, the husband left the wife and their two children in England and went to live in Canada. In 1972, he petitioned for divorce in Hungary. It was held that any final decree made by the Hungarian court would have had to be recognised in this country,[53] notwithstanding the fact that the parties had been living outside Hungary since 1956, that they had married in England, that their only matrimonial home had been in this country and that their children had been brought up in England and been given English names.[54] Recognition of the Hungarian decree[55] would have prevented the English court from making ancillary financial and property orders. Furthermore, the Hungarian court would not normally make any financial provision order unless the wife were totally incapacitated from working; and even if it did make such an order there was no procedure for enforcing it against the husband abroad. In any event, the Hungarian court had no power to deal with the matrimonial home in England.

11. We have already said[56] that the Act requires[57] that in many cases recognition be given[58] to extra-judicial divorces.[59] For example, under Islamic law,[60] a husband may divorce his wife by repeating the word "*talaq*' three times in the presence of witnesses,[61] and under the law of many countries with substantial Muslim populations such a divorce will be recognised as effective

[51]Because of the principles of comity: see especially *Igra* v. *Igra* [1951] P.404, 412 *per* Pearce J.: "Different countries have different personal laws, different standards of justice and differnt practice. The interests of comity are not served if one country is too eager to criticize the standards of another country or too reluctant to recognize decrees that are valid by the law of the domicile".

[52][1973] 1 W.L.R. 1066.

[53]Under Hungarian law (which in the circumstances the court was bound to apply: Recognition of Divorces and Legal Separations Act 1971, ss.5(1) (*a*), and (2)) the parties retained their Hungarian nationality which was a sufficient ground to justify the Hungarian court's asssumption of jurisdiction: *ibid.*, s.3(1)(*b*).

[54]The spouses' future was "obviously here or in Canada or some other place, but certainly not in Hungary": [1973] 1 W.L.R. 1066, 1070 *per* Ormrod J.

[55]In the event the adverse consequences of recognition were avoided, since the wife had filed a divorce petition in England before the Hungarian decree had become final. The court granted her an expedited decree absolute, and was thus able to assume jurisdiction in relation to financial and property matters: see para. 16 below.

[56]See para. 7, above.

[57]Either under ss.2 to 5 (which require "judicial *or other*" proceedings to have taken place) or on the common law grounds preserved by s.6 (which do not ).

[58]For a full account of the law see P.M. North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977), Chapter 11.

[59]We have no precise information as to the number of extra-judicial divorces affecting people resident in this country; but some indication that the problem is of significance is to be found in marriage statistics since parties to a marriage have to divulge the details of their previous marital history. In 1971 it was estimated that about 150 remarriages in this country each year followed an extra-judicial divorce; about half of these followed a *talaq*: *Hansard* (H.C.) 5 May 1971, vol.816 col.1551 *per* Sir Geoffrey Howe, Solicitor-General. No figures more recent than 1971 are available but we understand from enquiries made with the Registrar-General's Office that the numbers are likely to be larger now than in 1971.

[60]See generally A. Fyzee, *Outlines of Muhammadan Law*, 4th ed. (1975) Chap. IV.

[61]*Quazi* v. *Quazi* [1979] 3 W.L.R. 833, 837, 846 *per* Lord Diplock and Lord Fraser of Tullybelton; see further North, *op. cit.*, pp. 218–20 and the sources there referred to.

to dissolve the marriage.[62] Some countries, although in principle recognising the effectiveness of a *talaq*, impose additional formalities: for example, under the Pakistan Muslim Family Laws Ordinance 1961[63] notice of the *talaq* has to be given to a public authority, and the effect of the *talaq* is suspended for a period of 90 days to enable the authority to constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties. (There is however nothing to compel either spouse to take part in such conciliation proceedings). In *Quazi* v. *Quazi*[64] it was held by the House of Lords that such a *talaq* was a divorce "obtained by means of judicial or other proceedings".[65] Since the husband was a Pakistani national[66] the *talaq* divorce had to be recognised in England, with the result that the English court had no jurisdiction to make a financial provision order against the husband (who was resident in this country) or to make a property adjustment order in respect of the house in Wimbledon bought by the husband in 1973, and in which the wife had lived since 1974.[67]

12. It is true that the Act, as we have seen, provides grounds upon which recognition of a foreign divorce may in certain "extraordinary circumstances"[68] be denied;[69] but there appears to be only one reported decision in which an English court has exercised its discretion to refuse to recognise a divorce decree granted by a court which had jurisdiction (according to English rules) on the grounds primarily relevant to this Working Paper.[70] In *Joyce* v. *Joyce and O'Hare*,[71] the wife had in 1973 obtained magistrates' custody and maintenance orders in England on the grounds of the husband's adultery and cruelty. He paid nothing. In 1974 the husband went to live in Canada, and in 1975 started divorce proceedings there. The remaining facts are best summarised in the headnote:

> "The wife was anxious to contest the proceedings and consulted solicitors. They endeavoured by many inquiries to various bodies in

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[62]Thus affecting a potentially large number of U.K. residents and visitors. In 1978 four countries (or groups of countries) with whom the largest number of immigrants to the U.K. were connected (the "country of last or next residence") were Bangladesh, India and Sri Lanka (together 10.2%); Pakistan (9.9%); Australia (9.7%) and the African countries of the Commonwealth (together 9.0%): (1980) Annual Abstract of Statistics (C.S.O.) Table 2.13).

[63]Sects. 1 and 7.

[64][1979] 3 W.L.R. 833.

[65]Recognition of Divorces and Legal Separations Act 1971, s.2; see para. 8, above.

[66]1971 Act, s.3(1)(b); see para. 7, above.

[67]It may be that a "pure" *talaq* (and certain other types of extra-judicial divorce—see e.g. *Viswalingham* v. *Viswalingham* (1979) 123 S.J. 604) would be held not to have been obtained by "judicial or other proceedings" within the meaning of s.2 of the 1971 Act, and so not to be entitled to recognition under s.3. But if either party were *domiciled* in the foreign country where the divorce was obtained, its effectivess might still be recognised by virtue of s.6: see *Qureshi* v. *Qureshi* [1972] Fam. 173; *Quazi* v. *Quazi* (above) at p.852. The law is complicated and in some respects uncertain: see North, *op.cit.*,pp. 233–238; Cheshire and North, *Private International Law*, 10th ed. (1979) pp.378–84; J. H. C. Morris, *The Conflict of Laws*, 2nd ed. (1980) pp.151–4.

[68]*Kendall* v. *Kendall* [1977] Fam. 208, 214 *per* Hollings J. See n.70, below.

[69]See para. 9, above; Cheshire and North, *Private International Law*, 10th ed. (1979) pp.384–9; North, *op. cit.* pp.186–90, and (in relation to extra-judicial divorce) pp.238–241.

[70]See also *Kendall* v. *Kendall* [1977] Fam. 208 where a wife "had been deceived by her husband's Bolivian lawyers into applying for a divorce which she did not want in a language which she did not understand": J.H.C. Morris, *The Conflict of Laws* 2nd ed., (1980) p.151. The court granted her application for a declaration that the Bolivian decree thus obtained was invalid; but it is not clear from the report whether her main motive in seeking such a declaration was to obtain financial relief against the husband.

[71][1979] Fam. 93.

Canada to obtain legal representation for the wife but the wife was not eligible for legal aid unless physically present in the Province of Quebec. The solicitors wrote to the registrar of the court stating that the wife wished to contest the husband's petition and that the maintenance orders made by the justices on the ground of the husband's desertion and adultery were in arrear. Rules of procedure in the court of Quebec prevented any letters written by the wife's solicitors from being placed before the court. In an undefended suit, the judge, without knowledge that the wife wished to be heard and that there had been earlier proceedings before the justices, granted the husband a decree nisi, awarded custody of the two children to the wife and ordered the husband to pay $70 a week for the children's maintenance. That order for maintenance could only be enforced by the wife if she was present in Canada. In September 1975, the wife petitioned for divorce and by his answer, the husband sought recognition of the Canadian decree which had been made absolute in October 1975."

Lane J. held that to recognise the Canadian decree would jar upon the conscience[72] and that she was entitled to refuse recognition on the grounds, first, that the petitioner had not been given a reasonably effective opportunity to take part in the Canadian proceedings;[73] and, secondly, that in any event it would be contrary to public policy in all the circumstances to recognise a decree which would effectively prevent the wife from enforcing her claim for any financial provision,[74] and would leave her and the children without any remedy with regard to their home. The result of the decision was thus to create a "limping marriage", valid in England but not in Canada or, probably, elsewhere.[75] Lane J. commented on the fact that the Recognition of Divorces and Legal Separations Act 1971 contains no reference to ancillary relief, and said "If the courts of this country were empowered to grant ancillary relief on recognition of a foreign decree, the position would be somewhat different".[76]

13. It is difficult to predict whether the decision in *Joyce* v. *Joyce and O'Hare*[77] will encourage parties to invite the courts to refuse recognition of foreign divorces not for lack of jurisdiction but because of considerations of public policy. The courts have in the past been reluctant to refuse recognition on such grounds as can be seen from cases such s *Hack* v. *Hack*[78] and *Newmarch* v. *Newmarch*.[79] Furthermore, the speech of Lord Scarman in *Quazi* v. *Quazi*[80] suggests that he would not favour such a development:

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[72][1979] Fam. 93, 109, 114.
[73]See Recognition of Divorces and Legal Separations Act 1971, s.8(a) (ii).
[74]*Ibid.*, s.8(*b*).
[75][1979] Fam. 93, 113.
[76]*Ibid.*, at p.110.
[77]*Ibid.*, at p.93.
[78](1976) 6 Fam. Law 177.
[79][1978] Fam. 79, 97 where Rees J. said "If I had been so satisfied (i.e. that recognition would manifestly be contrary to public policy) I would nevertheless in the exercise of my discretion have upheld the decree". See also *Quazi* v. *Quazi* [1979] 3 W.L.R. 402, 418 *per* Ormrod L.J. It should be noted however that in *Newmarch* recognition of the foreign decree did not prevent the court from being able to order financial relief for the wife, while in *Joyce* such recognition would have had, and in *Quazi* it did have, this effect.
[80][1979] 3 W.L.R. 833, 856.

"The trial judge considered that the facts of the case did not justify him in refusing recognition. It was a matter for his discretion.... Even if I might have exercised the discretion differently it would be wrong to interfere; but, in truth, I think he was right".

We believe that a widespread refusal to recognise foreign decrees on the grounds of public policy would be unfortunate, and that the possibility of such a trend emerging adds weight to the case for conferring adequate powers on the court to ensure that recognition of a foreign decree does not necessarily affect the parties' financial position.[81]

*(b) Recognition of foreign nullity decrees*

14. As has already been pointed out, recognition of foreign nullity decrees is not governed by statute. In some respects the law is uncertain,[82] but it would seem that in principle a foreign decree of nullity will be recognised in the following cases:

(*a*) where the decree is granted by the courts of the parties' common domicile[83] and, probably, also where it is granted by the courts of only one party's domicile;[84]

(*b*) where the decree, although not obtained in the country of the parties' common domicile, would be recognised as valid by the courts of their common domicile;[85]

(*c*) possibly, where the decree is granted by the courts of the parties' common residence;[86]

(*d*) where the decree is granted by the courts of the country with which either party has "a real and substantial connection";[87]

(*e*) probably, where the decree is granted in circumstances in which, *mutatis mutandis*, the English court would have jurisdiction to grant a decree;[88]

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[81]See I.G.F. Karsten (1980) 43 M.L.R. 202, 208–9: "The real reason why the English courts have recently been making such heavy weather of the recognition of non-judicial divorces is that the question of recognition has tended to arise in the context of a claim by a wife to financial relief...The loss of the power to award financial relief to a spouse can be an exceedingly heavy price to pay for the avoidance of a limping marriage... Once this much-needed reform materialises, our courts will be able to banish their present scruples about recognising foreign divorces".

[82]See Dicey and Morris, *The Conflict of Laws*, 9th ed. (1973) pp.364–372; P.M. North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland*, (1977) Chap. 12; Cheshire and North, *Private International Law*, 10th ed. (1979) pp.406–416; J.H.C. Morris, *The Conflict of Laws*, 2nd ed. (1980) pp.158–162. The Law Commission and Scottish Law Commission expect soon to publish a joint Working Paper on the question of recognition of foreign nullity decrees.

[83]*Von Lorang* v. *Administrator of Austrian Property* [1927] A.C. 641. (This case is often cited as *Salvesen* v. *Administrator of Austrian Property* but this seems to be incorrect: see J.H.C. Morris, *op. cit.*, p.158 n.90).

[84]*Lepre* v. *Lepre* [1965] P.52.

[85]*Abate* v. *Abate* [1961] P.29.

[86]*Merker* v. *Merker* [1963] P.283, 297.

[87]*Law* v. *Gustin* [1976] Fam. 155; *Perrini* v. *Perrini* [1979] Fam. 84.

[88]I.e. where either party is domiciled in England and Wales when the proceedings are begun, or has been habitually resident here for a year before the start of the proceedings: Domicile and Matrimonial Proceedings Act 1973, s.5(2) and (3). See *Corbett* v. *Corbett* [1957] 1 W.L.R. 486; *Merker* v. *Merker* [1963] P.283.

(*f*) possibly, in the case of a void marriage, where the decree is pronounced by the courts of the country where the marriage was celebrated,[89] although recognition on this basis now seems less likely than was once the case.[90]

15. Even if a foreign nullity decree satisfies one or more of the jurisdictional conditions mentioned in the previous paragraph, an English court might refuse to recognise the decree on any of the following grounds:

(*a*) the decree was obtained by fraud;[91]

(*b*) it offends against rules of natural justice;[92]

(*c*) it offends against English ideas of "substantial justice".[93]

The grounds on which the English courts may refuse to recognize a foreign nullity decree are thus similar to those relating to non-recognition of divorces.[94] However it has been said[95] that the courts have shown a greater willingness to allow decrees of nullity to be attacked on grounds other than jurisdictional grounds. In particular, the courts have seemed perhaps surprisingly ready to withhold recognition where it is alleged that recognition would be contrary to natural or substantial justice.[96]

**(2) Effects of a valid foreign decree**

16. If a foreign decree of divorce or nullity[97] is recognised in this country the parties are no longer husband and wife, and accordingly no longer enjoy any rights which depend on that status.[98] Furthermore, the English courts have no jurisdiction to entertain subsequent divorce or (probably)[99] nullity

[89]*Corbett* v. *Corbett* [1957] 1 W.L.R. 486; *Merker* v. *Merker* [1963] P.283.

[90]The basis of recognition in such cases seems to have been reciprocity. As a result of the Domicile and Matrimonial Proceedings Act 1973 the English courts can no longer assume jurisdiction to annul a void marriage merely because it has been celebrated here; it therefore seems doubtful whether they will feel obliged to recognise foreign decrees where jurisdiction had been assumed on that basis.

[91]*Von Lorang* v. *Administrator of Austrian Property* [1927] A.C.641.

[92]*Mitford* v. *Mitford* [1923] P.130, 141–2; *Merker* v. *Merker* [1963] P.283, 296, 299.

[93]*Gray* v. *Formosa* [1963] P.259.

[94]As to which see para. 9, above.

[95]J.H.C. Morris, *The Conflict of Laws*, 2nd ed. (1980) p.161.

[96]*Ibid.*, and see P.M. North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977) pp.261–4; Cheshire and North, *Private International Law*, 10th ed. (1979) pp. 412–5.

[97]As to the effects of a foreign *separation* order see para. 64, below.

[98]See para. 2, above.

[99]If the marriage were *void*, it is possible that the English court would still have jurisdiction to grant a decree of nullity, notwithstanding the existence of a prior foreign decree entitled to be recognised here. In such a case the foreign decree would not have altered the status of the parties; both before and after the decree they were unmarried, and it might be urged that recognition of the foreign decree should not prevent the English court from itself pronouncing on that fact. Indeed in two cases an English court has itself granted a decree in similar circumstances: see *Galene* v. *Galene* [1939] P.237; *De Massa* v. *De Massa* (1931) [1939] 2 All E.R. 150n. However in neither of these cases does the effect of recognition of the foreign decree on the English court's jurisdiction seem to have been fully considered; and it has been suggested that the divorce analogy would be appropriate in relation to the effect of the foreign decree on proceedings in England for ancillary relief, since "the marriage has already been declared null and void": see P.M. North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977) p.268. The question in essence seems to be whether the English court would regard the foreign decree as creating an *estoppel per rem judicatam* against further litigation. There would be formidable problems if it did not do so—for example, what would the position be if the English court heard the petition, but then (contrary to the foreign decree which is entitled to recognition) held, on the facts, that the marriage was valid?

proceedings, with the result that they have no power to exercise the extensive powers to make financial provision and property adjustment orders in favour of either party.[100] The effect of a foreign decree on a wife's rights may thus, as we have ilustrated above,[101] be very serious. Nevertheless, a former husband or wife is not necessarily deprived of all effective financial remedies in this country, and we now summarise the procedures by which he or she may, notwithstanding the foreign decree, obtain some measure of relief.

*(a) Claim to ownership of property*

17. Either spouse can continue to assert a claim to the beneficial ownership of property at law or in equity.[102] He or she may, for example, be able to establish a proprietary interest under an implied, resulting or constructive trust, the existence of which the court may be able to infer from his or her contributions to the acquisition or improvement of the matrimonial home.[103] However, the outcome of such a claim is often difficult to predict;[104] and even if the applicant does successfully assert an interest the court lacks the wide and flexible powers of transfer and adjustment which it possesses under the divorce jurisdiction.[105] Those powers are exercised so far as possible to preserve a secure home for both parties whilst also preserving their financial interest in the property.[106] This aim is almost impossible to achieve if the court is obliged merely to give effect to the parties' proprietary interests.

*(b) Maintenance proceedings started before foreign decree effective*

18. If either party has during the subsistence of the marriage obtained a financial order from an English court on the ground of the failure of the other to provide reasonable maintenance[107] the order survives an English decree and it has been held that it also survives a foreign divorce,[108] and can subsequently be varied by the court. It should, however, be noted that it is essential that the

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[100]See para. 2, above.

[101]*Ibid.*

[102]The special summary procedure under s.17 of the Married Women's Property Act 1882 (which is available in the county court as well as in the High Court) will remain available for three years after the divorce or annulment (assuming that for this purpose the courts treat a foreign dissolution or annulment as if it had occurred in this country): Matrimonial Proceedings and Property Act 1970, s.39. It appears that, in some circumstances at least, the court will have jurisdiction under the 1882 Act in respect of property (including land) situate abroad: *Razelos* v. *Razelos* (No.2) [1970] 1 W.L.R. 392.

[103]See P.M. Bromley, *Family Law*, 5th ed. (1976) pp.461–475. In the case where one spouse has contributed to the *improvement* of the property, a claim may also be made under the Matrimonial Proceedings and Property Act 1970, s.37.

[104]"To determine property rights strictly so called between spouses is a notoriously hazardous and difficult operation" *Fielding* v. *Fielding* [1977] 1 W.L.R. 1146, 1148 *per* Ormrod L.J.

[105]See *Williams (J.W.)* v. *Williams* (M.A.) [1976] Ch. 278.

[106]See S.M. Cretney, *Principles of Family Law*, 3rd ed. (1979) pp.320–325.

[107]By virtue of the Matrimonial Causes Act 1973, s.27, or the Domestic Proceedings and Magistrates' Courts Act 1978, s.1. (The relevant provisions of this latter Act have not yet been brought into force, but we anticipate that they may be implemented during the period of consultation on this Working Paper.)

[108]*Wood* v. *Wood* [1957] P.254; *Newmarch* v. *Newmarch* [1978] Fam. 79, where the court upheld the validity of an Australian divorce decree in the exercise of its discretion under s.8(2) of the Recognition of Divorces and Legal Separations Act 1971 (para. 9, above) notwithstanding the fact that the wife established that she was not given such an opportunity to take part in the Australian proceedings as she should reasonably have been given: see *per* Rees J. at p.97; cf. *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93 (para. 12, above) where recognition of a Canadian divorce decree was refused.

English proceedings be started[109] before the foreign decree becomes effective, and that in any event the courts' powers to make orders on the ground of failure to provide reasonable maintenance are restricted, and in particular do not extend to the making of property adjustment orders.

*(c) English divorce or nullity proceedings started before foreign decree effective*

19. If either party files a petition for divorce or nullity in this country before the foreign decree becomes effective, the court has jurisdiction to grant a decree, and to exercise its powers to make financial provision and property adjustment orders. The courts may make orders before the English decree is made absolute,[110] but such orders do not take effect unless the decree has been made absolute.[111] In a proper case, therefore, the court will expedite the making of the decree absolute, to ensure that it is made whilst the marriage still subsists according to English law.[112] At this stage, it should be noted that the court has power, where litigation in respect of the marriage is continuing in another jurisdiction, to stay any English proceedings.[113] It is provided, however, that the court should not order a stay unless it appears that the balance of fairness, including convenience as between the parties to the marriage, is such that it is appropriate for the proceedings in the other jurisdiction to be disposed of first;[114] and in *Mytton* v. *Mytton*[115] the court refused a stay on the basis that the question of ancillary relief for the wife, who was living in property in England bought by the husband, was crucial.[116]

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[109]On one view, it is necessary that an *order should have been obtained*: see *Turczak* v. *Turczak* [1970] P.198 where a wife's application for periodical payments under s.22(1) of the Matrimonial Causes Act 1965 on the ground of her husband's wilful neglect to maintain was made *after* a Polish dissolution order, but *before* that order became final and absolute. Lloyd-Jones J. seems to have accepted that he could not make any order since there was no subsisting marriage between the parties *at the time when the application came before the court to be heard*: see at p.206. This decision (which is cogently criticised by I.G.F. Karsten in (1970) 33 M.L.R. 205) was apparently not cited in *Newmarch* v. *Newmarch*, where it was held that there was jurisdiction to make an order on the ground of wilful neglect provided that proceedings had been *started* before the foreign divorce became *effective*: see *per* Rees J. at pp.102–103. It is possible to reconcile the two decisions on the basis that in *Turczak* the court relied on the statutory provision (Matrimonial Causes Act 1965, s.22(1)(*b*)) that it should not entertain an application "unless it would have had jurisdiction to entertain proceedings for judicial separation" which (so it was said) it could not do if the parties had ceased to be husband and wife. That restriction was removed by s.6(1) of the Domicile and Matrimonial Proceedings Act 1973, and was thus not applicable in *Newmarch*. This suggested reconciliation of the two decisions has, however, been criticised by M.L. Parry in (1979) 9 Fam. Law 12 on the ground that proceedings for wilful neglect are based on the common law duty to maintain, which comes to an end with the marriage; thus, in his view, if the marriage were no longer in existence at the time of the hearing the court should not have entertained the application. Whatever the merits in this controversy Mr. Parry's argument in support of a continued application of *Turczak's* case would probably not survive the substitution by s.63(1) of the Domestic Proceedings and Magistrates' Courts Act 1978 of failure "to provide reasonable maintenance" for "wilful neglect", since the new formulation is entirely statutory and is not intended merely to provide a procedure for enforcement of the common law duty: see our *Report on Matrimonial Proceedings in Magistrates' Courts* (1976) Law Com. No. 77 paras. 9.1–9.24.

[110]See Matrimonial Causes Act 1973, ss.23(1) and 24(1).

[111]*Ibid.*, ss.23(5), 24(3).

[112]As was done in *Torok* v. *Torok* [1973] 1 W.L.R. 1066.

[113]Domicile and Matrimonial Proceedings Act 1973, Sched. 1, para. 9.

[114]*Ibid.*

[115](1977) 7 Fam. Law 244.

[116]Where the foreign proceedings are in a "related" jurisdiction, i.e. within the U.K., Channel Islands or Isle of Man, the court *must*, subject to certain conditions, stay the English proceedings: Domicile and Matrimonial Proceedings Act 1973, Sched. 1, para. 8.

*(d) Provision for children*

20. The termination of the marriage will not prevent the English court from entertaining applications by a child's mother or father for child maintenance under the provisions of the Guardianship of Minors Acts 1971 and 1973,[117] but the child must (probably) be a United Kingdom citizen or be present or ordinarily resident in this country[118] and the respondent has to be served with proceedings or submit to the jurisdiction.[119] Furthermore, if a child is made a ward of court the court may order either parent to make periodical payments towards the maintenance and education of the child.[120] However these powers are narrower than the powers exercisable in divorce proceedings,[121] both in respect of the types of order than can be made,[122] and of the range of persons who can be ordered to make payments.[123]

*(e) Enforcement of a foreign order*

21. If a foreign maintenance order has been obtained it may in some circumstances be enforced in this country. There is, indeed, an increasing move towards international enforcement of maintenance orders under the Maintenance Orders (Reciprocal Enforcement) Act 1972 which now applies to divorced spouses.[124] However the provisions for reciprocal enforcement, which we set out separately in the Appendix to this paper, suffer from several drawbacks in this context. First, they do not apply to every foreign country.[125] Secondly, orders relating to property are not within the purview of the reciprocal enforcement provisions. Thirdly, there can be no question of enforcement unless an order has been obtained;[126] not only may this be impracticable for financial[127] or other reasons but the maintenance provisions in the foreign country may be less wide or flexible than those in England.

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[117]Guardianship of Minors Act 1971, ss.9(2) and 10(1)(*b*) as substituted by the Domestic Proceedings and Magistrates' Courts Act 1978, ss.36(1) and 41(3) respectively.

[118]See *Harben* v. *Harben* [1957] 1 W.L.R. 261; *In re P.* (G.E.) *An Infant* [1965] Ch.568.

[119]See *Re Dulles' Settlement* (No. 1) [1951] Ch. 265.

[120]Family Law Reform Act 1969, s.6. The rules of jurisdiction are the same as those for guardianship cases in the High Court: see above.

[121]Once divorce proceedings have been started the court may make financial orders in respect of children of the family even if the suit is dismissed: see s.23(2) of the Matrimonial Causes Act 1973; *P(L.E.)* v. *P(J.M.)* [1971] P.318 (husband sought declaration that foreign decree valid, and in alternative petitioned for divorce; declaration granted before divorce petition called on. *Held*: court nevertheless had jurisdiction to make maintenance orders in respect of children); *Hack* v. *Hack* (1976) 6 Fam. Law 177.

[122]There is no power to make property adjustment orders: cf. s.24(1) of the Matrimonial Causes Act 1973.

[123]In divorce proceedings orders can be made against either party to a marriage in respect of any *child of the family*: *ibid.* This expression includes any child (other than one who has been boarded-out by an authority) who has been "treated by" either party to the marriage "as a child of their family": Matrimonial Causes Act 1973, s.52(1). Under the guardianship and wardship legislation an order can only be made against the child's mother or father.

[124]Maintenance Orders (Reciprocal Enforcement) Act 1972, s.28A, added by the Domestic Proceedings and Magistrates' Courts Act 1978, s.58.

[125]See Appendix.

[126]It may be possible to transmit a *claim* under Part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972: see para. 7 of the Appendix.

[127]Many such cases involve distant countries to which travel may be difficult or expensive, such as Canada (*Joyce* v. *Joyce and O'Hare* [1979] Fam. 93) or Australia (*Newmarch* v. *Newmarch* [1978] Fam. 79). Moreover, English legal aid is not available for foreign proceedings. The "shuttlecock" procedure may, however, avoid the necessity to travel to the other country: see para. 2 of the Appendix.

Finally, the case for relying on reciprocal enforcement assumes that the spouse should apply for an order in the country where the divorce was obtained: but that country, as we shall see below,[128] may be a less appropriate forum as regards the parties or their marriage than is this country.[129]

## PART III: THE PROBLEMS OF REFORM

### (1) Introduction

22. We do not think that the limited and partial remedies outlined above are adequate to fill the gap which exists in the law; in particular, for the reasons we have given above we do not think that the problem can be left to be solved by reciprocal enforcement of foreign maintenance orders.[130] It is thus our view that in some circumstances the court in England should have power to make a financial order in favour of a former spouse whose marriage has been terminated by a foreign decree. However, we have found considerable difficulty in defining in precisely what circumstances such a power should be exercisable. In our view, the advantage of giving a remedy needs to be very carefully balanced not only against the risks of "forum-shopping" (that is, the risk that litigants with little or no real connection with this country would start proceedings here solely becuase they would be likely to find it financially advantageous to do so) but also against the related risk that to confer such a power on the courts could, in the absence of any clear guidance on what law should apply to the incidents of a particular marriage, pose problems which it would be difficult, if not impossible, for them to resolve.

23. At the start of this paper,[131] we illustrated the gap which exists in the law by reference to the hardship which could be caused to an English woman whose marriage to a wealthy Ruritanian was validly dissolved by a *talaq* pronounced by him in Ruritania. We pointed out that the wife would be effectively without redress in this country, even though the matrimonial home was here, and indeed though the husband continued to reside here. The same example can, however, be adapted to illustrate some of the formidable problems which in our view have to be faced in formulating proposals for reform.

24. First of all, on the facts as given in the example, the wife made no claim for financial relief in Ruritania, possibly because there was no power to make any such order in Ruritanian law. But suppose that the wife *could* have claimed financial provision in Ruritania. Should she be allowed to claim financial relief in England instead? Should she be able to do so merely because she finds it more convenient, or tactically more advantageous or—perhaps most importantly—because she thinks she may get a larger award in this country than in Ruritania? Problems could arise even if the wife were able to make a claim for financial relief and in fact did so—but either failed to obtain any order, or obtained an order which she thought to be inadequate.[132] Should

[128]At para. 27.
[129]See e.g. *Torok* v. *Torok* [1973] 1 W.L.R. 1066.
[130]Cf. the view of Dimitry Tolstoy, Q.C. (1972) 35 M.L.R. 679, 680.
[131]Para. 2, above.
[132]The wife might have deliberately refrained from making any claim in that country because she knew she would obtain only very limited provision.

she be able to apply to the English court? If so, what principle should the English court apply in deciding whether or not to make an order in her favour? The root of the difficult and intractable problems thus raised is that different countries have different policies about the scope and purpose of the law governing financial provision. In English law the court is directed to have regard to all the circumstances of the case and so to exercise its powers as to place the parties, "so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other".[133] English law may seem to adopt the principle that the parties should be placed in the position which would have resulted if the marriage had continued, but other countries in contrast have adopted different policies—for example, that the law should aim only to restore the parties to the position in which they would have been had the marriage never taken place at all. In this latter view the function of financial provision for a wife is seen to be no more than rehabilitative;[134] such a law would thus seek to provide only short term relief designed to enable the wife to adjust to the changed circumstances. If the English court were given a general power to make financial orders notwithstanding the existence of a valid foreign divorce, it might thus be faced with an application by a former wife whose financial claim had been properly dealt with according to the law of the country where the divorce was granted (perhaps also the country of her domicile, nationality or residence) on the basis that financial provision was to be merely rehabilitative.

25. Problems might also arise because of different policies about the extent to which entitlement to financial relief should be affected by the applicant's conduct. In this country, the court is, in determining applications for financial relief, directed to "have regard to" the parties' conduct;[135] but in practice an applicant's misconduct is only allowed to affect the outcome of the case if it was of "such a gross kind that it would be offensive to a sense of justice that it should not be taken into account".[136] In other countries conduct may be of far greater importance—indeed the court may have no power to award financial relief to a "guilty" party, for example a wife who has been found to have committed adultery. What should be the attitude of the English court if faced with an application by a wife whose conduct either was treated as material by a foreign court granting the divorce, or would have been so treated had she applied there for financial relief?[137]

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[133]Matrimonial Causes Act 1973, s.25(1).

[134]This view appears to have influenced the law now in force in Australia (see H.A. Finlay, *Family Law in Australia*, 2nd ed. (1979) p.222 ff.) and West Germany (see Müller-Freinfels (1979) 28 I.C.L.Q. 184, 196–202).

[135]Matrimonial Causes Act 1973, s.25(1).

[136]*Jones* v. *Jones* [1976] Fam.8, 15 *per* Orr L.J. See also *Armstrong* v. *Armstrong* (1974) 118 S.J. 579, Court of Appeal transcript No. 137, cited in *Kokosinski* v. *Kokosinski* [1980] 1 W.L.R. 55, 65.

[137]Under the Recognition of Divorces and Legal Separations Act 1971 there is no requirement that findings of fault made either in divorce proceedings themselves or in ancillary proceedings are to be recognised: s.8(3). It would be necessary to decide whether, and if so how, this rule should be changed; the rule was expressly stated in similar terms in Article 1 of the Hague Convention (as to which see para. 7, above). And would it be open to the wife to raise in the English proceedings issues which she might have raised in the foreign divorce proceedings but which she failed to raise?

26. Finally, what would be the position if the foreign court had more restricted powers—limited, perhaps, to periodical payments, and not extending to capital provision—than those possessed by the English court? What should the English court do if a wife had obtained an order for periodical payments in the foreign proceedings but now sought an order relating to capital assets owned by the husband in England; or if the foreign court had made no order for periodical payments because it would have been unrealistic to do so, and no order in relation to the matrimonial home because it had no power to do so?

27. These questions all pose the same fundamental difficulty of deciding which of two or more legal systems with which the parties' marriage is in some way connected should apply to the financial and other consequences of termination. In a world of pure legal analysis, it would no doubt be possible to identify a single system of law with which the marriage was more closely connected than any other: that system could then be regarded as the "proper law" of the marriage. As such it would govern the marriage and its consequences. We do not however think that this aim can in practice be achieved. At a time when people can travel easily from one country to another marriages are increasingly connected with several different systems of law (for example, with the law of the parties' nationality,[138] or the law of their place of residence, the law of the place where the marriage was celebrated, or even with the law of their religion).[139] In our view, it is unrealistic to suppose that a process of juristic analysis will identify any single "right" system of law to which all questions relevant to a particular marriage should be referred to the exclusion of all other systems. However, even if we believed that such a search might have worthwhile results we are quite sure that the present law, insofar as it is based on the principle that the court of the country granting the divorce is alone competent to deal with all questions of financial provision beween the spouses, provides a wholly inadequate solution to the problem.[140] As we have seen,[141] a divorce which will have to be recognised in this country may well have been granted under a legal system with which the parties' real connection is tenuous in the extreme.[142]

**(2) Should there be a bar in cases where the foreign court has, or could have, made an order?**

28. The difficulties in the way of reform of the law are thus formidable. They are most acute in cases in which the wife could have applied for financial relief in the country where the divorce was granted, but either failed to do so or did so but obtained an order which she regards as inadequate; correspondingly the difficulties are least acute in cases where the law of the country where the divorce was granted contained no provision for financial

[138]The parties may, of course, have different nationalities; and one or both may have dual nationality.

[139]Particularly if the law of their nationality or residence applies different personal laws to members of different religions as is the case in Pakistan (Muslim Family Laws Ordinance 1961, s.1(2)) and a number of other countries, including several formerly subject to British rule.

[140]Cf. Dimitry Tolstoy, Q.C. (1972) 35 M.L.R. 679.

[141]At para. 10, above.

[142]See, e.g., *Torok* v. *Torok* [1973] 1W.L.R. 1066.

relief in favour of a wife. We think there is little doubt that a wife who is thus unable to obtain any financial relief should, provided that she can establish a sufficient link beween the marriage and this country, be eligible to apply for a financial order here; but we have had to consider carefully whether the power we propose for the English court to hear applications for financial relief notwithstanding the existence of a prior foreign decree of divorce should be exercisable only in such cases and not in cases where the foreign court had made, or could have made, a financial order.

29. We are, however, in no doubt that such a rigid restriction would be inappropriate. Our primary reason is that, as we have seen, the country in which the divorce was granted may well not be one with which the marriage had much real connection; but there are also subsidiary arguments which seem to us to support the view that a restriction of this kind would be undesirable. First, injustice could occur if the foreign divorce court, having dealt with part of a wife's claim for financial relief, could not or would not make any order in relation to capital assets in England, and the English court were precluded from making any order because of the foreign court's order. Secondly, such a restriction could lead to difficulties in deciding whether under the relevant foreign legal system a wife did or did not have a right to apply for financial relief. The English court would in each case have to examine the foreign law to determine the remedies available in the foreign country: and it would also be necessary to decide *what* rights under the foreign law would operate to bring the restriction into play—would a right to apply for payment of deferred dowry, for example,[143] suffice? Thirdly, the decided cases[144] show that it may be difficult for a wife to assert a claim in a foreign court (because of distance of travel for instance) even if she has the legal right to do so; if the fact that she had the legal right to apply in the divorce proceedings were a bar on applications for financial relief here, the court would be faced with the invidious question whether to exercise its discretion to refuse recognition of the divorce notwithstanding that it had been granted by a court of competent jurisdiction[145] in the eyes of English law. In such a case, if the only substantial assets were in England, the wife might not even find it worthwhile applying for a foreign order: yet it might be said that the foreign court could have made some order. Finally, a bar of the type envisaged would inevitably lead, to a greater extent than at present, to unedifying competitions to start divorce proceedings here in time to enable the English court to grant a decree (and thus ancillary relief) before the marriage had been finally terminated abroad.[146]

30. We therefore consider that it would be inappropriate to establish a rigid bar on the court hearing applications merely because a foreign court had made, or could have made, a financial order. We think it better to seek some other way of minimising the difficulties with which the courts might be faced if they were to have a general and unrestricted power to make financial orders notwithstanding the existence of a foreign decree.

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[143]As in *Shahnaz* v. *Rizwan* [1965] 1 Q.B. 390; *Qureshi* v. *Qureshi* [1972] Fam. 173.
[144]*Newmarch* v. *Nemarch* [1978] Fam. 79; *Joyce* v. *Joyce and O'Hare* [1979] Fam.93.
[145]See para. 9, above.
[146]Cf. *Torok* v. *Torok* [1973] 1W.L.R. 1066; see paras. 10 and 16, above.

### (3) Rules of jurisdiction

31. The traditional way of ensuring that only those persons whose case has a sufficient connection with this country are entitled to invoke its legal process is by means of jurisdictional rules. What is a sufficient connection for this purpose depends on the nature of the issue: thus, the English courts have jurisdiction to hear cases relating to the custody and upbringing of a child if the child is physically present (for however transient a purpose) in this country;[147] at the other exteme, if questions of status (such as legitimacy) are involved the court may not be able to assume jurisdiction unless it can be shown that the person concerned is domiciled here.[148] In the present context,therefore, the task is to formulate jurisdictional rules strict enough to prevent persons, whose marriage is insufficiently connected with this country to make it appropriate for the English court to adjudicate on financial matters, from invoking the court's powers; but not so strict as to exclude meritorious cases. We therefore turn to consider what the jurisdictional rules[149] should be in a case where a person seeks financial relief in England notwithstanding the existence of a foreign decree; we then consider whether the jurisdictional rules which we propose would by themselves be sufficient to ensure that the marriage in question is sufficiently connected with this country to minimise the problems we have outlined below.

#### (*a*) *Analogy with jurisdiction in divorce*

32. There is, we think, a strong argument for basing the jurisdictional rules governing applications in this country for financial relief after a foreign decree on the principles which govern jurisdiction in divorce, nullity and judicial separation. After all, if those rules are satisfied the applicant *could* have brought divorce or other proceedings in this country in the first place; had the applicant done so, the court would have had jurisdiction to grant the financial relief sought.

33. English courts have jurisdiction[150] to entertain proceedings for divorce, judicial separation or nullity[151] if either of the parties to the marriage—

> "(*a*) is domiciled in England and Wales on the date when the proceedings are begun; or
>
> (*b*) was habitually resident in England and Wales throughout the period of one year ending with that date."[152]

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[147]*Johnstone* v. *Beattie* (1843) 10 Cl. & F. 42; *Re D. (An Infant)* [1943] Ch. 305.

[148]See e.g. Matrimonial Causes Act 1973, s.45(1).

[149]The rules with which we are here concerned determine whether the courts in England and Wales should be entitled to hear the application; the question of which courts (High Court, county court etc.) should exercise jurisdiction is dealt with below: see paras. 53–54.

[150]Domicile and Matrimonial Proceedings Act 1973, s.5(2) and (3).

[151]In the case of nullity petitions there is an additional basis of jurisdiction, unlikely to be of practical significance in the present context, *viz.* the court has jurisdiction if either party died before the start of the proceedings and either (i) was at death domiciled in England and Wales, or (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

[152]Sect.5(5) of the Act provides for cases where a cross-petition or a supplemental petition is filed after the initial basis of jurisdiction has been destroyed by a change of domicile or residence.

It will be noted that the relevant question is whether the conditions were satisfied *on the date when the petition*[153] was presented.[154] If those jurisdictional criteria were to be adapted to applications for financial orders by an applicant who had been divorced abroad it would also have to be decided whether it should suffice if the jurisdictional criteria were satisfied (a) at the time the foreign divorce became effective,[155] *or* (b) the (later) time when the application to the English court for financial relief was started.

34. It seems at first sight attractive in principle to require the jurisdictional criteria to be satisfied at the time when the foreign divorce decree became effective; it would accordingly not suffice if they were only satisfied at the later date when the application in England was made for financial relief. The question is whether the divorce case could properly have come within the competence of the English courts, and it could clearly have done so if the divorce proceedings might have been started here at a time when the marraige still subsisted; equally (it would seem) the fact that the jurisdictional criteria for divorce happened to become satisfied, perhaps many years after the marriage, would be irrelevant in establishing the necessary connection between the marriage and this country. We see the attractions of this reasoning, but nevertheless consider that the adoption of such a rule as the exclusive test for jurisdiction could, particularly in the case of extra-judicial divorces, confront the English courts with precisely those legal problems which have given rise to criticism of the existing law. We consider these problems in the next paragraph.

35. The facts of *Quazi* v. *Quazi*[156] illustrate the problems which would ensue from the adoption of a rule conferring jurisdiction to hear applications for financial relief after a foreign divorce *only* in cases where the English court would have had jurisdiction to hear a divorce petition at the time when the foreign divorce became effective. In *Quazi* v. *Quazi*[157] the parties were Muslim nationals of Pakistan who had married in India in 1963. In 1968, by which time they had become resident and domiciled in Thailand, they there went through an extra-judicial Islamic divorce. However, they continued to live under the same roof and maintained the outward appearance of marriage until 1972. In 1973 the husband came to London with the child of the marriage, and bought a house in Wimbledon. In 1974 the wife flew to London "and turned up at the husband's house unannounced at midnight. She lived separately from the husband in his house and refused to accept the 'true role of a Muslim wife'."[158] Subsequently the husband flew to Pakistan, and there pronounced

[153]The jurisdiction of the court to entertain cross-proceedings and supplemental petitions is preserved notwithstanding any subsequent change in the parties' domicile or residence: see the previous footnote.

[154]It should be noted that applications for financial relief must be made in the petition: Matrimonial Causes Rules 1977 (S.I. 1977 No. 344) r.68(1). Leave is necessary to make any such application subsequently: *ibid.*, r.68(2).

[155]Rather than when the divorce was granted (i.e. is decree absolute, not decree *nisi*). The reason for this choice is that until the foreign divorce became effective the English court might itself have entertained divorce proceedings (as in *Torok* v. *Torok* [1973] 1 W.L.R. 1066; para. 10, above). A further alternative would be the date when the foreign proceedings were *started*; but this has no particular significance in terms of principle, and the date could in some cases be uncertain, especially in cases of extra-judicial divorces where there might be no reliable evidence as to dates.

[156][1979] 3 W.L.R.833.

[157]*Ibid.*

[158]*Ibid.*, at p.842 *per* Lord Salmon.

*talaq* before witnesses. The wife continued to reside at the house in Wimbledon up to the time of the English court hearing of the husband's petition for a declaration that the marriage had been lawfully dissolved. In July 1978 Wood J. held that the marriage had been dissolved in 1968 by the Thailand divorce; in April 1979 the Court of Appeal held that neither the Thailand nor the Pakistan divorce were entitled to recognition; in November 1979 the House of Lords held that, if the marriage were still subsisting in 1974,[159] the Pakistan divorce had then validly dissolved it.

36. The relevance of the facts of this case to the present argument is this. The case was said, both in the Court of Appeal[160] and House of Lords,[161] to illustrate the need for the courts to have power to make financial orders in favour of United Kingdom residents without having to determine the validity of foreign divorces.[162] Yet suppose that the reform designed to remedy this mischief required the court dealing with the application for financial relief to be satisfied that the English court would have had jurisdiction to entertain divorce proceedings *at the date when the foreign decree took effect.* This condition would certainly not have been satisfied if the marriage had been effectively dissolved by the Thai divorce, since at that time neither husband nor wife had ever been resident in this country, much less had a domicile here; but it might well have been satisfied at the time of the Pakistan divorce, since at that time the husband had presumably been habitually resident here throughout the previous year.[163] In order for the court to decide whether it had jurisdiction to hear the wife's claim—in effect for some share in a small house in Wimbledon[164]—it would thus be necessary for it to resolve precisely the question which absorbed so much time in the earlier stages of *Quazi* v. *Quazi*,[165] that is: was the marriage effectively dissolved by the Thai divorce (in which case, under the proposal now being considered, the court would have no jurisdiction to hear the wife's application), or did it survive until the Pakistan divorce? Furthermore, it would not require much alteration of the facts in *Quazi* v. *Quazi*[166] to make it questionable whether the court would have had

[159]The House of Lords did not determine the validity of the Thai divorce because "...the validity of a divorce by *khula* entered into in Thailand by Pakistani nationals who are domiciled there, is not a question that is very likely to require consideration by an Enlgish court in any subsequent case. It depends on the domestic law of Thailand, the Thai rules of conflict of laws, the application by the Thai courts of the doctrine of renvoi, and under that doctrine the applicability of the Muslim Family Laws Ordinance 1961 of Pakistan to consensual divorces. These are questions of fact to be decided by an English court on expert evidence of the foreign law concerned. In the instant case the expert evidence on these matters was inadequate, conflicting and confusing..." *ibid.*, at p.836 *per* Lord Diplock. The validity of the Pakistan divorce was of wider public importance "in view of the number of Pakistani nationals who are settled in the United Kingdom either accompanied or unaccompanied by their wives": *ibid.*, at p.835.

[160]See [1979] 3 W.L.R. 402, 405 *per* Ormrod L.J.

[161]See [1979] 3 W.L.R. 833, 841, 850 *per* Viscount Dilhorne and Lord Scarman respectively.

[162]Which could (as in that case) involve the expenditure of large sums of public money and "a disproportionate amount of intellectual effort" ([1979] 3 W.L.R. 402, 404 *per* Ormrod L.J.) in conducting an "immense lawsuit... requiring our courts to consider the family law of Islam" ([1979] 3 W.L.R. 833, 849 *per* Lord Scarman.)

[163]Domicile and Matrimonial Proceedings Act 1973, s.5(2)(*b*). It is not clear where the husband was domiciled at the time of the Pakistan divorce. It was held at first instance that at that date the husband had abandoned his Thai domicile of choice but had not then formed the intention to continue to live in England, with the result that this domicile of origin in India revived: see [1979] 3 W.L.R. 833, 851. The Court of Appeal, however, held that the husband had at the time of the Pakistan divorce acquired a domicile in England: see [1979] 3 W.L.R. 402, 414.

[164]*Quazi* v. *Quazi* [1979] 3 W.L.R. 833, 835 *per* Lord Diplock.

[165][1979]3 W.L.R. 833.

[166]*Ibid.*

jurisdiction to entertain divorce proceedings at the time of the Pakistan divorce. If, for example, the husband had not at the time when it became effective been habitually resident here for one year immediately before the divorce, the jurisdiction could only have been founded on his domicile—and questions of domicile, as in *Quazi* v. *Quazi* itself,[167] are often very difficult to resolve. We thus have no doubt that it could well frustrate the purpose of the proposed reform to require an applicant to establish that the English court would have had jurisdiction to entertain divorce proceedings at the date of the foreign divorce, since we think it probable that cases in which such a test would involve the English court in determining which of several foreign divorces was effective might by no means be uncommon. Moreover even where there is no multiplicity of divorces there may be a number of cases where there is no connection with this country until after the foreign divorce; in some such cases, where a real connection arises subsequently, a court should be empowered to entertain proceedings.

37. Accordingly we do not favour the adoption of a rule conferring jurisdiction to entertain proceedings for financial relief after a foreign divorce only where the English court would have had jurisdiction to entertain divorce proceedings at the time when the foreign divorce became effective. The question therefore arises whether the jurisdictional rule should instead be that the court should have jurisdiction to entertain applications for financial relief only if the court would *at the time of that application* have had jurisdiction to entertain divorce proceedings had the marriage still been subsisting. Such a rule would in fact permit applications in cases where the *marriage* had no connection at all with this country (as where a spouse came here for the first time after a foreign divorce) but in other cases (albeit perhaps rare) it would exclude deserving applicants. Suppose, for example,that a husband, who has lived in this country with his wife for many years, divorces her by *talaq* pronounced on a temporary visit to Pakistan with his wife in circumstances such that the validity of the divorce would be recognised in England. Suppose further that the wife in response to family pressures remains in Pakistan while the husband decides not to return to England, but finds work in, say, the Persian Gulf, leaving the former matrimonial home inthe occupation of relatives of the husband and the children of the marriage. It seems to us that it might well be appropriate for the court to exercise its property adjustment powers over the former matrimonial home, at the wife's insistance; yet it could well prove difficult to satisfy the proposed jurisdictional test in such a case. The wife would, under the proposal now being considered, need to show that she or her husband remained domiciled or habitually resident here. It seems doubtful whether either condition could be satisfied in the case we have just outlined. We believe that a case of this kind should be covered by our proposals, and we do not therefore favour limiting the jurisdictional rules to domicile or habitual residence in England at the time when the application for financial relief is made.

38. We are therefore of the view that the analogy of the divorce rule is acceptable if, but only if, it suffices that the criteria of domicile or habitual residence be satisfied *either* at the date when the foreign divorce became

[167] *Ibid.*, at p.851; see n. 163, above.

to establish habitual residence here in such a case before an application for relief is made. We would welcome views on this.

46. Our provisional recommendation therefore is that the court should have jurisdiction after a foreign divorce if, and only if, one of the grounds which we set out in paragraph 38 is satisfied. These are:

(i) if either party was domiciled in England and Wales either at the date when the foreign divorce became effective *or* the date when application is made for financial relief; *or*

(ii) if either party was habitually resident in England and Wales throughout the period of a year before the foreign divorce became effective or before the date of the application for relief.

We would however invite views especially on the possibility of an additional jurisdictional test based on habitual residence in this country as husband and wife for a specified period during the marriage.[180]

**(4) Other ways of restricting the court's powers**

47. In examining possible jurisdictional criteria, we have been heavily influenced by the consideration that deserving applicants with a real connection with this country might be denied access to our courts because of the jurisdictional rules adopted. The test which we provisionally favour, based on the analogy with divorce, seems to us to be satisfactory in this respect. However, it is open to the criticism that it would, in the absence of some other restriction, permit applications to be presented in circumstances which might well be thought to be wholly inappropriate. Take, for example, a case where a couple of German nationality, domicile, and residence were divorced in Germany in 1970. Let it be assumed, for the sake of argument, that the German court made no financial order because both parties were in comparable employment. Suppose that some years later the husband, having remarried, comes to work in this country in such circumstances that he can be said to have assumed habitual residence here. Is his former wife, who has no connection with this country at all, to be entitled to pursue him here for financial



41. A variant of this proposal would be to require habitual residence for a specified period (perhaps twelve months) by both parties as husband and wife during the *marriage*. This proposal would go some way to ensure that the marriage had had some connection with this country, but again there seem to us to be objections to it as the sole jurisdictional criterion. First, such a test

a pre-requisite that the respondent be habitually resident here, there would be greater reason to hope that any order for financial relief would in practice be enforceable against him. Against these advantages, however, has to be set the fact that any such test, if it were to be the sole jurisdictional criterion, might exclude meritorious cases. For example, suppose that the husband had left England at the time of the divorce, and did not intend to return. Why (it might be said) should the English court not have power to make orders relating to the former matrimonial home or other property situated here, or to make orders (either as to property adjustment or financial provision) which could be enforced abroad?

could exclude cases in which it might seem appropriate to grant relief. For example, suppose that a husband left his wife in their native country when he came here, perhaps promising that he would send for her when he had become established. It would seem to us wrong to deprive the wife of access to the English courts if the husband, having built up property in this country, divorced her abroad. Furthermore, in cases of extra-judicial divorces—(such as *Quazi* v. *Quazi*[168] the facts of which we have given above)[169] the English court might have to decide which (if any) of several divorces had been effective, because on the answer to that question might depend the answer to the question whether the parties had lived here during the "marriage", or whether the residence had only started after the effective dissolution of the marriage. Although, therefore, we think that the test based on habitual residence during the marriage would indicate some connection between the marriage and this country, we do not consider that it would be satisfactory as an exclusive jurisdictional test.

42. On the face of it a more attractive proposition is that the test of habitual residence for a specified period during the marriage should be a jurisdictional test *alternative* to the divorce analogy.[170] (It would be superfluous to set up an alternative test based on habitual residence *at the time of the application* since that test exists in the divorce analogy.[171]) Such an additional basis of jurisdiction would serve to cover a case where the parties had been resident in this country for most of their matrimonial life but had left this country more than a year before the start of the foreign divorce proceedings, perhaps leaving assets here. It might be said that in such a case the English court should not be prevented from dealing with matrimonial assets here unless the applicant (or respondent) were unable or unwilling to come to live in this country for the requisite period. There is, on the other hand, a weighty objection to this proposal. In the circumstances just set out an English court would not have had jurisdiction to hear divorce proceedings, nor to entertain an application for financial relief whether ancillary to divorce or during the subsistence of the marriage.[172] Should a party who has been divorced abroad be in a more advantageous position for invoking the English court's jurisdiction than one who seeks financial relief in any other



45. We have come to the tentative conclusion that the most appropriate jurisdictional test for applications for financial relief after a foreign divorce, both in principle and as a means of restricting forum-shopping, is the analogy with jurisdiction in divorce proceedings. We are aware that there are cases which could fall outside this test where some might think that jurisdiction should be exercised—such as where the parties have resided in this country for a substantial period during the marriage or there is matrimonial property situated here; but our tentative view is that it is not too much to expect a party

[174]See *Quazi* v. *Quazi* [1979] 3 W.L.R. 402, 405 *per* Ormrod L.J. (C.A.); [1979] 3 W.L.R. 833, 841 *per* Viscount Dilhorne and *ibid.*, at p.850 *per* Lord Scarman (H.L.).
[175][1979] 3 W.L.R. 833; see para. 35, above.
[176]See para. 38, above.
[177]Cf. the criticism in the previous paragraph of the test which would require *both* parties to be habitually resident here.
[178]See the previous para.
[179]We deal with this in paras. 51–54, below.

*(ii) Either party habitually resident here at the date of the application, provided that there is or has been a matrimonial home here*

43. This test (which has enjoyed some judicial support)[174] would have enabled the courts to give relief in most of the reported cases which have so far come before the courts; and the requirement that there should have been a matrimonial home here, coupled with the requirement of habitual residence here at the time of the application, would ensure a reasonably substantial connection with this country. Nevertheless, we consider that, as an exclusive test, it is open to the objection that it could operate to exclude a meritorious case—as for example where both wife and husband stayed abroad after the foreign divorce, even though the wife would, if appropriate powers were available, have wished to be allowed to continue living in the matrimonial home. There might also be problems in deciding whether there had been a "matrimonial home" here in cases where the parties had lived under the same roof in this country. For example, could it be said that the property in which the parties had lived separate lives in *Quazi* v. *Quazi*[175] constituted a "matrimonial home"? Thus we do not regard this as a satisfactory exclusive test; and, if the divorce analogy[176] were accepted, the test now being discussed would be superfluous[177] because the English court would already have jurisdiction based on the habitual residence of either party.

44. We also considered a further variant, namely that the English court should be able to assume jurisdiction if there were, or had ever been, a matrimonial home in this country: the habitual residence of the parties would thus be ignored for the purpose of entertaining proceedings. We are inclined also to reject this proposal. Apart from its unsatisfactory features as an exclusive jurisidictional criterion and the criticism that "matrimonial home" might be difficult to define for this purpose,[178] it is open to the strong objection that parties with very little connection with this country—who perhaps lived here for a few weeks in lodgings and were little more than "birds of passage"—would, subject to any discretion the court had in the matter,[179] be able to invoke the court's jurisdiction.

**Provisional view on jurisdiction**

45. We have come to the tentative conclusion that the most appropriate jurisdictional test for applications for financial relief after a foreign divorce, both in principle and as a means of restricting forum-shopping, is the analogy with jurisdiction in divorce proceedings. We are aware that there are cases which could fall outside this test where some might think that jurisdiction should be exercised—such as where the parties have resided in this country for a substantial period during the marriage or there is matrimonial property situated here; but our tentative view is that it is not too much to expect a party

[174]See *Quazi* v. *Quazi* [1979] 3 W.L.R. 402, 405 *per* Ormrod L.J. (C.A.); [1979] 3 W.L.R. 833, 841 *per* Viscount Dilhorne and *ibid.*, at p.850 *per* Lord Scarman (H.L.).

[175][1979] 3 W.L.R. 833; see para. 35, above.

[176]See para. 38, above.

[177]Cf. the criticism in the previous paragraph of the test which would require *both* parties to be habitually resident here.

[178]See the previous para.

[179]We deal with this in paras. 51–54. below.

to establish habitual residence here in such a case before an application for relief is made. We would welcome views on this.

46. Our provisional recommendation therefore is that the court should have jurisdiction after a foreign divorce if, and only if, one of the grounds which we set out in paragraph 38 is satisfied. These are:

(i) if either party was domiciled in England and Wales either at the date when the foreign divorce became effective *or* the date when application is made for financial relief; *or*

(ii) if either party was habitually resident in England and Wales throughout the period of a year before the foreign divorce became effective or before the date of the application for relief.

We would however invite views especially on the possibility of an additional jurisdictional test based on habitual residence in this country as husband and wife for a specified period during the marriage.[180]

**(4) Other ways of restricting the court's powers**

47. In examining possible jurisdictional criteria, we have been heavily influenced by the consideration that deserving applicants with a real connection with this country might be denied access to our courts because of the jurisdictional rules adopted. The test which we provisionally favour, based on the analogy with divorce, seems to us to be satisfactory in this respect. However, it is open to the criticism that it would, in the absence of some other restriction, permit applications to be presented in circumstances which might well be thought to be wholly inappropriate. Take, for example, a case where a couple of German nationality, domicile, and residence were divorced in Germany in 1970. Let it be assumed, for the sake of argument, that the German court made no financial order because both parties were in comparable employment. Suppose that some years later the husband, having remarried, comes to work in this country in such circumstances that he can be said to have assumed habitual residence here. Is his former wife, who has no connection with this country at all, to be entitled to pursue him here for financial provision and property adjustment orders? We recognise that such a situation could occur under the present law in a case where there had been no divorce at all: the wife could bring divorce proceedings (and seek financial relief) in circumstances similar to those we have just set out, relying on her husband's habitual residence here. Nevertheless we think that it is right to distinguish for this purpose between the case where the parties are still married and there is a legal duty of support (albeit perhaps difficult to enforce) and the case where a divorce has been obtained. After divorce (particularly in circumstances similar to those in the example given) there is a strong argument that the husband should reasonably be left to start a new life without the risk of a matrimonial claim being made against him at some time, possibly in the distant future.[181] In order to deter applicants from seeking an order where they have little link with

[180]Discussed at paras. 41–42, above.

[181]It is true that in the example given the wife could in theory obtain a foreign order enforceable here but in practice this would be unlikely and in any event, the fact that the English courts might be asked to enforce an order does not mean that in such cases they should be empowered to make one.

this country but can nevertheless satisfy the jurisdictional criteria, and in order to avoid imposing on the courts insoluble problems of policy of the sort to which we have referred above,[182] we think that there should be some additional filter on applications. We now turn to examine the possibilities.

48. In considering restrictions on the availability of the powers which we have proposed, so as to confine relief to those cases with whch it is appropriate for the English court to deal, it is important to take a view on the mischief at which the proposed legislation is aimed. In our view, the proposals should be concerned primarily to give a remedy in those exceptional cases where a spouse, usually the wife,[183] has been deprived of financial relief in circumstances where an English court might be driven to hold that it would be unjust to recognise the foreign decree. It follows that we consider the mischief at which the legislation should be aimed to be a narrow one. We do not think, in the absence of any international consensus on the prinicples which should govern finanacial provision, that the English courts should be unnecessarily exposed to the problems to which we have referred above.[184] In particular, we do not think that it would be appropriate to encourage applications to the courts of this country inviting them to act, in effect, as a court of appeal from courts of another country.

49. The three possible ways of providing a suitable check on in appropriate applications are, first, specific restrictions limiting eligibility to certain specified categories of applicant; secondly, conferring a discretion on the court with guidelines to indicate the circumstances to be taken into account in deciding whether an application should proceed or not; and, thirdly, a time restriction. We now examine these in turn.

*(a) Specific restrictions*

50. Under this proposal, the availability of financial relief after a foreign decree would be restricted to a limited class of applicant: for example, relief could be confined to those who were respondents in the foreign divorce proceedings (or to those who did not take part in the foreign proceedings) on the princple that a party who chooses a foreign forum for the divorce should not be allowed to switch to the English court for consequent financial relief. We have already given reasons[185] for not favouring the imposition of a rigid bar on the court hearing applications merely because a foreign court had made, or could have made, a financial order; and we think that these objections are generally applicable to restrictions of the type suggested. The imposition of such restrictions would, we think, almost inevitably result in cases of hardship where the court would be powerless to remedy a grave injustice; and, furthermore, such restrictions would usually involve the English court in an examination of the foreign law. Accordingly we do not favour any specific restrictions of this kind.

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[182]At paras. 22–26.

[183]A husband is less likely in practice to be so deprived (especially by the effect of an extra-judicial divorce) though he might well require an order relating to property in England.

[184]At paras. 22–26.

[185]At paras. 28–30, above.

(*b*) *A general discretion with guidelines*

51. Having rejected proposals for a rigid bar on applications, we are left with the alternative of a flexible discretion, under which, although an application could be presented by any person able to satisfy the jurisdictional test that we have recommended,[186] such applications would be the subject of preliminary scrutiny by the court which would only allow the applicant to proceed if, in the circumstances, it was thought appropriate to do so. In the general formulation of the proposed discretion, we think that it should be made clear by express statutory provision that the object of the discretion is to provide for the "occasional hard case".[187] We consider, therefore, that the court should be given power to entertain an application for a financial provision or property adjustment order notwithstanding the existence of a valid foreign divorce, if in the light of all the circumstances of the case (and in particular certain specified circumstances)[188] the case would otherwise be one where serious injustice might arise. Our present inclination is not to favour any requirement that the applicant must establish the facts of the case to be "exceptional" since he may well belong to a religious or ethnic group in which it is not uncommon, for example, for a wife to be divorced abroad without having a right to claim financial relief.

52. Furthermore, we consider that specific guidelines should be formulated to assist the court in its discretion. We provisionally recommend that the court should be directed to consider, amongst the circumstances of the case, the following factors:

(*a*) The connection of the parties, and of the marriage, with this country and whether it would be appropriate[189] for English financial relief to be granted.

(*b*) The connection of the parties, and of the marriage, with the country where the divorce was obtained.[190]

(*c*) The entitlement of the applicant to apply for financial relief or to obtain any other financial benefit in consequence of divorce (such as deferred dower)[191] in the country where the divorce was obtained.

(*d*) In cases where a financial order had been made in the foreign country, whether it had been complied with or whether there are reasonable prospects of its being complied with;[192] and, in cases where no financial order had been made there, the reason for the applicant's failure to obtain such an order. (Such reasons might include difficulty

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[186]At para. 46, above.

[187]See *Finch* v. *Francis* (21 July 1977) (unreported) *per* Griffiths J. (cited in *Firman* v. *Ellis* [1978] Q.B. 886, 904–5 *per* Lord Denning M.R.). The phrase was used by Griffiths J. to refer to the policy underlying the Limitation Act 1939, s.2D (under which a plaintiff may obtain leave to proceed with an action which would otherwise be statute-barred).

[188]See the next para.

[189]This question might arise, e.g., in relation to foreign assets. Enforcement difficulties might also arise: see para. 52(3), below.

[190]This is discussed in para. 27, above.

[191]See n.143, above.

[192]Where a foreign order is in existence, it may be appropriate for the court when making, say, a periodical payments order to require the payee to undertake to discharge any foreign order which in effect is being duplicated by an English order. There may, we think, be a case for promoting reciprocal arrangements enabling courts to suspend or discharge the orders of foreign courts; but such a proposal would be outside the scope of this paper.

for him in getting to that country, or his financial difficulty in prosecuting a claim there).[193]

(*e*) The prospects of any order made by a court in this country being enforceable; and, in particular, the availability of any property which might be the subject matter of such an order in this country (for example, the former matrimonial home) or the presence in this country of the party against whom an order is contemplated.

(*f*) The time which has elapsed since the foreign divorce, and the reasons for any delay in bringing the application in this country.[194]

We consider that these or similar guidelines would minimise the objections to making the exercise of the courts' powers dependent on the exercise of a judicial discretion and that this solution is the least unsatisfactory of those available. We would, however, welcome comments not only on the general question but also on the factors to which the court's attention should be specifically directed if the existence of a discretion is acceptable.

53. We are also of the view that the leave of a judge should be required[195] for an application to be allowed to proceed, the ground for leave being that in all the circumstances the case was a proper one to be heard. We have considered whether applications should be confined to the High Court or be tried also in the county court. We recognise that there might be a case for conferring jurisdiction on the county court, particularly in view of the fact that comparatively small sums of money are likely to be involved.[196] We have to bear in mind however that, as with all discretionary jurisdictions, the powers we are proposing could give rise to the development of divergent practices. It is to overcome this difficulty, as far as possible,that we think that the discretion should only be exercisable by the Family Division of the High Court—and thus by a comparatively small number of judges who would acquire experience in the exercise of this jurisdiction.

54. Thus we are of the tentative view that discretion should only be exercisable by a High Court judge and that the terms of any order for financial provision or property adjustment should remain exclusively within the province of the High Court. Again we would welcome views.

(*c*) *A time restriction*

55. We have suggested that the time which has elapsed since the foreign divorce is one of the factors which should be considered by the court in exercising its discretion, subject to which the proposed jurisdiction should be available. We now consider whether it would be desirable to impose a separate requirement that an application should be made within a prescribed period

[193]See *Joyce* v. *Joyce and O'Hare* [1979] Fam. 93.

[194]See also para. 55, below.

[195]This does not necessarily mean that there would have to be a two-stage process, i.e. a preliminary application for leave, followed (if leave were granted) by a hearing on the merits. In most cases the evidence needed for the substantive application would be required in order to enable leave to be obtained. The court would have inherent power to deal with individual cases in the most convenient way, e.g. by adjourning an application for leave to enable evidence to be filed by the other side; and by dealing with applications for leave *inter partes* and (if leave is given) with the substantive matters at the same hearing.

[196]Cf. the "modest prize at stake" in *Quazi* v. *Quazi* [1979] 3 W.L.R. 833, 850 *per* Lord Scarman.

(three years, for example), of the foreign decree. Such a time restriction would be designed to protect respondents against wholly stale claims, and can be supported by reference to the analogy of the English procedural rule[197] which requires application for financial provision and property adjustment orders to be contained in the petition, thus putting the respondent on notice of the claim. We see two major difficulties in the way of accepting such a proposal. The first is that, unless leave to bring proceedings outside the time limit could be obtained, it might prejudice a wife who had no notice of the proceedings or who perhaps assumed that they were invalid.[198] We accept, of course, that if the wife could show that she had received no notice of the proceedings this would be a ground on which she could resist recognition of the divorce;[199] but the object of the reform we are now considering is to reduce reliance on such attacks on validity to the minimum. Furthermore, we think that *Quazi* v. *Quazi*[200] provides evidence that there may well be cases where the parties proceed on the assumption that a particular procedure has been ineffective; if it subsequently turned out that their assumption was wrong it would be unfair to apply a rigid bar to financial relief based on the time which had elapsed. The second objection which we see to a time limit is that it could involve a court in having to determine (again, as in *Quazi* v. *Quazi*)[201] which (if any) of several proceedings for divorce has been effective. For these reasons we do not favour a fixed time limit; but if, contrary to this view, a time limit were to be imposed, the court would in our opinion have to have power to allow an application outside the permitted period in cases where it would be inequitable to enforce the time bar. In our view it is more satisfactory to allow the time question merely to be relevant to one of the guidelines in the court's discretion.[202]

**(5) Questions arising once an application is to proceed**

*(a) Choice of law*

56. It is necessary to consider whether, if the court allows the application to proceed, it should be governed by English law, or some other law (such as the law of the place where the foreign divorce was obtained). We have no doubt that English law should be applied; any other solution would, we think, be unacceptable for three reasons: first, it might result in precisely that denial of effective relief which it is the object of the proposed reform to overcome. Secondly, it would be difficult to determine which other law would be appropriate. As we have already pointed out, the country of the divorce might not be the country with which the marriage had the strongest connection, and the determination of a "proper law" of the marriage is likely to be elusive. Thirdly, expense would, and difficulty could, arise in obtaining expert evidence of any foreign law which was or might be applicable.

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[197]Matrimonial Causes Rules 1977 (S.I. No. 344) r.68.
[198]As in *Quazi* v. *Quazi*[1979] 3 W.L.R. 833: see below.
[199]See para. 9, above.
[200][1979] 3 W.L.R. 833.
[201]*Ibid.*
[202]See para. 52 (*f*), above.

*(b) Orders which the court could make*

57. If it is accepted that English law should be applied, we think that, in order to meet the variety of circumstances with which it may be faced, the court should be empowered to make any order that it could have made in divorce, nullity or judicial separation proceedings;[203] in deciding whether to exercise its powers, and if so in what manner, the court would follow the guidelines laid down in the Matrimonial Causes Act 1973.[204] The court would thus be obliged to take into account, amongst the circumstances of the case, the income, earning capacity, property and other financial resources of each of the parties, and these would obviously include any payments made consequent on the foreign divorce.

58. We have said that the court should have the full range of powers[205] to make financial provision and property adjustment orders conferred by the Matrimonial Causes Act 1973. We do not propose that there should be any statutory bar on the court making orders in relation to foreign assets of the respondent. We have already referred[206] to the case of *Razelos* v. *Razelos* (No.2)[207] where the court made orders under section 17 of the Married Women's Property Act 1882, *inter alia*, in respect of real property in Greece.[208] Under the divorce jurisdiction the law seems to be similar to that under the Married Women's Property Act 1882: as there is no statutory provision preventing the court from making an order relating to foreign property, the test is whether the order would be effective.[209] In *Tallack* v. *Tallack* and *Broekema*[210] for instance, the court refused to order the settlement of matrimonial property in Holland (the respondent being domiciled and resident in that country) when the evidence was that the Dutch courts would not give effect to such an order; the English court, moreover, could not enforce the order either by personal attachment or by ordering that the deed or conveyance be executed by some other person.[211] We do not therefore think that there is any need for a special bar on the making of orders relating to foreign assets in cases of applications following a foreign divorce. In many cases[212] the court would not make such an order, because any such order would be nugatory; a statutory bar on the court dealing with foreign property after a

[203]I.e. is to order periodical payments (whether secured or not), lump sum, transfer and settlement of property, and variation of settlements: see Matrimonial Causes Act 1973, ss. 23, 24. Financial orders in respect of children of the family could also be made. We also envisage that the provisions of the Matrimonial Causes Act 1973, s. 37 (avoidance of dispositions) would be available if an application for financial relief were made under the jurisdiction now proposed; proceedings under s.37 may be brought simultaneously with other proceedings for relief and the jurisdictional and other criteria would be the same.

[204]Sect. 25(1). These guidelines would of course operate in addition to the "preliminary" guidelines we have recommended in para. 52, above.

[205]See n. 203, above.

[206]At n. 102, above.

[207][1970] 1 W.L.R. 392.

[208]See *ibid.*, at pp. 400–401.

[209]See *Hunter* v. *Hunter and Waddington* [1962] P.1.

[210][1927] P.211.

[211]See Supreme Court of Judicature (Consolidation) Act 1925, s.47.

[212]See, e.g., *Tallack* v. *Tallack*, above; *Goff* v. *Goff* [1934] P.107; *Wyler* v. *Lyons* [1963] P.274.

foreign divorce would not only be unnecessary, but could cause hardship where it appears that the order could be given effect to in the foreign country.[213]

(*c*) *Recognition of the foreign decree*

59. The mischief with which this Working Paper is concerned arises where a foreign divorce has terminated the marriage; if it has not done so, the appropriate relief would be for the applicant to petition in this country.[214] In principle, therefore, the question whether the foreign decree should be recognised would be one of the matters in the course of the application which would have to be proved. It is true that in order to determine this issue the court might have to make precisely that laborious enquiry into validity which has occasioned so much adverse comment in the past; but we do not think that it would be acceptable to allow the court to entertain an application for relief under our proposed jurisdiction merely on the basis that the marriage *might have been* validly terminated. Apart from other considerations, it is undesirable that the English courts should sanction a procedure under which there would remain doubt as to whether the parties were or were not married. We believe, however, that the issue of the recognition of the foreign decree is less likely to be contested than under the existing law. A husband who has obtained a foreign decree would be unlikely to impugn the jurisdiction by which he obtained it; and it would rarely be in the interest of the wife to deny the validity of the foreign decree[215] if she had a proper right to apply for financial relief.

**(6) Other rights lost by divorce**

60. We should stress that the reform so far proposed would not by itself put the applicant in all respects in the same position as a person divorced in England, since such a person has, as we have seen,[216] rights under the Matrimonial Homes Act 1967 and the Inheritance (Provision for Family and Dependants) Act 1975 as well as a right to apply for relief under the Matrimonial Causes Act 1973.

61. We take the view that amendments of the Inheritance (Provision for Family and Dependants) Act 1975 would be appropriate to enable a person divorced abroad to qualify as a "former spouse" for the purpose of applications under that Act for financial provision from the estate of a deceased person who is domiciled in England and Wales at the time of death.[217] The Law Commission's Second Report on Family Provision on Death,[218] (the proposals of which were implemented by the 1975 Act) stated that, if it were

[213]In *Razelos* v. *Razelos*, above, Baker J. said "I...make an order in respect of [the Greek property] for what it may be worth... If the Greek courts will enforce such order, so much the better. If not, there is still the probability that [the husband] will return to England and the chance of enforcement in person..." (*ibid.*, at p.404).

[214]Or to apply under the Matrimonial Causes Act 1973 s.27 on the ground of failure to maintain.

[215]A wife would presumably be advised, at least in cases where the validity of the decree might be in doubt, to petition in the alternative for divorce or judicial separation, or to apply for financial provision under s.27 of the Matrimonial Causes Act 1973.

[216]At para. 2, above.

[217]See ss. 1(1) and (2) (*b*) of the 1975 Act.

[218](1974) Law Com. No.61.

proposed to consider extending the definition of "former spouse" in the way which we now propose, it would be necessary "to embark upon a much wider inquiry involving the whole question of how far the English courts should award maintenance to a former spouse after the dissolution... of the marriage abroad;"[219] and the Commission considered that such an inquiry fell outside the scope of that Report. We do not think that any such objection to extending the definition of "former spouse" applies in the present context, since the subject matter of this paper is concerned with this very inquiry. We would however welcome views.

62. We also invite views on whether amendment of the Matrimonial Homes Act 1967 would be desirable. Under that Act a spouse has certain rights in relation to the matrimonial home (which can be registered and thereby become enforceable against third parties), notably the right, if in occupation, not to be evicted by the other spouse except by court order; and the right, if not in occupation, to enter and occupy the property by court order.[220] Furthermore, the court may order the transfer of a protected or statutory tenancy on divorce or annulment.[221] Rights of occupation under the 1967 Act come to an end on divorce unless the court otherwise orders during the subsistence of the marriage;[222] thus it would be too late to invoke these rights after a foreign divorce became effective, and the power to transfer a tenancy on divorce would then no longer be exercisable.[223] There may therefore be a case for amending the legislation to enable a spouse's rights to be protected, notwithstanding a foreign divorce. However, this would involve somewhat complex legislation, and it may perhaps be considered that, under the proposals put forward elsewhere in this paper, the court will have adequate powers to protect the wife's occupation of the matrimonial home under the wide powers contained in the Matrimonial Causes Act 1973.[224]

**(7) Financial relief following foreign decrees of nullity and legal separation**

63. So far in this paper we have not distinguished between cases where the foreign decree is one of divorce, nullity or legal separation, but we must now consider the question wehether there should be any difference between the case where the decree obtained abroad is one of divorce and where it is one of nullity or legal separation. Dealing first with nullity, we have already pointed out[225] that the grounds for recognition of foreign decrees are not governed by the Recognition of Divorces and Legal Separations Act 1971 and differ somewhat from those relating to divorce and legal separations.[226] This should not,

[219] *Ibid.*, para. 50.

[220] Matrimonial Homes Act 1967, s.1(1) as amended.

[221] That is as from decree absolute: *ibid.*, s.7. The Law Commission in its *Third Report on Family Property* (1978) Law Com. No. 86 Book II paras. 2.38–2.41 recommended that the powers should be exercisable at any time after the grant of the decree (i.e. is decree *nisi*) and that they should be exercisable in cases of judicial separation. Transfer of local authority lettings is not possible under the 1967 Act (see Law Com. No. 86, paras. 2.65–2.72 where no change in the law was recommended) but an order for transfer of such a letting is possible under s.24 of the Matrimonial Causes Act 1973: *Thompson* v. *Thompson* [1976] Fam. 25.

[222] Matrimonial Homes Act 1967, s.2(2).

[223] Orders can only be made between decree *nisi* and decree absolute: *ibid.*, s.7(5). See also n.221, above.

[224] E.g. by ordering a settlement of property or postponement of sale during the minority of a child of the family, as in *Mesher* v. *Mesher (Note)* (1973) [1980] 1 All E.R. 126.

[225] See para. 14, above.

[226] *Ibid.*, where the nullity rules are outline.

however, in our view preclude an English court from being able to order financial relief merely because the marriage was validly annulled rather than dissolved (even in a case where the marriage was void rather than voidable) since the potential mischief is the same in each case. It should, however, be noted that in our view English law is unusual in conferring on the courts exactly the same financial powers in nullity proceedings as in divorce proceedings; in many countries the effect of holding that a marriage is void is to free the parties from all the incidents of marriage, including any obligation to maintain. The possibility has therefore to be faced that there could be a number of applications for relief here in respect of void marriages by persons with little real connection with this country, and whose complaint was really with the doctrinal logic of their own legal systems. We doubt, however, whether such cases are likely to be numerically significant; and thus they can be left to be dealt with under the discretion we have recommended, as and when they arise.

64. The problem in relation to a (valid) foreign decree of legal separation is somewhat different. In such a case there is no formal bar to either party obtaining financial relief in this country since either party could take divorce proceedings here and thus bring into play the powers of the court to make orders for financial relief. For the person legally separated by a foreign order who does not seek a divorce for religious or other reasons the issue is, however, less straightforward. He or she could bring proceedings in this country on the ground of failure to provide maintenance,[227] but the court's powers in such proceedings are limited (compared with those available in divorce, nullity or judicial separation proceedings) since there is no power to make a property adjustment order. Although, therefore, we think that in most cases it would be unnecessary to provide a special right to apply for financial relief after a foreign decree of legal separation, we consider that there could be cases where a decree of legal separation was obtained in a country where the powers of property adjustment consequent on such a decree were less wide than in this country and the parties did not seek a divorce: hardship could arise in such cases if there were no power to grant the same financial relief as on divorce. On balance, therefore, we are of the provisional view that the power we have recommended in cases of foreign divorce and nullity should also extend to cases where there has been a foreign legal separation. Again comments would be welcome.

**(8) Decrees obtained in the British Isles[228] outside England and Wales**

65. We have considered whether the proposed jurisdiction to award financial relief should extend to cases where a decree of divorce or nullity was obtained in Scotland, Northern Ireland, the Channel Islands or the Isle of Man. These countries all have their own legal systems and the grounds for

[227]Matrimonial Causes Act 1973, s.27.

[228]The term does not include the Republic of Ireland: most modern matrimonial legislation defines the British Isles ("British Islands") as being the United Kingdom, the Channel Islands and the Isle of Man; see e.g. the Recognition of Divorces and Legal Separations Act 1971, s.10(2). The proposals we have made should in our view apply where there has been a decree of nullity or judicial separation (divorce *a mensa et thoro*) in the Irish Republic (divorce not being available there) in the same way as where there has been a decree in any other overseas country.

matrimonial relief, and the financial provision orders available, differ from country to country. The ground for divorce in those jurisdictions (apart from Jersey)[229] is substantially similar to that in England and Wales[230] and the basis upon which financial relief is granted seems also to be similar.[231] Moreover financial provision orders made in Scotland[232] and Northern Ireland,[233] and periodical payments and lump sum orders[234] made in Guernsey, the Isle of Man and Jersey can all be registered and enforced in England.[235] There are, however, some significant differences in the powers of the courts in these countries to make orders affecting capital. The courts in Northern Ireland[236] and the Isle of Man[237] have the same powers to make property adjustment orders[238] as do the courts in England and Wales; and the courts in Guernsey[239] and Jersey[240] have powers which are in most important respects[241] similar to those in England and Wales. In Scotland, however, the courts have no power to order the transfer of property on divorce.[242]

66. It would nevertheless in our view be inappropriate to allow those divorced elsewhere in the British Isles to apply to the courts in England and Wales for financial orders; there will be few if any cases in which a person divorced in another part of the British Isles will have suffered the "serious injustice" which we believe it should be necessary to establish as a condition precedent to the exercise of the powers we propose.

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[229]In Jersey, divorces are based on matrimonial offence grounds (under the Matrimonial Causes (Jersey) Law 1949 as amended); but under the Matrimonial Causes (Amendment No.5) (Jersey) Law 1978, 2 years' living apart with consent and 5 years' living apart now also constitute grounds for divorce.

[230]See Divorce (Scotland) Act 1976; Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045); Matrimonial Causes (Guernsey) Law 1939 and Matrimonial Causes (Amendment) (Guernsey) Law 1972; Judicature (Matrimonial Causes) Act 1976 (Isle of Man).

[231]In Scotland, Guernsey and Jersey there are no detailed statutory guidelines equivalent to s.25 of the Matrimonial Causes Act 1973. The courts in those countries are, however, required to have regard to all the circumstances of the case. Northern Ireland and the Isle of Man have statutory guidelines identical to those in England and Wales. As to Scotland see also n.242, below.

[232]Maintenance Orders Act 1950, s.16(1) and (2)(b) as amended.

[233]*Ibid.*, s.16(1) and(2) (c) as amended.

[234]Lump sum orders are dealt with in separate legislation: see the next footnote.

[235]Periodical payments orders made in the Channel Islands and the Isle of Man are enforceable under the Maintenance Orders (Facilities for Enforcement) Act 1920, ss. 1 and 12(1) and Order in Council (S.I. 1959 No. 377, Sch.1). (The Maintenance Orders (Reciprocal Enforcement) Act 1972 repeals and replaces the 1920 Act but the repeal provision of the 1972 Act [s.22(2)] has not yet been implemented.) Lump sum orders are enforceable under the Foreign Judgments (Reciprocal Enforcement) Act 1933: see s.1(2) and the relevant Orders in Council (S.I. 1973 Nos. 610, 611 and 612 which apply respectively to Guernsey, the Isle of Man and Jersey). They are not "maintenance" orders within the meaning of the 1920 or 1972 Acts.

[236]See Matrimonial Causes (Northern Ireland) Order 1978 (S.I. 1978 No. 1045) Art. 26 and 27.

[237]See Judicature (Matrimonial Causes) Act 1976 (I.O.M.) s.24.

[238]I.e. is transfer of property; settlement of property; variation of ante-nuptial or post-nuptial settlement, or extinction or reduction of a party's interest thereunder: see Matrimonial Causes Act 1973, s.24(1).

[239]The 1972 amendment (see n.230, above) does not cover ancillary relief but under the Matrimonial Causes (Guernsey) Law 1939 (Art. 46) there is provision for settling or vesting matrimonial property in such proportions as the court may direct.

[240]In 1973 the Matrimonial Causes (Jersey) Law 1949 (see n.229, above) was amended to give the divorce court power to transfer or settle real or personal property: Art. 28 of the 1949 Law as amended.

[241]Especially the power to order transfer or settlement of property.

[242]Under the Divorce (Scotland) Act 1976 the principal relief on divorce consists of periodical allowance, capital sum and variation of settlement (s.5). The Scottish Law Commission is considering proposals to confer more extensive powers, including those of ordering transfer of property: see Scot. Law Com. Memo. No.22, *Aliment and Financial Provision* (1976) para. 3.20.

## PART IV: SUMMARY OF PROVISIONAL RECOMMENDATIONS

67. We now set out a summary of our provisional recommendations. Comments and criticisms are invited.

(1) English courts should be given power to entertain applications for financial provision and property adjustment orders notwithstanding the existence of a prior foreign divorce which is recognised by our courts.

(paragraph 22)

(2) There should be no bar on the court hearing an application for financial relief on the ground that a foreign court could have made, or has made, a financial order.

(paragraphs 28 to 30)

(3) The English court should have jurisdiction if one or more of the following tests is satisfied:

(i) if either party was domiciled in England and Wales either at the date when the foreign divorce became effective *or* the date when application is made for financial relief; or

(ii) if either party was habitually resident in England and Wales throughout the period of twelve months before the foreign divorce became effective or before the date of the application for relief.

(paragraphs 45 and 46)

(4) Views are invited as to whether the English court should additionally have jurisdiction where the parties habitually resided together in this country as husband and wife for a specified period during the marriage.

(paragraph 46)

(5) An applicant should be required to obtain the leave of a judge to apply for financial relief; in deciding whether or not to grant leave, the court should have regard to detailed guidelines.

(paragraphs 51 to 52)

(6) We tentatively propose that the High Court should have exclusive jurisdiction to hear such applications.

(paragraphs 53 to 54)

(7) There should be no special time or other restrictions on applications for financial relief.

(paragraphs 50 and 55)

(8) English law should govern the principles on which a court grants financial relief under these recommendations.

(paragraph 56)

(9) The court should be able to make any financial order that it might have made in English divorce proceedings and should exercise its powers in accordance with the guidelines laid down in section 25 of the Matrimonial Causes Act 1973.

(paragraph 57)

(10) There should be no statutory bar preventing the court making orders relating to foreign assets.

(paragraph 58)

(11) The court should be required to be satisfied that the foreign decree should be recognised here.

(paragraph 59)

(12) The Inheritance (Provision for Family and Dependants) Act 1975 should be amended in order to enable a person divorced abroad to be treated as a "former spouse" for the purpose of applications under the Act.

(paragraph 61)

(13) Views are invited as to whether the Matrimonial Homes Act 1967 should be amended to give rights thereunder to spouses whose marriages have been terminated abroad.

(paragraph 62)

(14) The same rules should apply after a foreign decree of nullity or legal separation as after a foreign divorce decree.

(paragraphs 63 and 64)

(15) There should be no right to apply to the English court for financial relief after a decree of divorce, nullity or judicial separation has been obtained elsewhere in the British Isles.

(paragraph 66)

## APPENDIX

## RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS[1]

### (1) Periodical payments

1. There is no power at common law to enforce a foreign order for periodical payments because such an order is not considered "final and conclusive"[2] by the English courts. Two statutes, however, now govern the reciprocal enforcement of many maintenance[3] orders: the Maintenance Orders (Facilities for Enforcement) Act 1920, and the Maintenance Orders (Reciprocal Enforcement) Act 1972.

*(a) The 1920 Act*

2. This Act, which will eventually be replaced by the 1972 Act,[4] applies to the Commonwealth countries listed in the next paragraph. Under it a maintenance order made in any country to which the Act extends may be registered in England and Wales (or Northern Ireland)[5] and vice versa.[6] Furthermore, a provisional maintenance order may be made[7] by a magistrates' court in England against a person resident in a country to which the Act applies (whether or not the cause of complaint arose in England);[8] it is then up to the court in the other country to decide whether or not to confirm the order.[9] Likewise, provisional orders made in the other country can be confirmed here.[10]

3. Although the 1920 Act is to be repealed by the 1972 Act, the repeal provision of the 1972 Act[11] has not yet been implemented, and the 1920 Act will remain in force until every country or territory subject to it has been

---

[1]We deal here only with reciprocal enforcement between courts in England and Wales and countries outside the British Isles. For arrangements within the British Isles, see para. 60 of the paper; and P.M. North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977).

[2]This is because such an order can be revoked or varied: see *Harrop* v. *Harrop* [1920] 3 K.B. 386. An order is however enforceable as regards accrued instalments if revocation or variation of the order is not possible in respect of those accrued sums: *Beatty* v. *Beatty* [1924] 1 K.B. 807. See also Foreign Judgments (Reciprocal Enforcement) Act 1933, s.1(2).

[3]Defined by s.21 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 to cover periodical payments but not lump sum orders.

[4]See paras. 4–10.

[5]Sect.1, which applies to courts of superior and inferior jurisdiction. Where a court of superior jurisdiction made the order it is registered in the High Court; in the other cases the order is registered in the magistrates' court.

[6]Sect.2. The object of ss.1 and 2 is to provide for cases where the court would have had jurisdiction to make an order but no prospect (without these provisions) of enforcing it. Registration is an automatic administrative matter.

[7]Under Sect.3.

[8]*Collister* v. *Collister* [1972] 1 W.L.R. 54 (where the parties' matrimonial life was in the Isle of Man).

[9]This is known as the "shuttlecock" procedure: see *Pilcher* v. *Pilcher* [1955] P.318, 330 *per* Lord Merriman P. There are thus two hearings; the first will normally be in the absence of the defendant (otherwise an ordinary matrimonial order could be made); the second normally in the absence of the complainant. The object is to provide for cases where otherwise the court would have been unable to make the order because the defendant was not present and could not be served with process within the jurisdiction. Confirmation (unlike registration) is discretionary: see *Pilcher* v. *Pilcher, ibid.*

[10]Sect. 4.

[11]Sect. 22 (1).

designated a "reciprocating country" under the 1972 Act. The following are the countries currently subject to the 1920 Act:[12]

Antigua
Australia:
  Territory of Cocos (Keeling) Islands
  Territory of Christmas Island
Bahamas
Bangladesh
Belize
Botswana
Cayman Islands
Cyprus
Dominica
Falkland Islands and Dependencies
Gambia
Gilbert and Ellice Islands
Grenada
Guyana
Jamaica
Lesotho
Malawi
Malaysia
Mauritius
Montserrat
Newfoundland and
  Prince Edward Island
Nigeria
Papua/New Guinea
Sri Lanka
St. Christopher, Nevis
  and Anguilla
St. Helena
St. Lucia
St. Vincent
Seychelles
Sierra Leone
Solomon Islands
Somalia
Swaziland
Trinidad and Tobago
Uganda
Virgin Islands
Yukon Territory
Zambia
Zimbabwe

(*b*) *The 1972 Act*

4. Part I of this Act, like the 1920 Act, provides for the automatic enforcement of orders[13] and for the provisional order ("shuttlecock") procedure[14]but is wider both in extent and scope. As to extent, it applies to non-Commonwealth as well as Commonwealth countries: any country prepared to accord reciprocal facilities to United Kingdom orders may be designated a "reciprocating country".[15] As to scope, Part I provides (as the 1920 Act does not) for the "shuttlecock procedure" to be applied to the variation and revocation of orders.[16]

5. Part I of the Act assumes that reciprocating countries will have similar maintenance laws because the court in the reciprocating country must be able to understand the foreign law with which it is dealing and must have a similar procedure.[17] Moreover, the law applied is that of the country which made the order, even under the provisional order procedure: thus, in the course of proceedings in country Y to confirm a provisional order made in country X, if the defendant establishes a defence under the law of country X, the court in

[12]See the (consolidating) Order in Council (S.I.1959 No.377); and the Revocation Orders of 1974 (S.I. 1974 No. 557), 1975 (S.I. 1975 No. 2188) and 1979 (S.I. 1979 No. 116). Changes since 1959 in the countries' titles and geographical areas are reflected in this list.

[13]Sects. 2 and 6; see para. 2, above. Registration here is in the magistrates' court in the area where the payer lives.

[14]Sects. 3, 7. A summary of the evidence is sent: s.3(5)(b); s.7(2)(a).

[15]Sect.1.

[16]Sects. 5,9; cf. *Pilcher* v. *Pilcher* [1955] P.318.

[17]See P.M. Bromley, *Family Law*, 5th ed. (1976) p.569.

country Y must refuse to confirm the order. If the laws in the two countries were radically different the registration and confirmation procedures would not work.

6. The following are the countries currently designated under Part I of the 1972 Act as "reciprocating" countries:[18]

Alberta
Australian Capital Territory
Barbados
Bermuda
British Columbia
Fiji
Ghana
Gibraltar
Hong Kong
India
Kenya
Malta
Manitoba
New Brunswick
New South Wales
New Zealand
Norfolk Island
Northern Territory of Australia
North-west Territories of Canada
Nova Scotia
Ontario
Queensland
Saskatchewan
Singapore
South Africa
South Australia
Tanzania (except Zanzibar)
Tasmania
Turks and Caicos Islands
Victoria
Western Australia

7. We understand from the Home Office that between 1977 and 1979 on average 186 maintenance orders each year were transmitted[19] (under both the 1920 Act and Part I of the 1972 Act) from England and Wales to other countries:[20] and 124 maintenance orders were similarly transmitted to this country from abroad.

8. Part II of the 1972 Act gives effect to the United Nations Convention on the Recovery Abroad of Maintenance (1956). It provides that any country to which the convention extends may be designated a "convention country".[21] The procedure is entirely different from the other procedures already described because it enables a person resident in one country to have a maintenance *claim* transmitted to the country where the defendant resides: no order is made in the first country, which simply sends the application to the other convention country.[22] Although evidence is taken in the court of the country where the applicant lives, this accompanies the application and forms, so to speak, the "complaint" upon which the foreign[23] court may make the order. The law applied is of course that of the country where the defendant lives; as we have seen,[24] this is in contrast to both the automatic registration

[18]See Orders in Council S.I. 1974 No. 556; S.I. 1975 No. 2187; and S.I. 1979 No. 115.
[19]Including both the automatic transmission and provisional order procedures: see para. 2, above.
[20]Excluding the Republic of Ireland, as to which see para. 10, below. between 1977 and 1979 there were on average annually 23 orders transmitted from England and Wales to the Irish Republic, and 55 orders transmitted the other way.
[21]Sect. 25. For a list of countries currently designated, see the next para.
[22]Sect. 26. In England and Wales the magistrates' clerk in the area where the complainant lives acts as forwarding agent.
[23]The provisions are of course reciprocal so that this country may be the "foreign" country.
[24]At para. 5, above.

and provisional order procedures under Part I, where the law applied is that of the country where the applicant lives. Part II, which is designed to apply to countries with legal systems different from ours (unlike Part I), may be seen as less ambitious than Part I under which *orders* can be made and enforced abroad.[25]

9. The following countries are currently designated as "convention countries" under Part II of the 1972 Act:[26]

Algeria
Austria
Barbados
Belgium
Brazil
Central African Republic
Chile
Czechoslovakia
Denmark
Ecuador
Finland
France (including the overseas departments of Guadeloupe, Guiana, Martinique and Réunion)
French Polynesia
New Caledonia and Dependencies
St. Pierre and Miquelon
Germany, Federal Republic of, and Berlin (West)
Greece
Guatemala
Haiti
Holy See
Hungary
Israel
Italy
Luxembourg
Monaco
Morocco
Netherlands (Kingdom in Europe and Netherlands Antilles)
Niger
Norway
Pakistan
Philippines
Poland
Spain
Sri Lanka
Sweden
Switzerland
Tunisia
Turkey
Upper Volta
Yugoslavia

We understand from the Home Office that, between 1977 and 1979, on average 41 maintenance claims under Part II of the 1972 Act were transmitted each year from England and Wales to another convention country; and 35 claims were similarly transmitted to this country.

10. There is also provision under the 1972 Act for special reciprocal arrangements to be made with individual countries.[27] Under the Act there are at present special reciprocal arrangements with the Republic of Ireland,[28] with

[25]This is perhaps shown clearly by the fact that reciprocal arrangements between the United Kingdom and certain countries (e.g. France) that signed the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (see n.29, below), which formerly existed pursuant only to Part II of the Act, have now been brought also within the Part I scheme. We understand that, although Part II continues to apply in such cases, Part I arrangements will effectively supersede those under Part II.

[26]See the Orders in Council S.I. 1975 No. 423 and S.I. 1978 No. 279.

[27]Sect. 40. The object of the special arrangements is to provide for different procedures and modifications to be made where necessary; see the Orders in Council referred to in the following footnotes. Sect. 40 allows for arrangements under either Part I or Part II to be made.

[28]See Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974 (S.I. 1974 No. 2140), which applies Part I of the Act in a modified form.

signatory countries to the Hague Convention,[29] and with certain United States jurisdictions.[30] It should also be noted that the E.E.C. Judgments Convention[31] when in force in this country will provide for the reciprocal enforcement of periodical payments orders[32] as between the United Kingdom and the other member states of the E.E.C.

**(2) Lump Sums**

11. Lump sums, as we have seen, do not come within the ambit of the 1920 or 1972 Acts. They are however enforceable both at common law (because they are final and conclusive)[33] and under Part II of the Administration of Justice Act 1920 under which a scheme of registration of foreign money judgments applies to a wide range of Commonwealth countries; and also under the Foreign Judgments (Reciprocal Enforcement) Act 1933,[34] which applies a similar, but broader, scheme to a smaller range of both Commonwealth and non-Commonwealth countries. As between the United Kingdom and other member states of the E.E.C., the Judgments Convention to which we have referred will replace the provisions of the 1933 Act and will, it seems, cover all financial relief[35] orders made by courts in the member states of the Community.

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[29]I.e. is the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973). By Order in Council (S.I. 1979 No. 1317) the provisions of Part I of the Act (in a modified form) were applied in respect of the following convention countries: Czechoslovakia, France, Norway, Portugal, Sweden and Switzerland.

[30]See Recovery of Maintenance (United States of America) Order 1979 (S.I. 1979 No. 1314). The Order applies Part II of the Act to the following States:

| | | |
|---|---|---|
| Arizona | Louisiana | North Dakota |
| Arkansas | Maine | Ohio |
| California | Michigan | Oklahoma |
| Colorado | Minnesota | Oregon |
| Connecticut | Montana | Pennsylvania |
| Florida | Nebraska | Texas |
| Idaho | Nevada | Vermont |
| Illionois | New Hampshire | Virginia |
| Indiana | New Mexico | Washington |
| Kansas | New York | Wisconsin |
| Kentucky | North Carolina | Wyoming |

[31]I.e. is the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, signed in 1968 by the original 6 members of the E.E.C. and to which, in an amended form, the United Kingdom, Ireland and Denmark are to become parties.

[32]See also the next para. in relation to the other financial relief orders enforceable under the convention.

[33]See para. 1, above.

[34]Sect.1(2).

[35]Including, it would seem, property adjustment orders, at any rate in so far as they have a "maintenance" element: see Arts. 1 and 5 of the convention (*Official Journal of the European Communities* No. L304/78, 30.10.78); and J.H.C. Morris, *The Conflict of Laws*, 2nd ed. (1980) p.82.

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