The Law Commission

Working Paper No 68

The Scottish Law Commission

Memorandum No 23

Custody of Children — Jurisdiction and Enforcement within the United Kingdom

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The Law Commissions would be grateful for comments before 1 March 1977.

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AND

THE SCOTTISH LAW COMMISSION

MEMORANDUM NO. 23

CUSTODY OF CHILDREN - JURISDICTION AND ENFORCEMENT WITHIN THE UNITED KINGDOM

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CUSTODY OF CHILDREN - JURISDICTION AND ENFORCEMENT WITHIN THE UNITED KINGDOM

PART I: INTRODUCTION

Terms of reference

1.1 In May 1972 pursuant to section 3(1)(e) of the Law Commissions Act 1965 the Lord Chancellor asked the Law Commission and the Secretary of State for Scotland and the Lord Advocate asked the Scottish Law Commission "to review:-

(1) the basis of the jurisdiction of courts in the British Isles[1] to make orders for the custody and wardship of minors and pupils;

(2) the recognition and enforcement of such orders in other parts of the British Isles;

(3) the recognition and enforcement of custody and similar orders made outside the British Isles; and

(4) the administrative problems involved in the enforcement in any jurisdiction in the British Isles of a custody or similar order made in any other jurisdiction whether in the British Isles or elsewhere."

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1 This paper is confined to the problems arising within the United Kingdom: see para. 1.3, below.

1.2 The two Commissions set up a Joint Working Party under the chairmanship of Lord Justice Scarman. The membership of the Working Party is set out in the Appendix. We, the two Commissions, wish to record our great indebtedness to the Chairman and members of the Working Party for their expert advice and help in the preparation of this paper, which we now issue for consultation.

1.3 This paper deals only with items (1) and (2) of our terms of reference and that part of item (4) which relates to United Kingdom situations. We have not considered expressly in this paper the problems which may arise in relation to the British Isles which are not part of the United Kingdom; but we hope that the solutions which we propose can form the basis of discussions between the United Kingdom and the authorities in the Channel Islands and the Isle of Man. The international aspects covered by items (3) and (4) of our terms of reference will be dealt with in a second consultative paper.[2]

The underlying human and social problems

1.4 Behind our necessarily somewhat technical terms of reference lie grave human and social problems which may have profoundly disturbing effects on the lives of many people. These are not only the parents of the child: there are others who may have, or may have assumed, responsibility for the child's welfare and who may seek the assistance of the courts in obtaining orders for custody. In such disputes affection and other emotions may be deeply involved and the persons concerned may suffer infinite distress. What is more serious, the welfare and happiness of the child may be put in jeopardy. In its grossest form such a dispute can result in the child being "kidnapped" from the jurisdiction of the court which has made or has

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2 See paras. 1.12 - 1.16, below.

power to make an order for its custody to another jurisdiction where another court may make a different and inconsistent order.

1.5 Moreover, custody disputes can be aggravated by lack of co-operation between the courts of different legal systems, as where the court refuses to enforce the custody orders of a court in another country, or by actual conflicts between such courts leading to concurrent proceedings or conflicting decisions or both. The problems of conflict and co-operation between courts lie close to the heart of our terms of reference.

The desirable aim of law and practice

1.6 In matters of custody it should be a major aim of all legal systems to foster co-operation and eliminate conflict between their respective courts. If cases must remain in which those objectives cannot be fully realised, then it is an overriding duty to ensure that such cases are resolved with the minimum distress and delay and in a way which accords the very highest consideration to the welfare of the child itself. It must be said at once that, despite the efforts and goodwill of the legislature and the judiciary in all civilised systems, these aims and objectives have been imperfectly formulated and still more imperfectly achieved.

1.7 The causes of conflict and the obstacles to co-operation are manifold. Legal systems vary widely in their attitudes to the custody of children. Some, like the three legal systems of the United Kingdom, recognise that the welfare of the child is of the first and paramount importance. Others adopt a different philosophy. Nor are such basic differences of approach the only source of difficulty. There are differences between the grounds on which the courts of various legal systems will assume jurisdiction over the custody of a child, differences

between the ages to which custody orders extend and also differences between the rights which orders may confer on the person to whom custody is awarded. It is also frequently the case that a custody order made in one jurisdiction cannot be enforced without further proceedings in another jurisdiction.

1.8 At a time when persons and families may increasingly easily travel from one country to another, these differences of approach between legal systems are often exploited by one of the parties to a custody dispute. This may occasion needless expense to the other party and may postpone the time when the child's future is settled. These differences may even mean that a solution, which would at one time have been best for the child, cannot be adopted because in the meantime the circumstances have irretrievably changed.

1.9 Yet the resolution of these problems by an appropriate framework of rules of law is by no means a simple matter. The suggested solutions which we advance are necessarily complex. We have, however, kept in mind that we are dealing not simply with technical legal problems but with human problems which affect the parents and guardians of children and may ultimately affect the children themselves, to whose welfare the law and practice of all United Kingdom legal systems pay special regard. In formulating our provisional proposals, it has been our aim to promote the welfare of children generally as well as the wellbeing and happiness of the child in the individual case.[3]

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3 See para. 3.22, below.

The report of the Hodson Committee

1.10 Some of the matters with which we are concerned in this paper have already been the subject of consideration by a Committee under the chairmanship of Lord Justice Hodson which was appointed in February 1958 with the following terms of reference:-

> "To consider and report what alterations in the law and practice are desirable to avoid conflicts of jurisdiction between courts in the different parts of the United Kingdom in proceedings relating to the custody of children and to wards of court and to ensure the more effective enforcement of orders made in such proceedings outside the part of the United Kingdom in which they were made."

The Hodson Committee's report[4] has not, however, been implemented and this paper traverses the ground covered by that report.

The scope of this paper

1.11 In Part II we explain in general terms the central problems with which we are here concerned so as to set the scene for the proposals made in the rest of the paper. To help the reader, we give a summary of our provisional proposals in Part VII.

1.12 As already mentioned, the international aspects covered by items (3) and (4) of our terms of reference will be dealt with in a second consultative paper. We are anxious, however, not to delay consultation on the United Kingdom aspects of our study and have therefore decided that this paper should be issued now.

1.13 In our second paper we shall examine the Hague Convention of 5 October 1961 concerning the power of authorities and the law applicable in respect of the

4. Report of the Committee on Conflicts of Jurisdiction Affecting Children (1959), Cmnd. 842.

protection of infants.[5] We shall also consider the proposals now under discussion in the Council of Europe to which we refer below.

Current work in the Council of Europe

1.14 The possibilities of improving co-operation in the field of custody and guardianship of minors, particularly with regard to the mutual recognition of court decisions, were considered at the seventh conference of European Ministers of Justice, under the auspices of the Council of Europe, in May 1972. The Ministers recommended that "member states of the Council of Europe conclude agreements guaranteeing the recognition and enforcement of decisions on the legal representation and custody of infants and that the Council of Europe consider the possibility of its member states' relevant laws being harmonised ... ".

1.15 Pursuant to that resolution the Council of Europe has established, through the European Committee for Legal Co-operation, a Committee of Experts on the Legal Representation and Custody of Minors. The United Kingdom is represented on this Committee by some members of our Working Party, and work proceeding in the Committee includes a draft Convention relating to the reciprocal recognition and enforcement of custody orders made in the contracting states.

1.16 Authority has been obtained in the Council of Europe for the publication of this draft Convention and we hope to ask for views on it in our second paper.

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5 This Convention has been ratified by the following States: Austria, France, Federal Republic of Germany, Luxembourg, Netherlands, Portugal and Switzerland. The U.K. has not ratified the Convention.

PART II: THE CENTRAL PROBLEMS RAISED BY THIS PAPER

The main questions

2.1 As we have said in paragraph 1.3 above, this paper is concerned only with the problems of jurisdiction and the enforcement of orders within the three legal systems of the United Kingdom. It is, perhaps, in the international field (which we will study in our second paper) that the most complex legal conflicts arise, but complicated conflicts certainly arise within the United Kingdom.

2.2 In matters of custody and wardship, the rules of jurisdiction adopted by the legal systems of England and Wales and of Northern Ireland differ widely from those adopted in Scots law. These differences between the three systems have been a fertile source of conflicts, but not the only source. Even where rules of jurisdiction are similar - as those of England and Wales on the one hand and Northern Ireland on the other - they allow the assumption of jurisdiction on multiple grounds; for that reason also, concurrent custody proceedings are possible in relation to the same child.

2.3 There are also differences between Scots law and English law in their approach to the recognition of custody orders made in other jurisdictions whether within the United Kingdom or elsewhere. There are similar differences between the law of Scotland and the law of Northern Ireland. Moreover, in none of the three countries is there any provision for the enforcement without further judicial proceedings of custody orders made in other jurisdictions.

2.4 We have sought, as we were bound to seek, to harmonise the bases of jurisdiction and the disparate approaches to recognition, in order to secure as far as practicable that in future concurrent assumptions of

jurisdiction will not take place and that orders made in one part of the United Kingdom should be recognised or enforced with a minimum of formality in the other parts.

2.5 In discussing these matters we propose to consider:-

(a) the implications of the present diversity of jurisdictional rules in matters of custody; and

(b) the implications of the present limited enforceability of custody orders.

(A) DIVERSITY OF JURISDICTIONAL RULES

The general case for rationalisation and reform

2.6 The jurisdictional rules in the United Kingdom in cases involving the custody or care and control of, or access to, children are diverse and follow no clear pattern.

2.7 In England and Wales jurisdiction to make orders as to children varies according to the kind of case in which the question arises. In wardship cases jurisdiction is based on nationality, ordinary residence or mere presence (because nationality, residence or presence are deemed to entail a duty of allegiance and thus to imply the Crown's right to protect the liege). Custody disputes also arise in proceedings for divorce (or nullity or judicial separation) and in those proceedings jurisdiction is based on the domicile or habitual residence of a parent. However, where an issue as to custody or care and control of children arises in a county court or magistrates' court, jurisdiction is based on the residence of one of the parties within the district or area of the court.

2.8 In Northern Ireland the provisions about jurisdiction are not unlike those in England and Wales but there are differences nonetheless, particularly in relation to summary jurisdiction.

2.9 In Scotland the Court of Session's jurisdiction is based on domicile of the child (for a custody petition) or domicile or habitual residence of a parent (for orders made in consistorial proceedings). The jurisdiction of the sheriff court is in the main based on the residence within the sheriffdom of one of the parties to the proceedings; but in separation proceedings it is also necessary that one of the parties to the marriage should be domiciled or habitually resident in Scotland.

2.10 The diversity of jurisdictional rules and their multiplicity are factors of which unscrupulous parents can take advantage and the mischief done can be very serious. Cases occur[1] in which children are taken from one country to another with the aim of evading compliance with custody orders already made or frustrating custody proceedings which are anticipated or already under way. The aim may also be to institute fresh proceedings in a forum in which one of the parties hopes to derive tactical advantage from the bases on which that forum proceeds, from the substantive law which it administers or from the procedural rules under which it acts. Such action creates confusion and uncertainty and causes unnecessary anxiety and expense. It often gives the kidnapper an unfair advantage. There is a standing temptation to the parent who feels he has a weak case to chance his luck by stealing away with the child and then invoking a legal system more to his liking.

2.11 The existing bases of jurisdiction are the product, not of any rational scheme, but of accidents of legal history. Taken as a whole, they foster rather than avoid concurrent assumptions of jurisdiction and the risk of conflicting judgments by courts in different United Kingdom countries. We demonstrate this in Part III below, and we criticise each of the existing bases of jurisdiction in considerable detail.[2]

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1 See paras. 3.9 - 3.20, below.

2 See paras. 3.40 - 3.69, below.

The appropriate solution: unified rules of jurisdiction or pre-eminent court?

2.12 The appropriate solution, in our view, is to establish unified rules of jurisdiction throughout the United Kingdom. The main alternative solution would be to retain, for the ordinary case, those rules of jurisdiction presently applied in the three legal systems of the United Kingdom, but, in cases of conflict, to require that other courts defer to the jurisdiction of a court indicated by a rule or rules of priority applying throughout the United Kingdom.

2.13 The alternative approach, the selection of a pre-eminent court, makes for less radical change than our preferred solution, namely, unified bases of jurisdiction. In England and Wales, "the pre-eminent court approach", while permitting the courts to make orders where one of the existing wide bases of jurisdiction is satisfied, for example if the child is of British nationality, or if he happens to be present in the court's jurisdiction, would require the court to defer to the pre-eminent court.

2.14 The argument for retaining wide bases of jurisdiction is that the law should favour ease of access to whatever court may seem to the parties to be convenient, particularly if the parties agree. These considerations apply with equal force to Northern Ireland, where the bases of jurisdiction resemble those in English law, but not to Scotland, because under Scots law the bases of jurisdiction (domicile and, only in emergencies, presence) are much narrower. Those who support the retention of wide bases of jurisdiction in England and Wales and in Northern Ireland in order to favour ease of access to the courts of those countries must, for consistency, also argue for the extension of those rules to Scotland in place of the existing rules of jurisdiction obtaining there. If the bases of

jurisdiction in Scotland were so widened, the risk of concurrent assumptions of jurisdiction within the United Kingdom would be greatly increased.

2.15 The arguments in favour of adopting unified rules of jurisdiction throughout the United Kingdom (which are also arguments against "the pre-eminent court approach") include the following:-

(a) Concurrency of jurisdiction is better prevented than cured. Unified rules of jurisdiction could be so chosen as to prevent conflicts arising.

(b) Ease of access to the court is an argument relating to the selection of jurisdictional criteria under either approach. Unified rules of jurisdiction could be chosen so as to favour ease of access to a convenient forum.

(c) The existing bases of jurisdiction in England and Wales and Northern Ireland are considered to be too wide and have been one of the main causes of conflicts within the United Kingdom. The primary basis of jurisdiction in Scotland (domicile), though less wide, nevertheless contributes to conflicts by its divergence from the bases applying in the other parts of the United Kingdom. It is impossible to defend the retention of such divergent bases within the United Kingdom.

(d) There is no incompatibility between the rationalisation of the existing bases of jurisdiction and securing the welfare of the individual child, because all courts in the United Kingdom are required to secure and can adequately safeguard the welfare of the child.

(e) Quite apart from the desirability of resolving conflicts, the existing rules of jurisdiction are defective in the sense that they do not point to a forum with which the child has appropriate long-term connections.[3]

2.16 In our view, the arguments in favour of "the pre-eminent court approach" are outweighed by the disadvantages, and by the arguments in favour of unified rules of jurisdiction. Unification of the rules of jurisdiction would eliminate almost, if not totally, the possibility of courts in different parts of the United Kingdom exercising jurisdiction concurrently, and thus will reduce greatly the temptations now offered to the kidnapper. For these reasons, we think that there should be unified rules of jurisdiction throughout the United Kingdom. We shall consider in our second paper whether the jurisdictional rules proposed in this paper should be adopted in regard to cases where a United Kingdom court and a foreign court claim jurisdiction.

The test for the unified rules of jurisdiction

(a) The primary ground for assuming jurisdiction: habitual residence of the child

2.17 In Part III below we discuss in detail the principles to which rules of jurisdiction should give effect

3 Ibid.

and we discuss a number of different bases of jurisdiction for which unified rules might provide. We have formed the view that the habitual residence of the child within one of the three parts of the United Kingdom should become the primary basis on which the courts of that part of the United Kingdom should exercise jurisdiction.

2.18 There is, however, a risk that unless habitual residence is defined with some particularity it could, in this context, perpetuate the very problems we are anxious to eliminate. If a parent or other kidnapper were to take a child away from a country where proceedings are pending he could, by alleging or proving a change in the child's habitual residence, achieve two unfair advantages:-

(a) he could ensure that the pending proceedings were brought to an end for lack of jurisdiction; and/or

(b) he could start fresh proceedings himself based on the child's new habitual residence.

2.19 To meet the first situation, we propose that the test of habitual residence should be applied as at the date of commencement of the original proceedings.[4] To meet the second, we propose a definition of habitual residence which postpones the date of acquisition of habitual residence in those cases where a child is removed either against the will of the other party to the original proceedings or in breach of an order of the original court.[5] These two proposals qualify our conclusion that the child's habitual residence should become the primary basis of

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4 See para. 3.74, below.

5 See para. 3.76, below.

jurisdiction.[6] We would, of course, welcome comments on these proposals.

(b) Additional grounds for assuming jurisdiction

2.20 We have further formed the view that there should be two additional grounds of jurisdiction:-

(i) To deal with matrimonial jurisdiction, we suggest that any United Kingdom court which has jurisdiction in proceedings for divorce, nullity or judicial separation should also have jurisdiction in respect of children of the family, irrespective of their habitual residence and irrespective of any earlier proceedings elsewhere.[7] We further suggest that this jurisdiction should preclude any other court from making a custody order until six months after the order for custody has been made in the matrimonial proceedings.[8]

(ii) We suggest that the court should have an emergency jurisdiction, by which we mean that any court should, on the basis of the child's physical presence at the commencement of the proceedings, have an unfettered discretion to make a temporary order that is essential for the immediate welfare of the child, but that the order so made should last only until replaced by an order of the courts with matrimonial jurisdiction or jurisdiction based on the habitual residence of the child.[9]

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6 See para. 3.78, below.

7 See para. 3.34, below.

8 Ibid.

9 See para. 3.95, below.

We also discuss later[10] without coming to any firm conclusion whether it would be appropriate for the court to be able to assume jurisdiction by the consent of the parties.

2.21 Again we would welcome comments in the context of our two specific provisional proposals at paragraphs 3.34 and 3.95 below and the detailed discussion of jurisdiction by consent at paragraphs 3.79 to 3.87 below.

Habitual residence as a justiciable issue

2.22 In the light of what we have said so far, there is one further point which we feel we should mention. When under the rules we suggest a court is invited to exercise its jurisdiction on the basis that the child is habitually resident within a particular part of the United Kingdom, it will be necessary for the court to determine whether the child is so resident. That question could thus become a justiciable issue, but we think that such cases will be rare and will not give rise to difficulty. Moreover, if the consent of the parties were acceptable as well as the habitual residence of the child as a basis on which jurisdiction may be founded, then there will be further cases in which it will be unnecessary to reach a deliberate conclusion as to where the child is habitually resident.

Co-operation between courts

2.23 Although our proposals would reduce the risk of concurrent proceedings relating to the same child, such concurrent proceedings may still take place. This could arise:-

(a) because of the temporary priority given to matrimonial proceedings;[11]

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10 See paras. 3.79 - 3.87, below.

11 See para. 2.20(i), above.

(b) because of a change in habitual residence or a dispute as to where the child's habitual residence was at one or more relevant times; or

(c) because while proceedings in one court are still pending, fresh proceedings are started in a different court and that court has jurisdiction by consent (this case will arise only if jurisdiction by consent is to be permitted).[12]

2.24 A similar need to reduce the risk of concurrent proceedings arose in the context of the Domicile and Matrimonial Proceedings Act 1973 under which jurisdiction in divorce can be based on the domicile of one party (and since that Act a wife's domicile is not necessarily that of her husband) or the habitual residence of one party, so that there could be in theory four possible courts with jurisdiction. In the Schedules to the 1973 Act there were erected parallel systems whereby one court could, or in certain circumstances was bound to, defer to another. Roughly similar provision will be needed here too if our proposals are accepted and we put forward a scheme in Part V below.

(B) LIMITED ENFORCEABILITY OF ORDERS

The general case for reform

2.25 A custody or wardship order made by a court in one United Kingdom country is not automatically accorded recognition by the courts of other parts of the United Kingdom and is not recognised and enforced by those courts as binding upon them. The issue of custody may therefore in theory, and frequently in practice, be fought a second

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12 See para. 2.20, above.

time even though a custody order has been made after a thorough and fair investigation of the facts and although both courts concerned treat the welfare of the child as the first and paramount consideration in deciding the merits of the case.[13] There are different approaches by the different courts in the United Kingdom as to the extent to which the earlier decision is to be respected.

2.26 In England and Northern Ireland once jurisdiction is assumed, the court treats the welfare of the child as the paramount consideration in deciding whether to exercise or decline the jurisdiction which it has. The existence of a foreign or United Kingdom custody award is merely one factor to be taken into account in determining the course which best promotes the child's welfare.[14] However wisely the English courts exercise their discretion to respect the custody orders of other courts, the fact that they have no duty to enforce them may, and it is understood does, encourage the evasion of orders made in other jurisdictions by removing the child to England. In Scotland, pre-eminence is accorded to the decree of the court of domicile,[15] but in recent cases it has been emphasised that while the Court

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13 Guardianship of Infants Act 1925, s.1 (for Scotland); Guardianship of Minors Act 1971, s.1 (for England and Wales); there is no similar provision in Northern Ireland, but the Guardianship of Infants Act 1925, s.1 (and/or the Guardianship of Minors Act 1971, s.1) has been generally regarded as declaratory of the law: see the Report of the Committee on the Supreme Court of Judicature of Northern Ireland (1970), Cmnd. 4292, para. 142.

14 See Re B's Settlement [1940] Ch. 54; McKee v. McKee [1951] A.C. 352.

15 See Radoyevitch v. Radoyevitch 1930 S.C. 619; Ponder v. Ponder 1932 S.C. 233; cf. Babington v. Babington 1955 S.C. 115; Oludimu v. Oludimu 1967 S.L.T. 105.

of Session will normally give effect to such a decree, the court must be satisfied that to do so would be in the best interests of the child.[16]

2.27 The Hodson Report adverted briefly to the fact that there is "no reciprocal enforcement of orders for custody or wardship made in the various parts of the United Kingdom",[17] and recommended a system of enforcement following registration as in the case of maintenance orders.

The main problem and suggested solution

2.28 The main problem is that of reconciling the duty of the court in which recognition is sought to recognise an extraneous custody order with its general duty to secure the welfare of the child. This problem may be a real one in the case of orders emanating from foreign courts; but it is largely irrelevant in the United Kingdom context, because all the United Kingdom courts are required to give primacy to the welfare of the child. It is true that circumstances may change but our proposals allow for a shift of jurisdiction if, after a period of time, the child's habitual residence has changed. For any residual problems or cases of urgency, we propose an emergency jurisdiction in the courts of the place where the child happens to be.

2.29 The detailed proposals which we make to enable a custody order to be recognised and enforced in other parts of the United Kingdom are set out in Part IV below. Their

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16 See Sargeant v. Sargeant 1973 S.L.T. (Notes) 27 (which concerned a child resident and domiciled in England removed unilaterally to Scotland during a period of access and within 2 months of an application to vary a custody order of a magistrates' court); see also Kelly v. Marks 1974 S.L.T. 118.

17 Report of the Committee on Conflicts of Jurisdiction Affecting Children (1959), Cmnd. 842, para. 56.

essential feature is that of speed and informality since on matters affecting custody of a child this may often be of the essence. In the context of the proposals in Part IV we will again welcome comments.

PART III: PROPOSALS ON THE BASES OF JURISDICTION

Introductory

3.1 In this Part, we examine the grounds on which the courts of the various parts of the United Kingdom exercise jurisdiction in regard to the custody of children and we make provisional proposals for reform. In England and Northern Ireland there subsists, alongside the jurisdiction to make custody orders under that name, the ancient jurisdiction to make a child a ward of court. When a child is made a ward, custody vests in the court and the court may entrust care and control to a named person. In this and in many other parts of this paper we use the expressions "custody" and "custody order" in a wide and non-technical sense as including those aspects of wardship and wardship orders which relate to control over the person of the child.[1]

Proposals in this paper are confined to "United Kingdom cases"

3.2 We shall be proposing uniform rules for the assumption of custody jurisdiction by the courts of the various parts of the United Kingdom, with the object of eliminating conflicts between those courts. Our present proposals are intended to apply only to cases which may properly be described as United Kingdom cases. How are those cases to be defined? As will appear later,[2] one of our proposals for a new basis of jurisdiction in the United Kingdom is that the courts of that part of the United Kingdom where a child habitually resides should have jurisdiction over matters of custody. It is our provisional

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1 In certain contexts, however, for the sake of clarity, we refer to both custody and wardship proceedings.

2 See para. 3.78, below.

conclusion that the most convenient definition of a "United Kingdom case" is a case where the child is habitually resident in some part of the United Kingdom. We therefore adopt that definition and all our proposals in this paper are confined to United Kingdom cases as so defined. The proposals are not intended to affect in any way the rules of jurisdiction at present observed in the various parts of the United Kingdom in cases which are not United Kingdom cases. Consideration of that matter is reserved for our second paper.

The main questions relating to jurisdiction

3.3 The main questions in relation to jurisdiction are:-

(a) On what grounds should jurisdiction be assumed by the courts of the various parts of the United Kingdom in respect of the custody of children?

(b) Where there are grounds on which more than one court could assume jurisdiction how does one decide which is the right court?

3.4 These broad questions will have to be answered, but for the purposes of analysis it is perhaps helpful to break them down into questions of a more practical nature, namely:-

(i) Where a child[3] is not already subject to any custody order, which United Kingdom court should be able to make one?

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3 In Scots law girls under the age of 12 and boys under 14 are called pupils. For children over those ages but still under 18, the term "minor" is used. In England and Northern Ireland, on the other hand, that term is used to denote any person under 18; no legal distinction material to the matters now under consideration is drawn between persons who have not reached that age. In this paper we use the term "child" to mean any person under 18.

(ii) Where a child is subject to a custody order, which United Kingdom court should be able subsequently to vary or revoke that order, or to make a new order superseding that order?

(iii) In what circumstances and to what extent should a custody order of one United Kingdom court prevent another United Kingdom court from assuming jurisdiction itself?

3.5 Very different approaches are adopted by courts in different parts of the United Kingdom, and indeed by different courts in the same part of the United Kingdom, to the assumption of custody jurisdiction. These divergences of approach seem difficult to justify and in the past they have led to conflicts of jurisdiction between courts in different parts of the United Kingdom. Further, conflicts can be caused because the issue of custody of a child may arise in the course of other proceedings for which jurisdiction is, or may be, assumed on a basis different from that applicable in custody cases.

(A) ANALYSIS OF THE EXISTING CONFLICTS

The categories of conflicts

3.6 For our purposes, the conflicts may be classified into two main categories:-

(a) conflicts arising from the adoption in different countries of different grounds of jurisdiction in custody proceedings; and

(b) conflicts of jurisdiction between matrimonial proceedings in one country and custody proceedings in another.

3.7 There is also a third category, which stems from a difference in substantive law. In this case the difference relates to capacity to marry, and it produces special problems associated with the enforcement in Scotland of orders restraining English wards of court from marrying there. This problem is dealt with at Part IV below.

Conflicts between custody cases

3.8 The first category of conflicts[4] arises from differences between the grounds of jurisdiction adopted respectively by the courts in England,[5] Northern Ireland and Scotland. In England, and in Northern Ireland, the High Court adopts a variety of grounds of jurisdiction including the nationality of the child, its ordinary residence in England or Northern Ireland (as the case may be) or even its mere presence within the jurisdiction.[6] They differ widely from those adopted by the Scottish court, which bases jurisdiction primarily on the child's domicile in Scotland,[7] and assumes jurisdiction on the ground of mere presence only in cases of emergency.[8] As a result, concurrent proceedings and conflicting decisions occur from time to time in the case of children present or resident in England or Northern Ireland but domiciled in Scotland. Conflicts

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4 See para. 3.6(a), above.

5 For brevity, henceforth we use the term "England" to refer to England and Wales.

6 Re P. (G.E.) [1965] Ch. 568 (C.A.); see para. 3.57 and n.86, below. The various grounds of jurisdiction adopted in England, Scotland and Northern Ireland are set out and discussed in paras. 3.40 - 3.69, below.

7 See, e.g., Kitson v. Kitson 1945 S.C. 434; Babington v. Babington 1955 S.C. 115.

8 Ponder v. Ponder 1932 S.C. 233, 238; McShane v. McShane 1962 S.L.T. 221, 222.

between England on the one hand and Northern Ireland on the other are rarer, partly because of the greater similarity in jurisdiction; nevertheless they can, and do, occur.

3.9 Over the years the most fertile source of conflicts has been the divergence of approach (which crystallised in the late nineteenth and early twentieth centuries following the cases of Johnstone v. Beattie[9] and Stuart v. Moore[10]) between the wardship jurisdiction of the English High Court, formerly exercisable in Chancery, and the Court of Session's custody jurisdiction. These decisions caused resentment in Scotland.[11]

3.10 In Johnstone v. Beattie[12] testamentary tutors (i.e. personal guardians) of a child had been appointed by the father, a domiciled Scot. The House of Lords, by a majority of three to two, held that the appointment did not have the effect of making the tutors the guardians of the child under English law or prevent the Court of Chancery from appointing other persons as guardians of the child in

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9 (1843) 10 C. & F. 42; 8 E.R. 657; (1856) 18 D. 343.

10 (1861) 9 H.L.C. 440; 11 E.R. 799; also (1860) 22 D. 1504; (1861) 23 D. 51, 446, 595, 779 and 902; and sub nom. Stuart v. Stuart (1861) 4 Macq. 1.

11 In Stuart v. Moore (1861) 4 Macq. 1, 76-77, L.J.C. Inglis pointed out that Johnstone v. Beattie was not binding in Scotland and anyway "when it was brought under the notice of the Scotch Judges and the legal profession in Scotland... it was universally felt that... it involved a violation of the principles of international law recognized in Scotland and all the States of the Continent of Europe so direct and unequivocal, that I believe the very last thing that would ever enter into the mind of a Scotch Judge would be to follow the authority or adopt the principle of Johnstone v. Beattie."

12 See para. 3.9, n.9, above.

England. In Stuart v. Moore[13] the child was a peer of Scotland and of the United Kingdom, with estates in England and Scotland, and had resided in Scotland with his widowed mother until her death. On her death S. and M. were appointed by the Court of Chancery guardians of the child and, on a difference arising between them as to the education of the child, applied to that Court for a scheme for his education. M. and the child were at that time in England, but pending the proceedings in the Court of Chancery, M. surreptitiously removed the child to Scotland. Thereafter the English court made an order for his education in England, and the Court of Session made orders providing for his education in Scotland and interdicting his removal from the jurisdiction of the Scottish court. The House of Lords reversed the orders of the Court of Session and confirmed the order of the Court of Chancery.

3.11 Stuart v. Moore shows how a conflict between two courts both claiming jurisdiction concurrently can exacerbate the already difficult problems between parents or guardians. Fortunately, in recent years, comity has largely prevailed in relations between the High Court and the Court of Session, and judges have stressed that:-

> "Conflict between those two courts is entirely out of the question. Each acts in the manner which it considers right as occasion arises. Neither court is avid of jurisdiction, and neither court will disclaim the jurisdiction with which it is entrusted."[14]

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13 See para. 3.9, n.10, above.

14 Re X's Settlement [1945] Ch. 44, 47, per Vaisey J.; referred to with approval by Lord Carmont in Babington v. Babington 1955 S.C. 115, 121.

But the jurisdictional rules have not changed and the avoidance of conflict depends on a degree of self-restraint on the part of the courts, the parties and their legal advisers which cannot always be attained.

3.12 There have been a number of reported cases in the last 30 years, of which Babington v. Babington[15] is perhaps the best illustration, of the conflicts that can be caused. Spouses domiciled in Scotland, where the matrimonial home was situated, separated and the wife went to live in England. The child of the marriage, a girl of eleven, was at a boarding school in England, but before the separation had normally spent her holidays with her parents in Scotland. The wife applied to have the child made a ward of court in England with the result that the child could not by English law be removed out of England without the authority of the High Court. The husband petitioned the Court of Session for custody, and applied for interim access to the child, in Scotland, during the Christmas holidays. The wife applied to the Court of Session to sist the proceedings on a plea of forum non conveniens. The Court of Session rejected the wife's application upon the view that the court of the domicile has a pre-eminent jurisdiction:-

> "... the mother has only been able to invoke the English Court of Chancery because the person of the child is at present within the English jurisdiction. It is in such circumstances that the mother asks this Court to abdicate its function, which may fairly be called positive and permanent, in favour of a forum which can only exercise a temporary and protective jurisdiction dependent on de facto residence in England. In the eye of international law it is only the decision of this Court which is entitled to the respect due to a Court entitled to deal with a matter of status and having the validity of a decision in rem."[16]

15 1955 S.C. 115; see also the Hodson Report (1959), Cmnd. 842, para. 39.

16 1955 S.C. 115, 121, per Lord Carmont; followed in Oludimu v. Oludimu 1967 S.L.T. 105, 107.

The Court of Session granted the husband's motion for access and the husband then applied to the English court for leave to take the child out of England for the short period of access. The wife opposed the application and herself sought an order for leave to take the child to Switzerland for a holiday. The English court refused the husband's application and granted the wife's request. The English court disregarded the order of the Scottish court and the Scottish court disregarded the fact that the child was an English ward of court. The English court's order prevailed merely because it could be enforced, although the child had stronger connections with Scotland where she was domiciled, had her home, and normally spent her holidays.

Conflicts between matrimonial and custody cases

3.13 Conflicts of the second category[17] arise between divorce proceedings with incidental issues of custody in one country, in which jurisdiction is based on the domicile or residence of a parent, and custody proceedings in another country in which jurisdiction is founded on some other ground.[18]

3.14 In recent years, the reported decisions suggest that the courts have usually allowed the question of custody to be settled in the divorce proceedings. In Re G. (J.D.M.)[19] a father domiciled and resident in Scotland had instituted divorce proceedings there in which he was awarded interim

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17 See para. 3.6(b), above.

18 See, e.g., Re X's Settlement [1945] Ch. 44; Robb v. Robb 1953 S.L.T. 44; Hamilton v. Hamilton 1954 S.L.T. 16; Re G.(J.D.M.) [1969] 1 W.L.R. 1001; Re S.(M.) [1971] Ch. 621.

19 [1969] 1 W.L.R. 1001.

custody of his child, then 3½ years old. The child's mother, who was resident in England, refused to comply with this order and the father sought an order in English wardship proceedings to enable the child to be removed to Scotland. Buckley J. granted the order on the view that the Scottish court was the appropriate court for the divorce proceedings and that in those proceedings "the character and behaviour of both parties in the course of their matrimonial difficulties will be bound to be examined by the court, and where the proper provision to be made for the future of this child can be best assessed in the light of all the circumstances then known to that court."[20] Thus the Chancery Division's practice of staying wardship proceedings to allow custody to be settled in divorce proceedings in the Probate Divorce and Admiralty Division was extended to cover Scottish divorce proceedings.

3.15 Re S. (M.)[21] was another case where the father was domiciled in Scotland, had initiated proceedings in Scotland against a wife resident in England, and had been awarded custody of the child in those proceedings. In this case, however, the child was with the father in Scotland. The mother sought to have her child, then aged 3, made a ward of court in England and sought an order for his return to England. Goff J. refused the application on the ground that the child was resident in Scotland and the court of the matrimonial proceedings had full cognizance of the case. This decision was reached although the court suspected that the father had deceived the mother in removing the child to Scotland and had therefore in a sense kidnapped the child.

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20 Ibid., at p. 1005.

21 [1971] Ch. 621.

3.16 There are no reported cases of the Court of Session declining jurisdiction in a custody petition in favour of English divorce proceedings because, until recently, jurisdiction in both types of proceedings was usually founded on the husband-father's domicile. The widening of the bases of divorce jurisdiction in 1973[22] has enhanced the risk of conflicts between:-

(a) custody petitions in Scotland based on the child's domicile in Scotland; and

(b) divorce proceedings in England based on the habitual residence in England, or on the English domicile, of a parent of the child.

Judicial attempts to reduce kidnapping: the discretionary test

3.17 As we have seen,[23] in wardship and certain custody proceedings in England and Northern Ireland, the courts possess jurisdiction on the basis of wide criteria such as the child's physical presence. By themselves, such criteria are too wide in the sense that they confer jurisdiction in cases where almost all the child's significant relationships are with a different jurisdiction; therefore such criteria, by themselves, encourage forum-shopping and kidnapping. To avoid the assumption of jurisdiction in inappropriate cases, the courts in England may decline to exercise jurisdiction which they otherwise possess if the welfare of the child so requires. Accordingly, in England,

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22 See the Domicile and Matrimonial Proceedings Act 1973, which introduced one year's habitual residence of either spouse as an alternative basis to domicile, and which enabled a child to derive his domicile from the independent domicile of his mother.

23 See para. 3.8, above.

two criteria may require to be satisfied: one a preliminary factual test which is easy to apply but is in itself too wide, and a second test, based on the child's welfare, which is discretionary, uncertain in its effects and much more difficult to apply but which has the advantage of flexibility. This second test has been developed considerably by the English courts in recent years.

3.18 The main development has been the summary order in kidnapping cases. It was at one time thought that where a party brought a child to England in violation of a foreign custody decree, the court had to go into the last details of the custody dispute between the parties before it could decline jurisdiction.[24] It is now clear, however, that the statutory welfare principle does not prevent the court from making a preliminary enquiry to determine whether a full investigation of the merits is needed or whether it should, instead, make a summary order for the immediate return of the children to their home jurisdiction.[25] This rule applies not merely where a foreign decree has been violated[26] but in all kidnapping cases,[27] that is, cases where the children have a settled home in one jurisdiction, and one of the parents (or another party), by some "wrongdoing" such as force, deception or stealth, removes them to England unilaterally without the consent of the other parent (or without other appropriate consents). A summary order is apparently not made where the child's presence in England is not the result of some "wrongdoing".[28]

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24 McKee v. McKee [1951] A.C. 352, 365-366 (P.C.).

25 Re L. [1974] 1 W.L.R. 250 (C.A.), where the relevant authorities are reviewed; see also Re K., The Times, 9 Mar 1976.

26 Re H. [1966] 1 W.L.R. 381 (C.A.); cf. Re E.(D.) [1967] Ch. 761 (C.A.).

27 Re T. [1968] Ch. 704 (C.A.); Re T.A. (1972) 116 S.J. 78.

28 Re A. [1970] Ch. 665 (C.A.).

3.19 In several cases, the English courts have made severe strictures against kidnapping,[29] and, in kidnapping cases, the court has on occasion been prepared to make an order for the return of a kidnapped foreign child to his foreign home and thus to restore the status quo unless satisfied that there would be harm to the child in adopting such a course.

3.20 This change in the climate of judicial opinion has taken place within the confines of the statutory welfare principle[30] which applies to the retention or abandonment of jurisdiction in kidnapping cases,[31] just as it does in relation to other questions. It has been made clear in recent decisions that, in all wardship proceedings, when all relevant factors have been taken into account, the ultimate question, which "rules upon or determines the course to be followed", is, what is in the best interests of the child?[32] In Re L.[33] the Court of Appeal explained that the same principles apply to kidnapping cases whether the court makes a full or limited enquiry and that, in the latter case, the summary order can be justified on grounds of the child's

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29 See, e.g., Harben v. Harben [1957] 1 W.L.R. 261, 267, per Sachs J.; Re E. (D.) [1967] Ch. 761, 769, per Willmer L.J.; Re T. [1968] Ch. 704, 714, per Harman L.J.; Re S. (M.) [1971] Ch. 621, 625, per Goff J.

30 See Guardianship of Minors Act 1971, s.1.

31 First applied in Re B's Settlement [1940] Ch. 54 to the exercise of jurisdiction; in Re L. [1974] 1 W.L.R. 250, 263, Buckley L.J. stated (obiter) that the section applies to applications for a summary order for the return of a kidnapped child; see also Re K., The Times, 9 March 1976.

32 J. v. C. [1970] A.C. 668 esp. per Lord Macdermott at pp. 710-711.

33 [1974] 1 W.L.R. 250.

welfare:-

> "To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grown rapidly. An order that the child should be returned forthwith to the country from which he had been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of that country may well be regarded as being in the best interests of the child."34

This passage clearly implies that summary orders returning a kidnapped child are justifiable where the child's severance from his native country is likely to be psychologically disturbing to him.

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34 Ibid., per Buckley L.J. at pp. 264-265.

Critique of the discretionary test

3.21 The emergence of a means of discouraging kidnapping, or of mitigating the unfair advantage which kidnapping can produce, by the use of the summary order is obviously material to the topics which we have to consider. The judges have, as is often the case, been confronted with a social mischief and have attempted, within the limits of the powers conferred upon them, to deal with it. The judges cannot change the jurisdictional rules which enable the parties to bring cases before them. Thus they sought to solve the problem of kidnapping mainly by asserting a discretionary power to refuse to proceed with the case. The legislature is not, however, similarly confined, and we must therefore make an assessment of the discretionary test as it has evolved in order to see whether it is fully satisfactory. We have come to the conclusion that it is not, and that there is a clear need for intervention by Parliament. Our reasons for this are:-

(a) Uncertainty. If all the courts in the United Kingdom were to apply broad jurisdictional rules and the discretionary refusal of jurisdiction, the result would be great uncertainty as to which court had jurisdiction in cases where proceedings were brought, whether simultaneously or successively, in different parts of the United Kingdom. Each country would have jurisdiction over children brought within its area, and would in most cases also have jurisdiction over children taken away. The resolution of the resulting conflicts would depend on a discretion exercised on the imprecise basis of an appreciation of the child's welfare in two or more jurisdictions.

(b) Fairness between the parties. In a sense a kidnapper ought "not to be allowed to get away with it", and the English courts have said that, in kidnapping cases, justice to the innocent party[35] and the kidnapper's conduct[36] are factors favouring the immediate return of the child. Nevertheless the discretionary refusal does not contain anything in the nature of a mandatory "clean hands" rule[37] requiring the return of kidnapped children, of the kind developed in the United States and now codified in section 8 of the United States Uniform Child Custody Jurisdiction Act 1968. Indeed the English courts have emphasised that it would be "wrong to suppose that in making orders in relation to children in [wardship proceedings] the court is in any way concerned with penalising any adult for his conduct".[38]

(c) Expense. This is a special aspect of unfairness between the parties. It is difficult to see why the person from whom a child has been kidnapped should be put to the trouble and

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35 Re H. [1966] 1 W.L.R. 381 (C.A.).

36 See Re L. [1974] 1 W.L.R. 250, 264, per Buckley L.J.: "The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account and may be a circumstance of great weight; the weight to be attributed to it must depend upon the circumstance of the particular case."

37 So named by Ehrenzweig, "Interstate Recognition of Custody Decrees", (1953) 51 Michigan Law Review 345.

38 Re L. [1974] 1 W.L.R. 250, 265, per Buckley L.J.; see also Re K., The Times, 9 March 1976.

expense of litigating on the merits in another country, even if a summary order is obtainable there.

(d) Ineffectiveness in practice. While the developments in English law have reduced the amount of kidnapping to some degree, they are nevertheless unlikely to provide as effective a deterrent to kidnapping and other unilateral removals as an automatic refusal of jurisdiction by operation of law. The English courts have a discretion to attach such weight as they think fit to kidnapping and it would appear that, despite judicial strictures against kidnapping, a kidnapper removing a child to England may in fact have a good chance of having his case decided on the merits in England.[39] The discretionary power to refuse to exercise jurisdiction is necessary solely or primarily because rules for the assumption of jurisdiction based on nationality, allegiance or mere presence are too wide. If more appropriate rules are selected, such a discretionary power would become both unnecessary and inappropriate.

Can strict rules of jurisdiction co-exist with the first and paramount consideration of the child's welfare?

3.22 It may be suggested that, despite the criticisms advanced at paragraph 3.21 above, the discretionary refusal of jurisdiction represents all that can be done without collision with the principle universally accepted in the United Kingdom that the welfare of the child is the first

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39 See Re E. (D.) [1967] Ch. 761 (C.A.); Re T.A. (1972) 116 S.J. 78; Re K., The Times, 9 March 1976.

and paramount consideration.[40] Promotion of the welfare of the child is, of course, the basic purpose of judicial intervention in matters of custody. However, in framing rules of jurisdiction, the legislature can, in our view, properly seek to ensure that concern for a child's welfare in particular cases does not produce a situation which will jeopardise the welfare of children generally. This points in our view to the imposition by statute of clear rules of a mandatory character which will, so far as possible, present no temptation to the parties to seek adventitious benefits by the kidnapping of children. The welfare of the child will remain a matter for the court once it has properly assumed jurisdiction and is dealing with the merits of the case. We are fortified in this view by the approach of the United States Uniform Child Custody Jurisdiction Act 1968, which provides a clear rule as to the principal basis of jurisdiction.[41]

Superior and inferior courts

3.23 In this paper, we have not expressly considered those existing rules of jurisdiction which are concerned with allocating custody cases to the appropriate inferior courts within a particular part of the United Kingdom; these rules fall outside our terms of reference.[42] In framing a new scheme for the assumption of jurisdiction and the resolution of conflicts as between the three parts of the United Kingdom, we have considered whether it would be desirable to distinguish between superior and inferior

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40 See para. 2.25, n.13, above.

41 See para. 3.63, below.

42 Some of these "local" rules of jurisdiction, however, may require to be amended or replaced in the light of our general jurisdictional proposals set out in para. 3.78, below. These matters of detail we leave for later consideration.

courts. By inferior courts, we mean the magistrates' courts and county courts in England[43] and Northern Ireland and the sheriff courts in Scotland. While it may be conceded that custody orders of the superior courts in the three United Kingdom countries should be enforceable throughout the United Kingdom, it does not necessarily follow that the same effect should be given to custody orders of sheriff courts, county courts and magistrates' courts.[44] In all three countries, custody orders of inferior courts are not binding on superior courts. Thus, in England, a magistrates' court order under the Guardianship of Minors Act 1971 or under the Matrimonial Proceedings (Magistrates' Courts) Act 1960[45] does not bind the High Court, though a High Court custody order supersedes a magistrates' court order. In Scotland, a custody order of a sheriff court does not bind the Court of Session (but a custody order made by the Court of Session may be varied or recalled in the sheriff court, if both parties agree).

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43 In England certain county courts now have divorce jurisdiction with ancillary powers in relation to the custody of children of the family, and all county courts have jurisdiction under the Guardianship of Minors Act 1971, which is, however, very rarely used.

44 In Kitson v. Kitson 1945 S.C. 434, 443, L.J.C. Cooper, obiter, said: "I see no reason ... why a pursuer should be allowed, when the defender and child are not in this country, to seek a decision from any one of some fifty Sheriff Courts in which he may be able to found jurisdiction, instead of applying to the Court of Session, which, in the case of a father of Scottish domicile, is the only Court with pre-eminent jurisdiction from the standpoint of international law."

45 The Law Commission's forthcoming Report on Matrimonial Proceedings in Magistrates' Courts (Law Com. No. 77) proposes the repeal of the 1960 Act and its replacement by legislation which would reform and rationalise the powers of English magistrates to make custody orders in matrimonial proceedings.

Application of this analogy would mean that the order of a magistrates' court which does not bind the High Court, would not bind the Court of Session either; and likewise that a sheriff court decree would not bind the High Court. In Northern Ireland a magistrates' court order under the Summary Jurisdiction (Separation and Maintenance) Act (Northern Ireland) 1945 would not bind the High Court.

3.24 We think, however, that a better approach is to treat all the courts of one United Kingdom law district as having co-ordinate authority for the purpose of inter-U.K. conflicts of law. This is the usual rule in international conventions on jurisdiction or enforcement of judgments. We think that it ought to apply within the United Kingdom where in custody matters the three legal systems bear to each other the same juridical relationship as each separately bears to foreign systems. This approach is consonant with those cases where the superior courts in Scotland have recognised, and lent their aid in enforcing, custody awards granted by the inferior courts of another United Kingdom country[46] or of a foreign country[47] where the latter had jurisdictional competence by the law of the forum. Any other rule would simply encourage or compel litigants to litigate again in a superior court whenever the inferior court's jurisdiction was challenged in a superior court elsewhere.[48]

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46 Sargeant v. Sargeant 1973 S.L.T. (Notes) 27 (Court of Session enforced a custody order of an English magistrates court where the child was domiciled and resident in England and an application for variation of the order was pending in that court).

47 See, e.g., Kelly v. Marks 1974 S.L.T. 118.

48 See, e.g., McLean v. McLean 1947 S.C. 79, where one of the parties commenced wardship proceedings after a conflict of jurisdiction arose between a magistrates' court in England and the Court of Session.

(B) CONFLICTS BETWEEN MATRIMONIAL AND CUSTODY PROCEEDINGS

Introductory

3.25 We now turn to the task of selecting appropriate criteria for the assumption of jurisdiction on a uniform basis throughout the United Kingdom. It is perhaps convenient to consider conflicts between matrimonial and custody cases[49] first, because our answer to them is simple. It is that the matrimonial jurisdiction should have primacy over any other jurisdiction as long as the proceedings for divorce, nullity or separation are pending and for a limited time thereafter.

Primacy of matrimonial proceedings

3.26 Questions of custody are frequently determined in the course of proceedings for divorce, nullity or separation, that is to say, where the principal order sought is not an order for custody. In United Kingdom systems of law, adjudicatory competence in relation to divorce, nullity or separation carries with it incidentally such competence in relation to custody. Clearly, this may lead to an assumption of jurisdiction in relation to custody in circumstances where, if custody were the main matter at issue, this assumption would be regarded as inappropriate. It is not evident, for example, that the court of the domicile or habitual residence of one parent is necessarily the ideal forum for determining the custody of a young child who may have been staying permanently elsewhere with the other parent. For reasons such as these, the Hodson Committee recommended that the courts should retain jurisdiction over custody in matrimonial proceedings except that "where proceedings as to the custody of children have been instituted in a court of pre-eminent jurisdiction

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49 See paras. 3.13 - 3.16, above.

based on ordinary residence the decision as to the future of the children should be left to that court."[50]

3.27 We suggest, nevertheless, that primacy should be given to the matrimonial proceedings for a number of reasons. Such a solution would be consistent with the court's duty to satisfy itself as to the proposed arrangements for the children before granting a decree of divorce, separation or nullity.[51] Again, the court cannot deal satisfactorily with the question of maintenance, aliment or financial provision for the children unless it knows who is to have custody of them. Moreover, the determination of a custody dispute by a court seized of divorce proceedings (which are far more common than independent custody proceedings) would tend to reduce expense by making separate custody proceedings unnecessary. In short, it is generally to the advantage of all concerned that a court dealing with the breakdown of a marriage should be able to deal with the affairs of the family as a whole.

3.28 Possible conflicts between concurrent matrimonial proceedings in different United Kingdom jurisdictions are minimised by the Domicile and Matrimonial Proceedings Act 1973,[52] which makes provision for the mandatory or discretionary suspension of proceedings in one United Kingdom jurisdiction if there are concurrent proceedings in another United Kingdom jurisdiction and for the

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50 (1959) Cmnd. 842, para. 53.

51 Matrimonial Causes Act 1973, s. 41(1) (England); Matrimonial Proceedings (Children) Act 1958, s. 8 (Scotland). In Northern Ireland, no such duty is imposed on the court.

52 See s. 5(6) and Schedule 1 (England); s. 11 and Schedule 3 (Scotland); s. 13(6) and Schedules 1 and 5 (Northern Ireland).

consequential lapse of interim custody orders made by the court which has suspended proceedings. Conflicts between divorce proceedings and concurrent independent custody proceedings could be reduced or eliminated if primacy were given to the matrimonial proceedings.

3.29 The existence, however, of an order for custody emanating from a United Kingdom court in such proceedings should not bar subsequent proceedings for custody in other United Kingdom courts indefinitely. We propose below[53] that the main basis of jurisdiction should be the child's habitual residence and further that the court of the place where the child is present should have jurisdiction in an emergency. It is thought that an ancillary custody order should only take priority over the court of the child's habitual residence for a limited period of time, say, six months and that the pre-eminence of the court of the matrimonial proceedings should not exclude the emergency jurisdiction of another court which, as we propose below,[54] would be exercisable over children present in that court's territorial jurisdiction.

3.30 We therefore consider that an appropriate solution would be as follows:-

(a) Where a United Kingdom court has jurisdiction in proceedings for divorce, nullity or separation, it should have jurisdiction, as under the present law, to make custody orders in the course of those proceedings.

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53 See paras. 3.74 - 3.78 and paras. 3.92 - 3.95, below.

54 See paras. 3.92 - 3.95, below.

(b) Except in the emergency cases to which we refer below[55] a United Kingdom court should decline to exercise jurisdiction to entertain custody or wardship proceedings either:-

(i) while proceedings for divorce, nullity or separation are continuing in another United Kingdom court; or

(ii) within six months from the date when another United Kingdom court has made its initial order as to custody in divorce, nullity or separation proceedings.

3.31 These proposals will require to be supplemented by rules regulating the way in which jurisdiction is relinquished in favour of the court of the matrimonial proceedings and the effect of relinquishment on interim custody orders. We deal with these matters in Part V below.

Variation and revocation of custody orders made in matrimonial proceedings

3.32 In all three United Kingdom countries, the courts have powers to make orders relating to the custody of children subsequent to the decree in proceedings for divorce, nullity or separation, and to vary or revoke orders for custody made during or after such proceedings. Moreover, where the court has jurisdiction in the original proceedings, it has jurisdiction in all subsequent applications for variation or revocation of the custody decree notwithstanding that the original and all other possible bases of jurisdiction have been lost. The advantages and disadvantages of these rules are rather evenly balanced. For a time, however, the court which dealt with the divorce or other proceedings, having access

55 Ibid.

to the original process, may be the most convenient court to dispose of subsequent custody applications. The vesting of jurisdiction, moreover, in that court as a pre-eminent court would tend to discourage forum-shopping and to avoid subsequent conflicts of jurisdiction.

3.33 We propose that where a United Kingdom court has made a custody order in proceedings for divorce, nullity or judicial separation, it should retain jurisdiction to vary or revoke that order or to make a fresh custody order for at least six months and, thereafter, until the court of the child's habitual residence makes a custody order regarding the child, in which case the earlier order should lapse. In other words, the court of the matrimonial proceedings should retain the power to vary or revoke its orders so long as they remain in force. The court of the child's habitual residence will have a concurrent jurisdiction which, if invoked after the lapse of the six-month period, will supersede the jurisdiction of the court of the matrimonial proceedings.

Provisional proposals

3.34 Our provisional proposals on the jurisdiction of a United Kingdom court to make custody orders in matrimonial proceedings may be summed up as follows:-

(1) Where a United Kingdom court has jurisdiction in proceedings for divorce, nullity or separation it should have jurisdiction, as under the present law, to make custody orders in the course of those proceedings.

(2) Except in the emergency cases to which we refer below,[56] a United Kingdom court should decline to exercise jurisdiction to entertain custody or wardship proceedings either:-

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56 See paras. 3.92 - 3.95, below.

(a) while proceedings for divorce, nullity or separation are continuing in another United Kingdom court; or

(b) within six months from the date when another United Kingdom court has made its initial order as to custody in divorce, nullity or separation proceedings.

(3) Where a United Kingdom court has made a custody order in proceedings for divorce, nullity or separation, it should retain jurisdiction to vary or revoke that order or to make a fresh custody order unless and until the court of the child's habitual residence makes a custody order regarding the child.

(C) CONFLICTS BETWEEN CUSTODY CASES

Introductory

3.35 As already indicated,[57] we consider that new rules for the assumption of jurisdiction in custody proceedings applying uniformly throughout the United Kingdom are required. In paragraphs 3.41 to 3.78 below, we show in detail why in our opinion each of the existing bases of jurisdiction in custody proceedings is inappropriate, we examine alternative grounds and we suggest, with reasons, new and different rules of jurisdiction in such proceedings.

Criteria for evaluating the rules for the assumption of jurisdiction

3.36 Before deciding a matter so closely affecting the welfare of children as the appropriate rules for the assumption of jurisdiction, on which the consequential recognition and enforcement of custody orders will depend,

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57 See paras. 2.6 - 2.16, above.

it may be helpful to consider the objectives which these rules should attempt to attain. These, in our view, should include the following:-[58]

(a) The rules of jurisdiction should point to a forum with which the child and, preferably, the other persons concerned have the closest long-term connections. A decision as to custody affects vitally the relationship of a child with its parent or parents, and with other members of its family. It seems right that the decision should be taken by a court closest to the relationships in the family where the child has been living; among other things, if that court applies its own law to those relationships, the persons concerned are likely to be more familiar with that law, and to have accepted it as theirs, than with any other system of law with which there is only a transient connection.

(b) The rules of jurisdiction should point to a forum which is convenient for the persons concerned. This suggests not only that the court should be accessible to the parties, but that the relevant evidence may be adduced there without undue difficulty. Custody decisions involve an assessment by the court of the matters affecting the welfare of the child, and this assessment is made after hearing evidence adduced by the parties and after considering reports relating to the family circumstances of the child, his education and personal relationships.

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58 In framing these objectives, we have found the following two works to be useful: Leonard G. Ratner, "Child Custody in a Federal System", (1964) 62 Michigan Law Review 795, esp. at pp. 808-810 and the United States Uniform Child Custody Jurisdiction Act 1968.

(c) The rules allocating jurisdiction should be clear and easy to apply. The parties should be able to ascertain the appropriate forum with reasonable certainty. Clarity may also ensure that the substantive issue of the child's welfare is not lost sight of in unnecessary disputes about jurisdiction.

(d) The rules of jurisdiction, moreover, should point to a forum whose jurisdiction will be recognised abroad. This is not a matter upon which the United Kingdom can legislate, but in the selection of the appropriate criteria, considerable weight should be given to their international acceptability. There would be little point in resolving conflicts in matters of custody within the United Kingdom, if internal conflicts were transformed into external conflicts.

(e) Conversely, and for the same reasons, the grounds of jurisdiction should, preferably, be of a kind which the courts of the United Kingdom would be prepared to recognise if applied by foreign courts.

(f) The basis of jurisdiction should not be so wide that forum-shopping is encouraged or that conflicts of jurisdiction arise.

(g) Nothing in the rules allocating jurisdiction should preclude the court of the place where the child is physically present from taking immediate measures to secure the protection of the child in cases of emergency or urgency.

3.37 In some respects these criteria compete with each other in the sense that, if greater weight is attached to one rather than another, different bases of jurisdiction will be selected. But while different views may be entertained as to the relative weight or importance of those criteria, it is hoped that there will be general agreement that some weight should be attached to each of them.

3.38 It will be observed that the "welfare of the child" is not included expressly among the criteria set out above. While the welfare of the child is the first and paramount consideration for the court having jurisdiction in custody proceedings, and concerned with the merits of the case, this principle is not, in our view, an appropriate criterion for the assumption of jurisdiction and we have already referred to some of the disadvantages of treating it as such.[59]

3.39 We have considered whether there should be included as a separate criterion that the rules should point to a forum with which the child and the other persons concerned are expected to have the closest connections in the future. We have rejected this idea because its incorporation might be thought to encourage kidnapping and because a liberal interpretation of the first of our criteria will, in our view, be sufficient to secure the desired result.

Analysis of the existing grounds of jurisdiction in custody proceedings

(a) Introductory

3.40 We now turn to examine the existing grounds of jurisdiction in custody proceedings. These grounds consist of nationality or allegiance, domicile, "home", physical presence, and tests based on residence.

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59 See para. 3.21, above.

(b) Nationality or allegiance: an unsuitable test

3.41 In England and Northern Ireland, the nationality of the child is a ground of jurisdiction in wardship proceedings,[60] but the power of the court will rarely be exercised if the child is not physically present within the jurisdiction.[61] Nationality is not a ground of jurisdiction in Scotland, though it is in some European countries, including, for example, Austria, Belgium, France, Germany, Italy, the Netherlands and Switzerland. The Hague Convention of 5 October 1961 gives the courts of a child's nationality jurisdiction in custody matters which may be exercised so as to supersede awards by the courts of the child's habitual residence and orders of the court of nationality must be recognised by contracting states.[62]

3.42 While the nationality of the child as a criterion has the great merit of easy ascertainment, it is thought that it ought not to be a ground of jurisdiction in custody cases because it does not necessarily point to a forum:-

(a) which is fair and convenient for the parties;

(b) with which the child has subsisting practical, as opposed to legal, connections;

(c) which can effectively enforce its order; or

(d) which may be adopted by United Kingdom courts without creating the risk of conflicts of jurisdiction within the United Kingdom.[63]

We therefore reject nationality as a basis of jurisdiction.

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60 See Re P. (G.E.) [1965] Ch. 568 (C.A.).

61 Ibid.

62 Articles 4 and 7.

63 Cf. the Hague Convention of 5 October 1961, Article 14, which applies special rules where the domestic law of the child's nationality consists of several legal systems.

3.43 A fortiori, we think that the concept of allegiance to the Crown in the absence of nationality (which is a test of jurisdiction in wardship proceedings)[64] should also be rejected as a basis of jurisdiction.

(c) Domicile: an unsuitable test

3.44 The child's domicile is the primary ground of jurisdiction in independent custody proceedings in Scotland, at any rate in the Court of Session.[65] It is also the primary test of the jurisdictional competence of other courts in such cases.[66] In England and Northern Ireland, domicile is not a direct ground of jurisdiction in custody cases,[67] but it may be one factor to be weighed in the balance when deciding whether the court should exercise or decline jurisdiction which it possesses on some other ground.[68] In the United States it was formerly thought that only the courts of the domicile of the child could make custody orders.[69] The Second Restatement conceded jurisdiction also to the courts of the place where the child, or both parents, are physically present.[70] Domicile, however, is not adopted by the United States Uniform Child Custody Jurisdiction Act 1968 which prefers a residence-based test.[71]

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64 Re P. (G.E.) [1965] Ch. 568 (C.A.).

65 See para. 3.8, above.

66 Radoyevitch v. Radoyevitch 1930 S.C. 619; Ponder v. Ponder 1932 S.C. 233.

67 Re P. (G.E.) [1965] Ch. 568 (C.A.).

68 See, e.g., Re A. [1970] Ch. 665, 674; Re S. (M.) [1971] Ch. 621, 625.

69 See Restatement of the Law of Conflict of Laws (1934), Ch. 5, paras. 144-146.

70 Restatement of the Law (Second) Conflict of Laws (1971), Vol. 1, Ch. 3, para. 79.

71 See para. 3.63, below.

3.45 The Hodson Report unanimously rejected domicile as a test of pre-eminent jurisdiction partly on the ground that "in doubtful cases difficult and debateable questions of law and fact arise, especially of intention, the solution to which may be lengthy" and partly on the ground that they were dealing with "in effect conflicts of domestic jurisdiction and not conflicts of international law."[72] The second argument is less convincing[73] since the selected criterion should preferably be one which is likely to be recognised abroad.

3.46 There were at one time several rational and practical justifications for selecting the child's domicile as the primary ground of jurisdiction in custody proceedings. The selection of domicile in Scotland meant that the whole complex of rules governing the child's personal status and the guardianship of his property and person were referable to the same law. Moreover, for so long as a man's wife and children had domiciles of dependence derived from his domicile, the relationship of all members of the family, their rights of succession inter se, (in Scotland) the appointment of guardians and judicial factors, questions of legitimacy, and jurisdiction in proceedings for divorce, nullity or separation were governed by the same law, the law of the father's domicile.

3.47 These advantages have, however, been whittled away by legal developments, culminating in the Domicile and Matrimonial Proceedings Act 1973 which applies throughout the United Kingdom. Under that Act,[74] the parents of a

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72 (1959) Cmnd. 842, para. 44.

73 See O.Kahn-Freund, "Conflicts of Jurisdiction affecting Children", (1960) 23 M.L.R. 64, 66.

74 See ss. 1 and 4.

legitimate child may have different domiciles and the child's domicile is that of his father only until the father and mother live apart, when the child's domicile may be that of the mother if he has his home with her. Thus the law of the father's domicile no longer governs the relationships of the whole family.

3.48 Moreover, at the time when (in Scotland) the rule giving pre-eminence to the domiciliary court was fixed[75] that court had exclusive jurisdiction in divorce and certain other proceedings. As a result, however, of the gradual statutory introduction of residential grounds of jurisdiction in divorce and similar proceedings, now based throughout the United Kingdom by the Domicile and Matrimonial Proceedings Act 1973 on one year's habitual residence by either spouse,[76] the claim of the domiciliary court to be the uniquely appropriate forum in "permanent" family matters is no longer tenable.[77] Nevertheless, since a person has only one domicile, its use as a test of jurisdiction would prevent conflicts of jurisdiction.[78]

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75 Barkworth v. Barkworth 1913 S.C. 759; Westergaard v. Westergaard 1914 S.C. 977.

76 1973 Act, s. 5 (England); s. 7 (Scotland); s. 13 (Northern Ireland).

77 Cf. the remarks of Lord Dunpark in Kelly v. Marks 1974 S.L.T. 118, 123: "The Court of Session now exercises jurisdiction in consistorial and custodial questions on grounds other than that of the husband's domicile in Scotland, and a decree of custody pronounced by a foreign court of the husband's domicile has lost some of its former sanctity. It may be that as a result of these developments the common law jurisdiction of this court ... has been extended ... to the point of making a custody order contrary to the foreign decree" (scil. of the domiciliary courts).

78 Cf. Re P.(G.E.) [1965] Ch. 568, 592, per Russell L.J.: "... there is something to be said for the view that [the Scottish] approach derives from an attempt to resolve internal conflicts in the United Kingdom".

3.49 An important disadvantage of domicile as a test is that, since the child's domicile may ultimately depend on the domicile of its father or mother, and that domicile may be ascertained by artificial rules including the rules of reversion to a domicile of origin, there is no certainty that the use of domicile as a criterion will point:-

(a) to a convenient court in a country with which the child has any real connections;[79]

(b) to a court which can effectively enforce its orders; or

(c) to a forum whose adjudicatory competence will be recognised in countries other than "common law" countries.

3.50 Domicile suffers also from the major disadvantages that, in particular cases, its ascertainment may be difficult and may occasion delay and expense on what is a mere technical matter. The domicile of most children will depend upon the intentions of others and the evidence of these intentions may be difficult to obtain. In doubtful cases much may depend upon questions of fact often difficult to ascertain and always difficult to evaluate as throwing light upon intention. Since in custody proceedings time is often of the essence, domicile is not an ideal ground

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79 See the example given by Pearson L.J. in Re P.(G.E.) [1965] Ch. 568, 589-590: "A child of foreign nationality but English domicile of origin might have lived abroad for many years and have no intention of returning to England, and yet have his English domicile of origin surviving or reviving if he had not acquired or had lost a domicile of choice. The answer made in argument is that the jurisdiction would not be exercised if the infant, though technically domiciled in this country, had ceased to have any real connection with this country. That answer, however, does not wholly remove the objection to a theory which asserts the existence of jurisdiction in a case where its existence would be absurd".

of jurisdiction.[80]

3.51 Under the Domicile and Matrimonial Proceedings Act 1973, a legitimate child's domicile may now be derived from his mother's domicile if he has his home with her.[81] Under the previous law of Scotland, the father could control custody jurisdiction by moving to another country to live there permanently even if he did not take the child with him. Moreover, if the mother made her home elsewhere with the child and the father stayed in Scotland, the Scottish courts retained jurisdiction even though the child had lost all connections with Scotland. The 1973 Act removes this element of discrimination against the mother, but it gives control of the child's domicile, and therefore under Scots law control of custody jurisdiction, to a parent who moves to another country with the child to live there permanently. The test of domicile may therefore encourage kidnapping and can be unfair as between the parties.

3.52 For these reasons we think that domicile should not be a basic ground of jurisdiction in custody proceedings. This conclusion would entail an amendment of the law of Scotland but not of the law of England or Northern Ireland.

(d) "Home": an unsuitable test

3.53 The late Mr. Michael Albery, Q.C., in his Note of Dissent to the Report of the Hodson Committee, proposed

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80 See the criticisms made by the Court of Appeal in Re P. (G.E.), above, at p. 583: "The tests of domicile are far too unsatisfactory"; at p. 589: "... the rules for ascertaining domicile are in some respects artificial and unrealistic and would produce strange results if domicile were taken as a basis of jurisdiction to make a wardship order"; and at p. 592: "Domicile is an artificial conception..."

81 Section 4.

that the test of jurisdiction in custody should be the last joint home of the child's parents. This he advocated on the ground that "the cases where it will be wholly inapplicable will be very rare, and cases where any uncertainty arises in its application almost equally rare. This is of great importance because it is most undesirable that there should be a preliminary contest as to jurisdiction if this can possibly be avoided".[82] The main advantage of this test is that it would effectively prevent forum-shopping once a dispute between parents as to custody had arisen and enable the parties to reach an amicable arrangement as to the custody of their children without fear of prejudicing future questions of jurisdiction.

3.54 But, while in many cases the last joint home of the child's parents would be a satisfactory test, it is not thought that it would fulfil adequately the requirements of the law in this domain. The criterion is more suitable as a test of pre-eminence for resolving conflicts between courts which possess jurisdiction under other criteria, such as physical presence and domicile.[83] It is not suitable as the primary test for assuming jurisdiction which could be invoked even in the absence of conflicts, that is to say, as a test replacing physical presence in England and domicile in Scotland. It does not seem appropriate for orphans, or in other cases where one of the litigants is not a parent, and would be inapplicable where the parents have never lived together, as in most custody proceedings affecting illegitimate children.

3.55 In any event, the last joint home of the parents does not necessarily achieve the objective of the convenience of the parties and witnesses, for the parents' last joint

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82 (1959) Cmnd. 842, para. (9).

83 It was a test of this kind which Mr. Albery had in mind in making his suggestion.

home may have been in a country which both of them have left many years previously, which has no interest to assume jurisdiction, and which can no longer provide relevant evidence as to the substantive issues. For this reason, also, it does not point to a forum which can effectively enforce its orders. The concept, moreover, is not used as a test in other United Kingdom proceedings to which custody claims are ancillary, nor is a test based on "home" likely to be accepted by other countries, which find the nuances of the concept difficult to appreciate. Finally, the concept of "home" though suggested by the Private International Law Committee in their first Report[84] as part of a new set of rules for the attribution of domicile, is open to objections as a basis of jurisdiction in custody proceedings similar to those affecting domicile itself. "Home" is an imprecise term open to a variety of interpretations according to the context and according to the disposition of the hearer.[85]

3.56 For all these reasons, it is considered that neither "home" nor "the last joint home of the parents" would be a satisfactory test for the assumption of jurisdiction in custody proceedings.

(e) Physical presence: an unsuitable general test

3.57 The mere physical presence of the child within the territory is a ground of jurisdiction in England and Northern Ireland in wardship proceedings. He need not be ordinarily resident in England, and may be merely passing through.[86]

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84 (1954) Cmd. 9068, para. 15 and Appendix A, Article 2.

85 Re Brace, decd. [1954] 1 W.L.R. 955, 958; Herbert v. Byrne [1964] 1 W.L.R. 519, 528.

86 See para. 3.8, above; but the court will not usually exercise jurisdiction on the basis of the child's temporary presence in England unless the court's protection is essential, e.g. in a case of emergency to prevent some grievous wrong being committed : Re P. (G.E.) [1965] Ch. 568, 588 per Pearson L.J.

In Scotland the court may in an emergency situation assume jurisdiction to make "temporary" measures on the ground of the presence of the child.[87]

3.58 It is clear that physical presence as a test satisfies some of the objectives set out in paragraph 3.36 above, but is open to the objection that it would not necessarily point to a court with which the child or any of the litigants are likely to have long-term connections, or which has any claim to apply its own law to the facts of the case. Above all, its choice would tend to encourage kidnapping and to favour conflicts of jurisdiction rather than to prevent them, since it gives an advantage to a person who has the child in his physical custody, even unlawfully.

3.59 For these reasons, we do not favour the child's physical presence as a basic ground of jurisdiction in custody or wardship proceedings. On the other hand, it seems necessary to retain it as a subsidiary ground to enable the court to deal with emergency situations where an immediate order as to custody is necessary for the protection of the child. Our proposals on this point are contained in paragraph 3.95 below.

(f) Tests based on residence

3.60 If nationality, domicile, "home" and physical presence are excluded as primary bases of jurisdiction, the obvious tests which remain are those linked to residence.

(i) The variety of residence-based tests

3.61 In the United Kingdom there are several different residence-based tests for assuming jurisdiction in custody proceedings. Some tests are based on the child's residence

87 See para. 3.8, above.

within the country. Thus the High Court in England possesses jurisdiction on the basis of the child's ordinary residence in wardship proceedings[88] and in custody proceedings under the Guardianship of Minors Act 1971.[89] A county court and a magistrates' court have jurisdiction under that Act if the child resides within the place for which the court acts.[90] Other tests are based on the residence of the respondent or defender. Thus, in England the county court or magistrates' court within whose district the respondent resides may exercise jurisdiction under the 1971 Act.[91] In Scotland, the sheriff court assumes jurisdiction on the basis of the defender's residence for 40 days within the sheriffdom[92] although it is possible that the child must also be domiciled in Scotland. In England, Scotland and Northern Ireland the inferior (viz., county and magistrates', and sheriff) courts may in certain circumstances exercise jurisdiction also in the place where the applicant or pursuer resides.[93] Where, however, one parent resides in

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88 Re P.(G.E.) [1965] Ch. 568.

89 Ibid.

90 1971 Act, s. 15(1)(b) and (c).

91 Ibid.

92 Sheriff Courts (Scotland) Act 1907, s. 6(a); Guardianship of Infants Act 1886, s. 9; Kitson v. Kitson 1945 S.C. 434; Campbell v. Campbell 1956 S.C. 285.

93 For England, see Guardianship of Minors Act 1971, s. 15 (1)(b)(county court); s.15(1)(c) (magistrates' court); see also Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 1(2), referred to in para. 3.98, n. 145, below. For Scotland, see Maintenance Orders Act 1950, s. 7 (sheriff court); for Northern Ireland, see Maintenance Orders Act 1950, s. 10.

another part of the United Kingdom, an order may be made only if certain conditions are satisfied, e.g. the other parent and the child must reside in the part of the United Kingdom where the application is made,[94] or the parties must last have ordinarily resided together in that part of the United Kingdom[95] or the respondent must be personally served in the jurisdiction.[96]

(ii) Whose residence?

3.62 In considering a residence-based test, it is convenient first to answer the question whose residence is relevant, that of the petitioner or pursuer, that of the respondent or defender or that of the child itself? The test of the respondent's (or defender's) residence would have the advantage that the child will normally be living with the respondent and the decree will be easily enforceable. Such a test would, however, encourage forum-shopping and kidnapping. Moreover, the respondent's residence, like the applicant's residence, is unsuitable as a test because it does not necessarily point to the country with which the child has the closest connections.

3.63 The United States Uniform Child Custody Jurisdiction Act 1968 gives pre-eminent jurisdiction to the state of the child's last established home, or "home state" which is defined as:-

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94 For England, see Guardianship of Minors Act 1971, s.15(4) (as amended) (magistrates' court only); for Scotland, see Maintenance Orders Act 1950, s. 7 (sheriff court).

95 For England, see Matrimonial Proceedings (Magistrates' Courts) Act 1960, s.1(3)(a); for Northern Ireland, see Maintenance Orders Act 1950, s.10.

96 1971 Act, s.15(3)(b)(magistrates' court and county court).

> "...the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months..."[97]

Temporary absence of any of the named persons is counted as part of the 6 months. The state which is the home state at the beginning of the proceedings, or was the home state within 6 months before, has jurisdiction. The emphasis here is on residence with a parent or guardian in the interest of the stability of the home environment, and the accessibility of evidence to the court. That test is, however, supplemented by alternative tests[98] and we think that the same objective might be achieved by a test based on the child's residence possibly coupled with a qualifying period. A child will normally be living with his parents, a parent or a person acting as parent and we doubt whether it is necessary to add this requirement to the child's residence.

3.64 If a residential test is to be adopted, it is clear to us that the appropriate test is one which points to the residence of the child himself. It is the child's welfare that is at stake, and the courts which have the best claim to determine what is in the interests of the child would seem to be those of the place where, prior to the custody dispute, the child resided with his parents or guardians and enjoyed family and social connections. If, moreover, some emphasis is placed on the duration of the child's residence, those courts are likely to have most ready access to the relevant evidence and to be convenient for at least

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97 Section 2(5); see also s. 3(a)(1). It will be seen that the test of "last established home" is a residential test and not a test depending on the meaning of "home", a concept which we have criticised at paras. 3.54 - 3.55, above.

98 Section 3(a)(2) extends jurisdiction to a state with a "significant connection" with the child and at least one of the contestants.

one of the parties. Their selection should minimise the attractiveness of kidnapping a child with a view to forum-shopping.

(iii) What kind of residence?

3.65 The residential test should point to the court of the place with which the child has the closest connections, that is to say, where, prior to the custody dispute, the child was being brought up and educated by both of its parents, or by one parent or guardian. This will often, but not necessarily, be the child's domicile in the sense of United Kingdom law. It will be something more than an occasional residence, or residence for a limited purpose, but a residence which may be expected to continue despite limited periods of absence. The court should be able to make a custody order after a child, who has been resident there, has been removed or detained outside the court's territory against the will of a parent or other person having a right to custody or access by law, deed or decree.

(iv) Ordinary residence

3.66 The test of "ordinary residence" at least partially fulfils these criteria. It is a test which is used in wardship proceedings in England and Northern Ireland and which has been relevant in custody proceedings in all three parts of the United Kingdom because jurisdiction in certain matrimonial proceedings at the instance of a wife has been founded since 1949 on the facts that the wife has been "ordinarily resident" for three years within the territory and that the husband has been domiciled outside the British Isles. This test of ordinary residence for a specified period has worked well in matrimonial proceedings.

(v) Unsuitability of ordinary residence

3.67 The Hodson Committee, indeed, suggested that ordinary residence without any qualification relating to its period should be adopted.[99] In our view this would be inappropriate for the reasons stated by Mr. Michael Albery in his Note of Dissent.[100] These need not be repeated at length, but the essential points are these:-

(a) In the typical custody dispute, the test "instead of providing a clear guide to the parties as to where the pre-eminent jurisdiction lies, would often raise an undesirable preliminary issue which could only be resolved by the decision of the Court".[101] In situations like that in Babington v. Babington,[102] if the relevant test were ordinary residence alone, the court would require to decide whether a child from a Scottish home is ordinarily resident in Scotland or at his boarding school in England, or to decide at what point of time a child, removed from Scotland to England by a parent, commences to have its ordinary residence in England.

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99 (1959) Cmnd. 842, paras. 45-49 and 60(i); in Re P. (G.E.) [1965] Ch. 568, 586, Lord Denning M.R. favoured ordinary residence as a test but thought that it should be pre-eminent not exclusive and where other courts possessed jurisdiction on the basis of some other test, "in case of conflict, much respect should be paid to the decision of the courts of the country where the child is ordinarily resident".

100 (1959) Cmnd. 842, paras. (2)-(8).

101 Ibid., para. (5).

102 1955 S.C. 115; see para. 3.12, above.

(b) If, on the other hand, it is true to say, as we said in Macrae v. Macrae,[103] that a man may and generally does change his ordinary residence in the course of a day, the test of ordinary residence without a temporal qualification gives an advantage to a person who kidnaps a child.

3.68 Some of these difficulties could be avoided if the definition outlined by Lord Denning in Re P. (G.E.)[104] were adopted, namely, that so long as the parents are living together in the matrimonial home, the child's ordinary residence is that home, even though he may be away at boarding school; if the parents are living separate and apart and by arrangement between them the child resides in the home of one of them, then that home is his ordinary residence; the child's residence so found cannot be changed by one parent without the consent of the other; and, finally, if the child is taken away by one parent without the other's consent his ordinary residence will not be changed until that other parent acquiesces in the change or delays so long in bringing proceedings[105] that he must be taken to have acquiesced.

3.69 The objections to "ordinary residence" are nevertheless sufficiently cogent to suggest that the concept should not be adopted if a suitable alternative can be found. Even if "ordinary residence" for a qualifying period were required, difficulties would arise from the fact that

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103 [1949] P. 397.

104 [1965] Ch. 568, 585-6 (C.A.).

105 Ibid.; "six months' delay would, I should have thought, go far to show acquiescence. Even three months might in some circumstances. But not less" per Lord Denning M.R. at p. 586.

the courts have not always drawn a clear distinction between the concept of "residence" and that of "ordinary residence". The better view may be that "ordinary residence" is to be contrasted with "occasional" or "casual" residence;[106] but, in Hopkins v. Hopkins,[107] where a wife attempted to found jurisdiction in divorce upon her own residence for three years in England, it was held that there was no ground for applying a different meaning to the words "resident" and "ordinarily resident" over a defined period of time. A similar approach was adopted in the Scottish case of Land v. Land,[108] where it was held that the pursuer's residence for two months in Holland during the statutory 3-year period prior to the commencement of proceedings was fatal to her contention that she had been ordinarily resident in Scotland for that period.

Habitual residence as a test of jurisdiction

3.70 For these reasons, it is thought that it would be preferable to adopt as the basic test of jurisdiction the habitual residence of the child. Habitual residence denotes a kind of connection, distinguishable from domicile in that no stress is laid on future intention, and differing from ordinary residence in that greater weight is given to the quality of the residence, its duration and continuity and factors pointing to durable ties between a person and his residence.

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106 Lysaght v. I.R.C. [1927] 2 K.B. 55, 74; I.R.C. v. Lysaght [1928] A.C. 234, 248.

107 [1951] P. 116; distinguished in Stransky v. Stransky [1954] P. 428.

108 1962 S.L.T. 316; distinguished, however, in Casey v. Casey 1967 S.L.T. (Notes) 106 and Cabel v. Cabel 1974 S.L.T. 295.

3.71 In the recent case of Cruse v. Chittum,[109] Lane J. held[110] that the expression "habitually resident" indicated the quality of the residence rather than its duration and required an element of intention to reside in the country in question; that the residence should not be temporary or of a secondary nature; that the word "habitually" denoted a regular physical presence which had to endure for some time; and that habitual residence was distinguishable from ordinary residence and was equivalent to the residence necessary to establish domicile without the element of animus necessary for the purpose of domicile. This is consistent with the interpretation approved by the Council of Europe's Committee of Ministers.[111]

3.72 Recommending the adoption of "habitual residence" as a test of jurisdiction in divorce, the Law Commission stated that:-

> "There would be advantages for the future, and confusion might be avoided, if a uniform test were adopted throughout the field of family law as far as possible,..."[112]

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109 [1974] 2 All E.R. 940 (construing the Recognition of Divorces and Legal Separations Act 1971, s. 3(1)(a)).

110 Ibid., at pp. 942-3.

111 See Resolution 72(1) of the Committee of Ministers of the Council of Europe of 18 January 1972 (Council of Europe, Committee on Legal Co-operation, Fundamental Legal Concepts, C.C.J. (70) 37) which refers to "habitual residence" in these terms:-

"Rule 7. The residence of a person is determined solely by factual criteria;...

Rule 9. In determining whether a residence is habitual, account is to be taken of the duration and continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence."

112 Report on Jurisdiction in Matrimonial Causes (1972), Law Com. No. 48, para. 41.

The use of this concept would align more closely the rules of jurisdiction in custody proceedings with the rules of jurisdiction in matrimonial proceedings enacted in the Domicile and Matrimonial Proceedings Act 1973.[113] The concept is now used in international conventions to which effect has been given by recent statutes[114] and is the basic test of jurisdiction in Article 1 of the Hague Convention on the Protection of Infants of 5 October 1961. It is, therefore, a test of jurisdiction which is likely to attract international recognition.

Duration of habitual residence

3.73 The test of the habitual residence of the child standing by itself without qualification is still open, though with less force, to objections similar in kind to those applying to ordinary residence. A requirement of habitual residence for a specified period would go some way to meet the objections, but the test would still be open to the criticisms stated in paragraph 3.67. If the period is too short an advantage is given to the kidnapper. If the period is too long there is a risk that the most convenient court with greatest access to the relevant evidence is excluded, since the child may have put down roots in the jurisdictional territory of the court yet not have been resident in that territory for the prescribed period. The requirement, therefore, of a fixed period of habitual residence would in many cases provide merely an arbitrary solution. There are, moreover, special difficulties in the application of a test of habitual

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113 Sections 5 and 6 (England); ss. 7 and 8 (Scotland); and ss. 13 and 14 (Northern Ireland).

114 See Administration of Justice Act 1956, s. 4; Wills Act 1963, s. 1; Adoption Act 1958, s. 11; and Recognition of Divorces and Legal Separations Act 1971, s. 3(1)(a).

residence to young children. They may not have lived for the specified period or may not have had a residence which can be described as habitual for the period specified.

The proposed test of jurisdiction: habitual residence of the child

3.74 These difficulties are not easily met by any single formula. We advance for comment and criticism, nevertheless, the following rules for the assumption of jurisdiction in wardship and independent custody proceedings:-

(a) The principal test of jurisdiction should simply be the habitual residence of the child at the commencement of the proceedings.

(b) Unless it is established that the habitual residence of a child is in some other country, it shall be presumed that his habitual residence is in the country where he has resided cumulatively for the longest period in the year immediately preceding the commencement of the proceedings.[115]

3.75 The test formulated in (b) above is intended to establish a presumption of fact only which can be rebutted by evidence establishing that the country of habitual residence is elsewhere. It should, we think, provide a reasonably certain, yet flexible, test. In many cases the

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115 This presumption would not detract from the principle that the quality of residence is of crucial importance: see para. 3.71, above. Thus if a child spent the greater part of the year at a boarding school in England immediately prior to the commencement of proceedings but had his home with parents in Scotland, we would expect the court, in the absence of any further countervailing factors, to find that the child was habitually resident in Scotland.

length of residence alone will in practice suffice to determine the place of habitual residence; in other cases, the presumption arising from the duration of the child's residence in a country will be displaced by evidence to the contrary, for example by showing that the child had been "kidnapped" to that country by one parent against the will of the other or that the child's residence there had been prolonged by a serious illness which prevented him from returning to his home.

3.76 We have considered whether the foregoing test for determining the habitual residence of a child should be supplemented by a rule specifically designed to deal with kidnapping cases. It is arguable that such a rule would be unnecessary since, as indicated above, the test itself would enable the courts to deal with such cases. On the other hand, it can be said that kidnapping is too important a matter to be left at large and that the courts (and lay magistrates, in particular), the parties and their advisers should have greater guidance on this point than would be afforded by the rebuttable presumption test without more. On the whole, we favour the latter approach and we provisionally propose that where the child's residence has been changed without lawful authority during the year immediately preceding the commencement of the proceedings, then, in reckoning the child's residence for the purpose of the rebuttable presumption, no account should be taken of the period of that changed residence. It is envisaged that this test would apply where the child's residence is changed in breach of an order of a United Kingdom court, or against the will of a person, such as a parent or guardian, having the legal right to fix the child's residence.

3.77 The test of habitual residence together with the qualifications set out in paragraphs 3.74 and 3.76 would seem to present the following advantages:-

(a) it points to a forum with which the parties have connections of a kind which give it a legitimate claim to entertain questions relating to the child's family relationships and to apply its own law to the facts of the case;

(b) the test would be simple and relatively easy to apply and would offer no premium to a person who disturbs the existing arrangements for custody;

(c) the test would point to a forum which more often than not would be most convenient to the parties; which can normally enforce the orders which it makes; and whose claim to exercise jurisdiction is likely to be recognised abroad;

(d) the test, if adopted generally throughout the United Kingdom, would tend to prevent conflicts of jurisdiction.

Provisional proposals

3.78 To sum up, we provisionally propose that the following rules should apply in United Kingdom cases:-[116]

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116 See para. 3.2, above

(1) The general rule should be that a court[117] in a United Kingdom country should have jurisdiction to entertain wardship or independent custody proceedings if, and only if, the child in question is habitually resident in that country at the date of the commencement of the proceedings.

(2) Unless it is established that the habitual residence of the child is in some other country, it should be presumed that his habitual residence is in the country where he has resided cumulatively for the longest period in the year immediately preceding the commencement of the proceedings.

(3) In cases where the child's residence has been changed without lawful authority during the year immediately preceding the commencement of the proceedings, no account should be taken of the period of that changed residence in reckoning the periods of the child's residence for the purposes of (2) above.

(D) JURISDICTION BY CONSENT

The Hodson Committee

3.79 The majority of the Hodson Committee did not consider:-

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117 Our jurisdictional proposals are intended to apply to all courts in the United Kingdom; as to rules of local jurisdiction, see para. 3.23 and n.42, above.

> "that the parties concerned should be at liberty to confer jurisdiction by consent on the courts of any country in which the child is not at the time ordinarily resident."[118]

The effect of this proposal is problematic because the majority Report did not make it clear whether the existing bases of jurisdiction were to be abolished and replaced by "ordinary residence" or whether "ordinary residence" was merely to be pre-eminent among existing jurisdictions. In other words, it was not clear, for example, whether the English High Court could exercise jurisdiction over a child physically present in England but ordinarily resident in Scotland if nobody objected or whether it must ex proprio motu decline jurisdiction.

3.80 These defects in the Report were pinpointed by Mr. Albery in his Note of Dissent[119] in which he argued that the existing grounds of jurisdiction should be retained; and that the courts should be able to exercise jurisdiction on these grounds unless the respondent objected on the footing that the pre-eminent jurisdiction lay elsewhere in the United Kingdom. Given the width of the existing grounds of jurisdiction in England and Northern Ireland, the practical effect of Mr. Albery's proposal would have been to allow parties ease of access to the courts of those countries if they thought it convenient. No special rules for submission to the jurisdiction would be necessary given the width of existing rules. The proposal would not, however, have given equivalent ease of access to the Scottish courts because of the narrowness of the Scottish domicile-based rules of jurisdiction.

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118 (1959) Cmnd. 842, para. 52.

119 Ibid., para. (12).

The arguments for and against jurisdiction by consent

3.81 In these circumstances, we require to examine the question of jurisdiction by consent (in Scotland, prorogation of jurisdiction) afresh and in the light of the new jurisdictional rules which we have proposed. Should the parties have power to confer by consent jurisdiction upon a court which is not in the country of the child's habitual residence?

3.82 The main argument in favour of allowing jurisdiction by consent is that the parties would be able to proceed in a forum convenient to both of them and this may save time and expense. For instance, if both parties are present, and wish to proceed, in England even though the child is habitually resident in Scotland, it may appear unreasonable to force them to bring proceedings in a Scottish court, which ex hypothesi is a less convenient forum. Further, as Professor Ratner has argued:-

> "A forum selected by one parent and accepted by the other without objection provides a venue convenient to both in which a full adversary proceeding is likely to occur. Since such an adversary proceeding increases the availability of the evidence and the probabilities of a correct decision, the same values that underlie the established home principle support the jurisdiction of such a forum. Consent has long provided a basis for jurisdiction over person in conventional two-party litigation; in custody proceedings, too, an effective disposition is likely to result from the decision of a court whose authority is recognized by both claimants."[120]

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120 "Child Custody in a Federal System", (1964) 62 Michigan Law Review 795, 819-820; it is to be noted, however, that the United States Uniform Child Custody Jurisdiction Act 1968 does not allow jurisdiction to be established merely by submission of the parties.

3.83 On the other hand, there are arguments against allowing jurisdiction by consent and these may be stated as follows:-

(a) Societies, through their legal systems, take a special interest in family matters and, to ensure that this interest is respected, do not normally permit the parties to choose freely where such matters will be decided. While this argument has special force in matters of divorce, it has some weight, too, in custody cases.

(b) The preceding argument may be adopted by other legal systems and it is open to question whether a consent jurisdiction would be recognised abroad.[121]

(c) The range of persons with a legitimate interest in the custody of children may extend beyond their parents and may include the grandparents of a child, another relative, such as an aunt, who has brought up the child, and even a local authority. It would not always be easy to ensure that all appropriate consents had been obtained.

(d) If rational grounds of jurisdiction are established, the need for jurisdiction by consent is less obvious.

The need for safeguards

3.84 If a rule permitting jurisdiction by consent were to be introduced, it would, we think, require to be subject to certain safeguards and qualifications:-

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121 Cf. the Hague Convention of 5 October 1961 which does not provide for the assumption of jurisdiction by the consent of the parties.

(a) We think that the consent of the parties before the court should not have the effect of requiring the court to assume jurisdiction. When a court is invited to assume jurisdiction by consent, it should always be within its discretion to accept or decline jurisdiction, and in the exercise of the discretion the welfare of the child would clearly be the paramount consideration.

(b) We suggest that a court should have no power to assume jurisdiction by consent, unless the consenting persons include:-

(i) the person (if any) who for the time being has the legal custody of the child; and

(ii) any person who has the care and control of the child.

(c) It may be thought that the court should not have power to assume jurisdiction by consent unless the child is physically present within the area to which the jurisdiction of the court extends.

Other safeguards may occur to those reading this paper and we would welcome views on this point.

Jurisdiction by consent and concurrent proceedings

3.85 If the assumption of jurisdiction by consent is to be permitted, it will also be necessary to consider the problem of concurrent proceedings in different parts of the United Kingdom. Two broad situations may be distinguished:-

(a) Cases where, when the court is invited to assume jurisdiction by consent, there are already pending in another part of the United Kingdom proceedings in which a court has jurisdiction to deal with the custody of the child.

(b) Cases where the court assumes jurisdiction by consent at a time when there are no concurrent proceedings in any other part of the United Kingdom, but, after the court has assumed jurisdiction, such concurrent proceedings are commenced.

3.86 We suggest that in the first class of cases mentioned in paragraph 3.85 there should be no power in the court to assume jurisdiction by consent unless it is satisfied that the other court can relinquish jurisdiction and has in fact done so. In the second class of cases, provision will clearly be required to determine which of the concurrent proceedings should go forward. In Part V of this paper we discuss the kinds of provision which might be made for this purpose.

Conclusion: no provisional proposal but views are invited

3.87 The question whether a court should have the power to assume jurisdiction in custody proceedings by the consent of the parties is an important issue raised by our terms of reference. We think that there are persuasive arguments both for and against the assumption of jurisdiction by the consent of the parties. We make no proposal in favour of one approach rather than the other, but invite views.

(E) POWER TO ALTER OR SUPERSEDE CUSTODY ORDERS

The problem examined

3.88 The principles for evaluating jurisdiction to make a first award[122] should, we think, apply also to the rules under which the court of another United Kingdom country assumes jurisdiction to entertain applications for a new order altering or superseding the original order. In other words, the new court which alters or supersedes an existing custody order should, if possible, be, among other things, the forum with which the child has the closest long-term connections and which is fair and convenient to the parties. Apart from custody orders made in matrimonial proceedings[123] and emergency custody orders,[124] the custody orders to be considered are those made by the court of the child's habitual residence.[125]

3.89 It seems clear that the court which made the original order should retain jurisdiction to vary or revoke its order until at least the time (if any) when the court loses its original grounds of jurisdiction as where, after the order, the child's habitual residence is changed to another country. In the context of its "ordinary residence" proposals, however, the Hodson Report recommended that:-

> "When proceedings have been instituted in one court and a change of residence supervenes after an order had been made ... the court of the new ordinary residence should then be the court of pre-eminent jurisdiction; but that once ordinary residence has been established in judicial proceedings the court of that country should remain seized of the matter unless satisfied,

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122 See para. 3.36, above.

123 See para. 3.34, above.

124 See para. 3.95, below.

125 See para. 3.78, above.

upon application made for that purpose, that the ordinary residence of the child has changed."[126]

If, as appears to be the case, this passage means (substituting "habitual residence" for "ordinary residence") that the court of the habitual residence should retain jurisdiction until it has itself decided that it no longer possesses it, the proposal seems likely to occasion unnecessary expense, inconvenience and even unfairness by forcing the parties to go to a court which will probably be unduly remote from the relevant evidence.

3.90 We think it preferable that the custody order of the original court should continue in force and be liable to be varied or revoked by that court until it is superseded by an order made by the court of the child's new habitual residence or by an order made by the court of the matrimonial proceedings.[127]

Provisional proposal

3.91 Our provisional proposal on this point may be summed up as follows:-

> A United Kingdom court which has made a custody order in wardship or custody proceedings on the basis of the child's habitual residence should retain jurisdiction to vary or revoke the order or to make a fresh order unless and until a court in another United Kingdom country makes a custody order:-
>
> (a) in matrimonial proceedings between the child's parents; or

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126 (1959) Cmnd. 842, para. 50.

127 See para. 3.34, above.

(b) in wardship or custody proceedings on the basis of the child's habitual residence in that country.

The order of the original court should then be treated as superseded by the new order.[128]

(F) JURISDICTION IN EMERGENCY CASES

The problem considered

3.92 We have already suggested that physical presence of the child should be retained as a subsidiary ground of jurisdiction in custody proceedings to enable the court to deal with cases of emergency.[129] In this limited sense the physical presence of the child was accepted as an appropriate jurisdictional ground by a majority of the Hodson Committee, who proposed that "in cases of urgency the court of the country where the child is physically present should have jurisdiction to make an order, which would be subject to the control of and variation by the court of ordinary residence [i.e., the pre-eminent jurisdiction]".[130] Similarly the Hague Convention of 5 October 1961 gives jurisdiction to the court of the country where the child is physically present only in cases of urgency, and goes on to provide that the measures taken by that court in such circumstances should cease to have effect when the authorities otherwise competent have intervened.[131]

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128 If a rule permitting jurisdiction by consent of the parties were to be introduced (see paras. 3.79 - 3.87, above), the custody order of the original court would also be superseded when the court assuming jurisdiction by consent makes a custody order.

129 See para. 3.59, above.

130 (1959) Cmnd. 842, para. 60(iv).

131 Article 9.

The United States Uniform Child Custody Jurisdiction Act 1968 concedes jurisdiction on the basis of the child's physical presence only where "(i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected..."[132]

3.93 We have considered whether we should follow the American Act in attempting to specify within fairly narrow limits the circumstances which would justify the exercise of this emergency jurisdiction. Such an approach would have the merit of introducing some certainty in this area and would also provide a safeguard against the concept of emergency being interpreted too widely. Our provisional view, however, is that, since it is impossible to predict and therefore to prescribe by statute all the circumstances in which the intervention of the court may be necessary or desirable, it would be better not to fetter the court's jurisdiction on this point. We therefore do not propose to define the court's emergency jurisdiction more precisely than to say that the court of the place where the child is physically present should have jurisdiction to make orders where the immediate intervention of that court is necessary for the protection of the child.

3.94 Finally, we would emphasise that these emergency orders would be interim only and would be liable to be superseded at any time by orders made by the court of the child's habitual residence or the court of the matrimonial proceedings.[133]

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132 Section 3(a)(3).

133 Cf. the Hague Convention of 5 October 1961, Article 9.

Provisional proposals

3.95 We would summarise our proposals on emergency orders as follows:-

(1) Where a child is physically present in a United Kingdom country at the date of the commencement of the proceedings, the courts of that country should have jurisdiction to entertain wardship or custody proceedings if, and only if, the immediate intervention of the court is necessary for the protection of the child.

(2) Such an emergency order should be liable to be superseded at any time by the court of the place where the child is habitually resident or by a court in which matrimonial proceedings are continuing.[134]

(G) PROCEEDINGS WHERE THE COURT HAS POWER TO MAKE CUSTODY AND OTHER ORDERS

Introductory

3.96 Jurisdiction to entertain proceedings for maintenance, aliment or financial provision for children fall outside our terms of reference.[135] Nevertheless they present problems which cannot be ignored. It is obviously desirable that the question as to liability of a parent to support his or her children should be determined at the same time as the question of their custody. For this reason, courts in the United Kingdom are entitled, and in some cases bound, to deal with custody and maintenance at the same time in the same proceedings.

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134 If a rule permitting jurisdiction by consent of the parties were to be introduced (see paras. 3.79 - 3.87, above), the emergency order would also be superseded when the court assuming jurisdiction by consent makes a custody order.

135 See para. 1.1, above.

3.97 We have provisionally proposed that jurisdiction in proceedings for divorce, nullity and separation should carry with it a pre-eminent jurisdiction to make ancillary custody orders.[136] In all three United Kingdom systems of law, jurisdiction in those proceedings also carries with it jurisdiction to determine ancillary applications for maintenance, aliment or financial provision.

Combined proceedings for custody and maintenance, aliment or financial provision

(a) England

3.98 There are, however, other types of proceedings with which custody proceedings may be combined. In England combined proceedings for custody and maintenance or financial provision may be brought in the following instances:-

(a) The High Court may order either parent of a ward to make payments for his maintenance to the other parent or to any other person to whom the court has given care and control.[137]

(b) Under the Guardianship of Minors Acts 1971 and 1973 the High Court, a county court or a magistrates' court may on the application of either parent of a child make such order as it thinks fit for the custody of or access to a child.[138] If the court[139] gives custody

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136 See para. 3.34, above.

137 Family Law Reform Act 1969, s. 6(2).

138 1971 Act, s. 9(1)(as amended). The powers of the magistrates are subject to certain restrictions: see 1971 Act, s.15(2).

139 The jurisdictional grounds are various and differ according to the type of court: see para. 3.61, above.

of a legitimate child to either parent or a third party, it may order the parent excluded from custody to pay maintenance for the child.[140]

(c) Under section 27 of the Matrimonial Causes Act 1973 a wife (and in some circumstances a husband) may apply to the High Court or a divorce county court for financial provision if the other spouse has wilfully neglected to provide reasonable maintenance for her and for any child of the family under 18 for whose maintenance it is reasonable to expect the respondent to provide. Provided the court makes an order for financial provision in such proceedings, it may also make an order for custody.[141]

(d) Under Part II of the Children Act 1975,[142] the High Court, a county court or a magistrates'

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140 1971 Act, s. 9(2) (as amended).

141 Matrimonial Causes Act 1973, s. 42(2); in these proceedings, the court has jurisdiction if the applicant or the respondent is domiciled in England on the date of the application, or the applicant has been habitually resident in England throughout the period of one year ending with that date, or the respondent is resident in England on that date: Matrimonial Causes Act 1973, s.27(2) as amended by the Domicile and Matrimonial Proceedings Act 1973, s. 6(1).

142 This Act received the Royal Assent on 12 November 1975. Part II of the Act will come into force on such date as the Secretary of State may by order appoint.

court[143] may, while a custodianship order is in force, order the child's mother or father (or both) to make to the custodian such periodical payments towards the maintenance of the child as it thinks reasonable.[144]

(e) Section 2(1) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 empowers a magistrates' court to make orders for the separation and maintenance of the parties to a marriage as well as orders for custody and maintenance of, and access to, any child of the family under the age of 16. An order for maintenance for a child under 16 can only be made in favour of a person to whom custody has been given by the order.[145]

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143 The 1975 Act, s. 46(3), expressly provides that a magistrates' court shall not make an order under the Act requiring a person to make payments towards the maintenance of a child unless the person has been served with the summons.

144 Section 34(1)(b); the jurisdiction of the High Court is based on the child's presence in England: s. 100(2)(a); the jurisdiction of the county court or magistrates' court is based on the presence of the child within the district or area of the court: s. 100(2)(b) and (d).

145 1960 Act, s. 2(1)(h). A magistrates' court may make an order under the 1960 Act if it has jurisdiction in the place where either spouse ordinarily resides or where the cause of complaint wholly or partly arose: s. 1(2). The normal basis of jurisdiction is the defendant's ordinary residence in England: Forsyth v. Forsyth [1948] P. 125 (C.A.); Macrae v. Macrae [1949] P. 397 (C.A.); Hamilton v. Hamilton [1949] W.N. 61; Collister v. Collister [1972] 1 W.L.R. 54. But the mere presence of the defendant within the jurisdiction when the summons is issued might suffice: Forsyth v. Forsyth, above, at p. 136. The court can also exercise jurisdiction over a defendant residing in Scotland or Northern Ireland if the complainant resides in England and the parties last ordinarily resided as man and wife in England: 1960 Act, s. 1(3)(a).

(f) Under section 5(4) of the Affiliation Proceedings Act 1957, a magistrates' court may make an order for the custody of an illegitimate child under the age of 18 if an affiliation order is in force providing for payments to the mother and she dies or becomes of unsound mind or is in prison.[146]

(b) Scotland

3.99 In Scotland, custody proceedings may be combined with:-

(a) actions between spouses for adherence and aliment raised in the sheriff court[147] (but not if the action is raised in the Court of Session);[148]

(b) applications by a spouse in the Court of Session or sheriff court on the other spouse's failure to obey a decree of adherence and aliment;[149]

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146 The court has jurisdiction to make an affiliation order if both the mother and the defendant reside in England: 1957 Act, s. 3(1); Berkley v. Thompson (1884) 10 App.Cas. 45 (H.L.); or where the mother resides in Scotland or Northern Ireland and the defendant resides in England: Maintenance Orders Act 1950, s.3(2); or where the mother resides in England and the defendant resides in Scotland or Northern Ireland and the act of intercourse took place in England: 1950 Act, s.3(1).

147 Sheriff Courts (Scotland) Act 1907, s. 5(2); O'Brien v. O'Brien (1957) 73 Sh.Ct.Rep. 129.

148 Ramsay v. Ramsay 1945 S.L.T. 30.

149 Matrimonial Proceedings (Children) Act 1958, s. 9(2).

(c) actions of affiliation and aliment (invariably by the mother against the father) or any action by a third party for aliment for an illegitimate child in the Court of Session or sheriff courts;[150]

(d) actions for aliment in the sheriff court at common law;[151] and

(e) actions for aliment in the sheriff court in which the order-making power is regulated by statute.[152]

(f) In addition the Court of Session has power at common law to award aliment in custody petitions.

3.100 These various types of proceedings attract different jurisdictional criteria, including the domicile of a spouse-parent,[153] the pursuer's residence with certain qualifications[154] and criteria appropriate to personal actions for money, such as the defender's residence, place

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150 Illegitimate Children (Scotland) Act 1930, s.2(1).

151 E.g., where a relative, such as a grandparent, who is liable at common law to aliment a child, is the defender in a custody action.

152 Guardianship of Infants Act 1925, s. 3(2) (under which, when the court makes an order giving custody to one parent, then it may order the other parent to pay maintenance); ibid., s. 5(4) (where the court appoints a sole testamentary tutor, it may order a parent to pay the tutor a periodical sum for the child's maintenance); Children and Young Persons (Scotland) Act 1932, s. 73(1) (under which, on application to resolve disputes between joint tutors appointed under the 1925 Act, s. 6, the court may make custody orders and order a parent to pay maintenance to the custodier).

153 In actions of adherence and aliment in the sheriff court: Clive and Wilson, Husband and Wife (1974), pp. 222-223.

154 In actions for custody and aliment: Maintenance Orders Act 1950, s.7.

of business, arrestment to found jurisdiction, ownership of heritage, reconvention and prorogation.[155] Further, where the judicial order-making powers to award custody and aliment are regulated by the common law of Scotland, the two questions of custody and aliment are probably severable for jurisdictional purposes. Thus, jurisdiction over custody on the basis, say, of the child's domicile would not necessarily imply jurisdiction to award aliment against an absent defender.[156] Conversely, want of jurisdiction to deal with custody would not preclude jurisdiction to award aliment against a defender resident in Scotland. Jurisdiction to entertain actions of aliment of legitimate children at common law depends on the principles applicable to ordinary personal actions for money.[157] The same is true of actions for affiliation and aliment.

(c) Northern Ireland

3.101 In Northern Ireland, orders for custody and maintenance may be combined under:-

(a) Section 22(2) of the Matrimonial Causes Act (Northern Ireland) 1939, which provides that in proceedings for restitution of conjugal rights, the High Court may, either before or (where the respondent has failed to comply

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155 Hamilton v. Hamilton (1877) 4R. 688, 691; Pearce v. Pearce (1898) 5 S.L.T. 338; Thomson v. Thomson (1838) 11 S. 165; Macdonald v. Macdonald (1846) 8D. 830; Sheriff Courts (Scotland) Act 1907, s. 6, paras. (a), (b), (c), (d), (h) and (j); Fraser v. Campbell 1927 S.C. 589; Robertson v. McMillan (1943) 59 Sh. Ct. Rep. 12; Silver v. Walker 1938 S.C. 595.

156 Cf. the reasoning in Fraser v. Fraser and Hibbert (1870) 8M. 400.

157 See n.155, above.

with the terms) after final decree, make final provision for, inter alia, the custody and maintenance of the children of the family.[158]

(b) The Summary Jurisdiction (Separation and Maintenance) Act (Northern Ireland) 1945, which enables a magistrates' court[159] on finding a complaint of a matrimonial offence proved, to make an order providing, inter alia, for both the custody and maintenance of the children of the marriage.[160]

Jurisdiction in combined proceedings for custody and maintenance

3.102 We have proposed[161] that the principal basis of jurisdiction in independent custody or wardship proceedings should be the habitual residence of the child; in additon, the court of the child's physical presence should

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158 The High Court has jurisdiction to entertain a suit for the restitution of conjugal rights if the parties are domiciled or resident in Northern Ireland at the commencement of the proceedings, or if they had a matrimonial home in Northern Ireland at the time when cohabitation ceased: see Dicey and Morris, The Conflict of Laws (8th ed.) pp. 333-334; Mason v. Mason [1944] N.I. 134, 145-146; Wells v. Wells [1960] N.I. 122.

159 Save where hearing an appeal from a magistrates' court in proceedings under the 1945 Act there are no proceedings in which a county court can make an order for both custody and maintenance.

160 Section 3(1)(b). The court may award maintenance for a child of the marriage who is committed to the custody of the wife: s. 3(1)(d). The jurisdiction of a magistrates' court in Northern Ireland to make a custody order is partly territorial and partly residential: s. 1(1).

161 See para. 3.78, above.

have jurisdiction to make interim custody and wardship orders in circumstances of emergency.[162] We think that these proposals should also apply to custody proceedings which are combined with proceedings for maintenance, financial provision or aliment. In other words, the court should only have jurisdiction to make custody orders in combined proceedings if the above jurisdictional criteria are satisfied.

3.103 It will have been observed that in some cases the award of maintenance is ancillary to an order for custody. For instance, in England under the Guardianship of Minors Acts 1971 and 1973 the court can award maintenance for a child only if it has made an order as to its custody.[163] In such cases the implementation of our proposals would necessarily entail a change in the existing jurisdictional grounds to make maintenance orders.

3.104 On the other hand, there are cases where provision for custody can only be made if the court has made an order for maintenance or financial provision. For example, in England in proceedings for wilful neglect to maintain under section 27 of the Matrimonial Causes Act 1973 the court can make a custody order only if it has made an order for financial provision.[164] Our jurisdictional proposals are not intended to, and would not, affect the present jurisdictional position insofar as orders for maintenance or financial provision are concerned, but the court would only be able to make a custody order in such proceedings if the proposed jurisdictional criteria are satisfied.

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162 See para. 3.95, above.

163 See para. 3.98(b), above.

164 See para. 3.98(c), above.

Provisional proposal

3.105 We propose that in combined proceedings for custody and maintenance, aliment or financial provision a court in the United Kingdom should be able to make a custody order only if the child is habitually resident within its jurisdiction; in addition, in such proceedings the court should have jurisdiction to make an interim custody order on the basis of the child's physical presence within its jurisdiction if, and only if, the immediate intervention of the court is necessary for the protection of the child.

Custody orders in adoption proceedings: no proposals made

3.106 The law relating to the adoption of children, as amended by the Children Act 1975, contains a number of provisions under which the court may make orders disposing of or affecting the custody of a child. Thus, under section 19 of the Act of 1975 the court may, on an application for an adoption order, make an interim order vesting the custody of the child in the applicants for a period not exceeding two years. Again, sections 37 and 53 of the Act of 1975 provide that where, on an application for an adoption order in respect of a child, the court is of opinion that it would be more appropriate to make a custody order in favour of the applicant, the court may direct the application to be treated as if it were an application for an order for the custody of the child under the Act.[165]

3.107 In the case of adoption orders, the residence of the child in England and Scotland, as the case may be, is sufficient to found jurisdiction provided that the applicant is domiciled in any part of Great Britain.[166]

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165 There are other provisions in the Act of 1975 which may affect the custody of children: see s. 25.

166 Adoption Act 1958, s. 1.

It is clear that the basis of jurisdiction to make custody orders in adoption proceedings requires reconsideration, but we do not think that such a reconsideration could be profitably undertaken without a general examination of the basis of jurisdiction to make adoption orders. Such an examination is in our view needed, and we hope that it will be undertaken; but it is outside the scope of this paper. The paper therefore contains no proposals as to the powers of the courts to make custody orders in adoption proceedings.

PART IV: RECOGNITION AND ENFORCEMENT OF UNITED KINGDOM CUSTODY AND WARDSHIP ORDERS

(A) THE GENERAL SCHEME OF ENFORCEMENT

The present position

4.1 Where a custody order[1] made in another United Kingdom country is produced to a court in England or Northern Ireland, the order will not be automatically enforced: "comity demands, not its enforcement, but its grave consideration".[2] In Scotland, pre-eminence has been given traditionally to a custody order of the country where the child is domiciled. Such an order is recognised by the Scottish courts and, in accordance with it, subject to travel and other arrangements, the child may be sent back to his home.[3] While this is the traditional approach, the Scottish courts have in recent cases tended to inquire whether it is for the child's welfare that the custody order should be enforced.[4] The present position is, therefore, that in each United Kingdom jurisdiction a custody order from another United Kingdom jurisdiction cannot be enforced without further judicial proceedings, which can be expensive and protracted.

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1 In section (A) of this Part, we use the expression "custody order" in a general sense as including a wardship order.

2 McKee v. McKee [1951] A.C. 352, 365, per Lord Simonds.

3 Radoyevitch v. Radoyevitch 1930 S.C. 619; Ponder v. Ponder 1932 S.C. 233.

4 Sargeant v. Sargeant 1973 S.L.T. (Notes) 27; Kelly v. Marks 1974 S.L.T. 118; Buckingham v. Buckingham, The Scotsman, 2 August 1975.

Reciprocal enforcement of custody orders

4.2 If our provisional proposals in Part III are accepted, the courts of all three parts of the United Kingdom will have a common basis of jurisdiction to make custody orders. Such a reform would remove the major obstacle which now exists to any project for the reciprocal enforcement of custody orders as between the several jurisdictions of the United Kingdom. The reform would in our view open the way for a scheme whereby custody orders made in one part of the United Kingdom could be enforced in another part of the United Kingdom with the minimum of expense and delay.

4.3 It is self-evident that the procedures laid down by such a scheme should be as simple and speedy as possible. At the outset, we are faced by the complexities which arise from the fact that in each of the three jurisdictions there are various categories of courts having jurisdiction to make custody orders. When it becomes a question of enforcing in one part of the United Kingdom a custody order made in another, nothing but complication could arise from a scheme which provided for different enforcement procedures, or different enforcement agencies, according to the status of the court by which the order was originally made. We therefore propose that the enforcement agency in each part of the United Kingdom should be the supreme court[5] and that court alone, irrespective of the status of the court in the other part of the United Kingdom by which the order was made. Our choice falls on the supreme court for this purpose not only because the jurisdiction of that court extends throughout the whole of that part of the United Kingdom where it sits, but also because the supreme court in each of the several parts of the United Kingdom has at

5 By this expression we mean the High Courts in England and Northern Ireland and the Court of Session in Scotland.

its disposal efficacious procedures for securing compliance with custody orders throughout its jurisdiction and efficacious powers of punishing those who fail to comply with such orders.

Relevant considerations

4.4 In devising a scheme for the reciprocal enforcement of custody orders throughout the United Kingdom, there are two factors to be borne in mind and balanced against each other:-

(a) The need for speed, simplicity and economy makes it desirable that the necessity for intervention by the courts of the enforcing country should be reduced to a minimum. A simple system of registration should be sufficient to secure that the order of the original court has, in so far as it disposes of rights of custody and access, or regulates the education of a child, the effect of an order made by the supreme court of the enforcing country. We think that in many cases the mere fact that the order has such an effect in the enforcing country will be sufficient to ensure that it is complied with in that country.

(b) On the other hand, there will be cases in which the lawful custodian of the child requires further assistance from the supreme court of the enforcing country; for example, he may need a warrant to the officers of that court to take the child from the de facto custodian and hand it over to him. In such a case a similar warrant may or may not have been issued by the original court; but, even where it has, we see difficulties in providing that such a warrant should take effect

automatically in the enforcing country, since different officers will be involved and different directions as to what they are to do may be required.

Provisional proposals

4.5 Bearing in mind the factors mentioned in the preceding paragraph, we provisionally propose, and invite comment upon, a scheme on the following lines:-

(1) Where an order for the custody of a child has been made by any court in one part of the United Kingdom ("the issuing court") it may be registered in the supreme court[6] of another part of the United Kingdom ("the registering court") on production of an authenticated copy of the order, together with a statement signed by the applicant stating that to the best of his knowledge and belief the order is still in force and that there is no later and competing custody order of a United Kingdom court relating to the child.

(2) On production of the above-mentioned documents, the officer of the registering court will forthwith register the order unless it is brought to his notice that there is a later and competing custody order of a United Kingdom court relating to the child.

(3) We have considered whether the officer of the registering court should be empowered to decline to register the order in other cases, for example, where it has been brought to his notice that fresh proceedings relating

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6 See para. 4.3, n. 5, above.

to the custody of the child have been commenced in a United Kingdom court. Our provisional view, on which we would welcome comment, is that the officer of the registering court should not be entitled to refuse registration except in the circumstances referred to in (2) above.

(4) If there is a later and competing custody order of a United Kingdom court relating to the child but the applicant asserts that it was made without jurisdictional competence, the application for registration will be referred to a judge of the registering court. Registration of the earlier order may only be effected if the judge decides that the later and competing order was made without jurisdictional competence.

(5) On being registered in accordance with the foregoing provisions, an order by the issuing court shall forthwith have effect in the country of registration as if it were an order made by the supreme court in that country, so far as it relates to rights of custody of and access to the child or regulates the child's education.

(6) Any party to the original proceedings before the issuing court may, for the purpose of securing the further enforcement of the registered order in the country of registration, apply to the supreme court of that country for an injunction, interdict, an order for the delivery of the child, or other ancillary orders. Such a remedy may

at the discretion of the court be granted ex parte or after hearing such other parties as the court deems appropriate.

(7) The registering court may discharge the registration of the order on an application made to it for that purpose or of its own motion.

(8) The new registration procedure would extend to custody orders made under the emergency jurisdiction proposed in paragraph 3.95 above. We deal separately with interim orders in paragraph 4.7 below.

4.6 The power proposed under sub-paragraph (7) of the last paragraph is required primarily to deal with cases where the registration has become inappropriate because the registered order has been discharged or recalled by the issuing court or has been superseded by a later order of a court in the United Kingdom having jurisdiction under our proposals. We appreciate that there may be cases in which a party wishes to challenge the registration of an order on the ground that it was made without jurisdiction or is vitiated by fraud or perjury. We do not wish to restrain the freedom of the registering court to discharge the registration in such circumstances, but we venture to express the hope that in many such cases the registering court would take the view that the convenient course will be to leave the original order to be challenged in the courts of the country of origin.

4.7 We have considered the types of orders which, in addition to "final" custody orders, should be enforceable by the new registration procedure. On an application for an interim custody order, the High Courts in England and Northern Ireland may proceed on the basis of affidavits,

but it is increasingly the practice in the High Court in England for the oral evidence of the parties to be taken even in proceedings for interim orders. The practice in the divorce county court in England is similar. Magistrates' courts in England proceed upon oral evidence in all cases. In Scotland, interim orders are granted on the basis of ex parte statements by counsel or solicitors. In all three countries the practice is to require a welfare report on the child if the application is opposed. Interim custody is very often the crucial stage in custody proceedings, since the holding of a trial or proof may cause delay in which the child can develop roots in his new environment. We therefore propose that the scheme of registration and enforcement set out in paragraph 4.5 above should apply to interim custody orders in addition to other custody orders.

Enforcement of orders of magistrates' courts

4.8 Our proposed scheme will make it possible for a custody order made by a magistrates' court in England, on being registered in another part of the United Kingdom, to be enforced by the supreme court procedures of that part of the United Kingdom. There is no doubt that these procedures are more effective than the procedures at present available for the enforcement of the custody orders of English magistrates' courts in England itself. Thus, English magistrates' courts have no power to prohibit the removal of a child from the jurisdiction, and no power to order the delivery up of a child at a time and place specified in the order.[7]

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7 The powers of English magistrates' courts to enforce their custody orders are considered in the Law Commission's forthcoming Report on Matrimonial Proceedings in Magistrates' Courts (Law Com. No. 77). The report recommends that English magistrates should have power to prohibit the removal of a child from the jurisdiction. This recommendation, if implemented, would not affect our proposals in this paper.

Emergency enforcement

4.9 Our proposed scheme for the reciprocal enforcement of custody orders made within the United Kingdom is designed to provide a standard procedure for the reciprocal enforcement of such orders. However, it must be accepted that cases will arise when, a custody order having been made by a court in one part of the United Kingdom, it is necessary to take urgent action in support of it in another part of the United Kingdom, although the order has not been registered. Thus, where an order has been made by the Court of Session awarding the custody of the child to the mother and prohibiting the removal of the child from Scotland, the father may, having succeeded in bringing the child to England, attempt to board an aeroplane for Australia taking the child with him. We have very little doubt that in such circumstances the English High Court, if there is time for the mother to apply to it, would support the order of the Court of Session by granting an interim injunction prohibiting the removal of the child from England, even though the Scottish order was not registered in England. But in such a situation there may well be no time for an application to the English court. We propose that it should be provided by statute that where a court makes an order which prohibits or restricts the removal of a child from one part of the United Kingdom that order should have the effect of imposing similar prohibitions or restrictions on the removal of the child from the United Kingdom.[8]

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8 See also paras. 6.19 and 6.21, below.

4.10 In the preceding paragraph we have expressed the view that the English High Court would have power, where a custody order had been made in Scotland, to support the Scottish order by prohibiting the removal of the child from England, even though the Scottish order was not registered in England. We have little doubt that the Court of Session and the Northern Ireland High Court would have a corresponding power.

Recognition of custody orders

4.11 In the arrangement of this Part of our paper we have departed from the order of item (2) of our terms of reference[9] by dealing with the reciprocal enforcement of custody orders before dealing with the question of their recognition. We have chosen to do so because it facilitates the delimitation of the concept of recognition in this context.

4.12 Inherent in our proposals is the broad principle that a custody order made by any United Kingdom court will be recognised as prima facie valid in all parts of the United Kingdom. The order should be recognised as binding by the parties to the original proceedings, wherever those parties may be. It will be recognised as authorising certain administrative action throughout the United Kingdom, for example, recourse to the "stop list" procedure envisaged in paragraph 6.19 below. It will also be recognised to the extent of requiring the courts of one part of the United Kingdom to decline to entertain custody proceedings in certain cases; for example, in the cases specified in paragraph 3.34 above.

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9 See para. 1.1, above.

4.13 On the other hand, the relative independence of the legal systems of the United Kingdom does not make it practicable to envisage a scheme for the automatic enforcement in one part of the United Kingdom of custody orders emanating from another part. The officers of law in each part of the United Kingdom require the express authority of their own courts before taking action which may in the end involve the use of force. Recognition, therefore, does not necessarily imply enforceability, but is always a condition of enforceability.

4.14 The principle of the inter-United Kingdom recognition of custody orders is, as we have said, inherent in our proposals. We shall require to consider at a later stage whether it will be necessary to state this principle expressly in the statutory provisions which give effect to our proposals.

(B) SPECIAL PROBLEMS RELATING TO THE ENFORCEMENT OF WARDSHIP AND CUSTODY ORDERS CONCERNING MINORS OVER 16

Wardship orders

4.15 Cross-border conflicts within the United Kingdom are to some extent caused by the differences between the internal substantive laws of England and Northern Ireland on the one hand and Scotland on the other concerning parental and quasi-parental authority.[10] Of particular importance is the fact that in England and Northern Ireland a wardship order may be made in respect of any person under the age of majority and may, whenever made, remain in force until the ward attains that age. In Scotland, however, the general age limit for custody decrees is 16 years. Further, English (and Northern Irish) law requires parental

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10 See para. 3.7, above.

consent to the marriage of a child of 16 or 17, or, where the child is a ward of court, judicial consent. In Scotland, a child becomes capable of marrying at 16 years and there is no requirement of consent.

4.16 If our proposals[11] are accepted that habitual residence should be the sole ground of jurisdiction in wardship cases except in emergencies, then it will be unusual in future for a minor of 16 or 17 who is habitually resident in Scotland to be made a ward of court in England or Northern Ireland. There remains, however, the problem of a minor who is habitually resident in England or Northern Ireland but who has a Scottish domicile; for example, a Scottish boy who for a few years makes his home in England while receiving training or education, but who intends to resume his Scottish residence when the course is finished. If such a person is of the age of 16 or 17 and is subject to a wardship order made in England, it would, we think, be unreasonable that the order should have the effect of preventing him from marrying in Scotland, the country of his domicile, without the consent of an English court.

(a) The Hodson Committee's proposals

4.17 The Hodson Committee put forward a proposal which requires to be considered as a possible solution. They recommended that in wardship proceedings relating to a child domiciled in Scotland, the child should be entitled to plead in bar of the proceedings that he is over 16 and, although ordinarily resident in England or Northern Ireland, is domiciled in Scotland.[12] They further recommended that, except where such a plea in bar of proceedings was sustained, wardship orders should be enforceable in Scotland, even in the case of children

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11 See paras. 3.78 and 3.95, above.

12 (1959) Cmnd. 842, paras. 55 and 60(vi).

domiciled in Scotland. Moreover, the High Court should in wardship cases "be empowered to make an interim order for the limited purpose of keeping matters entire, for example by injunction against marriage with a particular person pendente lite".[13]

4.18 We have come to the conclusion that the Hodson Committee's recommendations are not a satisfactory solution to the problem with which we are now concerned. Our reasons are as follows:-

(a) The recommendations would not permit of a plea in bar where the child concerned, being domiciled in Scotland, was under 16. If such a child, having attained the age of 16, wished to marry in Scotland while the wardship order was still in force and registered in Scotland under our proposals in section (A) of this Part he would by the law of Scotland require the consent of the English court. This is in our view an unsatisfactory result.

(b) A child of 16 or 17 domiciled in Scotland who was made the subject of English wardship proceedings might for one reason or another fail to raise the plea in bar. If the wardship order was then made and registered in Scotland under our proposals in section (A) of this Part and he wished to marry in Scotland while the order was still in force and so registered, he would by the law of Scotland require the consent of the English court. This again appears to us to be unsatisfactory.

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13 Ibid., para. 55.

(c) A wardship order might be made in respect of a child habitually resident and domiciled in England, and thereafter, while the order was still in force and registered in Scotland, he might acquire a Scottish domicile. If having attained the age of 16 he wishes to marry in Scotland, it is in our view wrong that he should require the consent of the English court.

(b) Our provisional proposals

4.19 The heart of the problem is the extent to which an English or Northern Irish wardship order should be enforceable in Scotland if it relates to a child over 16 who is domiciled in Scotland. Our provisional proposals are as follows:-

(1) A wardship order made in England or Northern Ireland should not have the effect of preventing a person over 16 who is domiciled in Scotland from marrying in Scotland.

(2) In so far as a wardship order in respect of a person over 16 who is domiciled in Scotland imposes personal restraints on the ward otherwise than in respect of marriage (for example, by providing that the ward should not associate with a particular person) it should not be enforceable in Scotland except on a specific order of the Court of Session.

(3) The foregoing rules should not prevent the court which has made a wardship order from punishing any person who, having been forbidden by the court to associate with the ward, acts in breach of the court's order within the jurisdiction of the court, or assists the ward to leave the jurisdiction.

Custody orders

4.20 In English law, custody orders may be made in respect of children aged 16 or 17 under a variety of powers.[14] It is, however, exceptional for a custody order to be made in respect of such children. In Northern Ireland the position is the same. In Scotland, the age limit for custody orders is now universally accepted as being 16, subject to one anomalous and little known statutory exception in the case of illegitimate children.[15]

4.21 A custody order may vest certain parental or quasi-parental rights in a named person, but we know of no authority for the view that such an order operates outside the country in which it is made so as to place any restraint on the marriage of the child to whom it relates or any other personal restraints upon him. If (as we think is the case) a custody order imposes no such restraints, then the problems discussed in relation to wardship orders in the preceding paragraphs have no counterpart in relation to custody orders. Accordingly, we make no special proposals as regards custody orders, but suggest that they should be governed without exception by the general scheme for enforcement set out in section (A) of this Part.

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14 See the Law Commission's Working Paper No. 53, Matrimonial Proceedings in Magistrates' Courts (1973), p. 119; see also Children Act 1975, Part II.

15 See Affiliation Orders Act 1952, s. 3.

PART V: CONCURRENT WARDSHIP OR CUSTODY PROCEEDINGS WITHIN THE UNITED KINGDOM

Introductory

5.1 It is as a general rule unsatisfactory that custody proceedings[1] concerning the same child should proceed at the same time in different countries. Such proceedings may waste judicial effort and both public and private financial resources. They may exacerbate bitterness between the parties and adversely affect the welfare of the child. The most unfortunate effects of such concurrent proceedings are generally seen when the courts of two different countries make conflicting orders.

Types of concurrent proceedings and the possibility of conflicts

5.2 Within the United Kingdom, three types of conflicts involving concurrent custody proceedings may arise:-

(a) where there are concurrent matrimonial proceedings between the parents of a child in two different countries;

(b) where there are matrimonial proceedings in one country and concurrent custody proceedings in another country (or, indeed, other countries); and

(c) where there are concurrent custody proceedings in two or more different countries.

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1 In this Part of the paper we use the expression "custody proceedings" in a general sense to include wardship proceedings. However, for the sake of completeness, we refer to both types of proceedings in summarising our provisional proposals at para. 5.17, below.

5.3 The Domicile and Matrimonial Proceedings Act 1973[2] makes provision for resolving conflicts in situation (a). At the present moment conflicts between concurrent proceedings can only be resolved in situations (b) and (c) by restraint and comity. But the widening of the bases of jurisdiction in matrimonial proceedings has increased the risk of conflicts between matrimonial proceedings and concurrent custody proceedings. We think that our proposals for harmonising the grounds of jurisdiction to make orders in respect of the custody of children will reduce the risk of conflicts. Nevertheless, under our proposals as so far formulated, the possibility of conflicts in situations (b) and (c) will remain.

Alternative proposals for avoiding conflicts

5.4 To avoid conflicts, we put forward the following alternative proposals for consideration:-

(a) Except in an emergency situation,[3] the courts in a United Kingdom country should be under a duty to stay (or, in Scotland, sist) custody proceedings when it appears that another court in the United Kingdom in which proceedings are pending is, under our proposals, the pre-eminent forum.

(b) This proposal is exactly the same as (a) above, except in one important respect: the court which is not the pre-eminent forum, instead of being under a duty to stay or sist the proceedings, should have a discretionary power to do so.

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2 See s.5(6) and Schedule 1(England); s.11 and Schedule 3 (Scotland); s.13(6) and Schedules 1 and 5 (Northern Ireland), which make provisions for the obligatory or discretionary suspension of proceedings in one U.K. jurisdiction if there are concurrent proceedings in another U.K. jurisdiction. In England only 2 discretionary stays were ordered in 1974; there were no applications for obligatory stays in that period: Civil Judicial Statistics (1975), Cmnd. 6361, p. 48.

3 See para. 3.95, above.

Before discussing the relative merits of these two alternatives we must define what we mean by the pre-eminent forum.

The pre-eminent forum

5.5 Where there are matrimonial proceedings in one country and custody proceedings are continuing simultaneously in another country, we have proposed[4] that the issue of custody should be resolved in the matrimonial proceedings. In such a case the court of the matrimonial proceedings is the pre-eminent forum. It is therefore right that the other court (notwithstanding that it may itself have jurisdiction to deal with the question of custody) should have either a power or a duty to stay the proceedings pending before it in favour of the court of the matrimonial proceedings. The court which has imposed the stay should, unless a custody order has been made or approved[5] in the matrimonial proceedings, have power to discharge the stay when the matrimonial proceedings are stayed or concluded.

5.6 The third category mentioned at paragraph 5.2 above concerns concurrent custody proceedings. Where there are proceedings to vary or revoke an order by the court of the child's former habitual residence, and concurrent proceedings for a new order in the court of the child's new habitual residence, then, having regard to our proposals at paragraph 3.91 above, it seems appropriate that the court of the new habitual residence should be the pre-eminent forum to decide the issue of custody. In

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4 See para. 3.34, above.

5 In England and Scotland, the court is under a duty to satisfy itself that the proposed arrangements for custody are satisfactory before granting a decree of divorce, nullity or separation: see Matrimonial Causes Act 1973, s.41(1) (England) and Matrimonial Proceedings (Children) Act 1958, s.8 (Scotland). The court of the matrimonial proceedings may approve the arrangements made under an earlier custody order.

the case of two (or more) concurrent custody proceedings in different law districts, then, having regard to our proposals at paragraph 3.78 above, the court of the child's habitual residence should be the pre-eminent forum to decide the issue of custody. (We leave aside for later consideration the exceptional cases of dual habitual residence). In cases of concurrent custody proceedings, however, it is not possible to decide which court has jurisdiction to decide on the merits until the preliminary factual question of the child's habitual residence has been resolved.

5.7 The Hodson Committee recommended that, where custody proceedings are instituted in two or more United Kingdom jurisdictions and the question of the child's ordinary residence is raised in each of those proceedings, priority should be given to the proceedings which were first commenced and that the competing proceedings should be stayed until the court to which the first application was made had determined the issue.[6] Our own proposals for dealing with cases where custody proceedings are instituted in two United Kingdom jurisdictions are on somewhat similar lines. We propose that in such a case the court in which the proceedings were first commenced should be the pre-eminent court for the purpose of determining the child's habitual residence, and that the other court should have either a power or a duty to stay the proceedings pending before it in favour of the pre-eminent court. The court which has imposed the stay should, however, have power to discharge the stay if the proceedings before the pre-eminent court are stayed or concluded without a decision being given on the merits.

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6 (1959) Cmnd. 842, para. 51.

5.8 Where the proceedings are stayed pursuant to our provisional proposals in the three preceding paragraphs, we think that provision will be necessary to enable a party to those proceedings who is not also a party to the proceedings before the pre-eminent court to intervene in the proceedings before the pre-eminent court. We propose that provision should be made by rules of court for that purpose.

A power or a duty to stay?

5.9 We now return to the question whether the court which is not the pre-eminent forum should be under a duty to stay the concurrent proceedings which are pending before it, or whether it is sufficient for the court to have a power without a duty to impose a stay.

5.10 In favour of the view that the provision should take the form of a power rather than of a duty, it may be said that to insist that in all circumstances the court should have a duty to stay is in the last analysis to deprive it of its obligation to have primary regard to the welfare of the child in the circumstances of the particular case. Moreover, if a pre-eminent court is indicated by legislation, it seems unlikely that in practice there would be many concurrent exercises of jurisdiction. It must be assumed that the courts endowed with the power to stay will act in a responsible manner and will normally exercise their power in favour of the pre-eminent court. The exceptional case where the court might not exercise the power would be a case in which there were strong reasons why the court itself should make a custody order and in which there was reason to suppose that the pre-eminent court would not make a competing custody order. As an example, we may suppose a case in which foster parents who have looked after a child for three years in England apply for his custody

under Part II of the Children Act 1975.[7] Divorce proceedings may be pending between the parents in Northern Ireland, but both parents may be content that the child should go on living with the foster parents. In such a case the English court might well refuse a stay and make the custodianship order with no risk whatever of a conflicting order being made by the Northern Ireland court.

5.11 In favour of the view that the provision should take the form of a duty, it may be said that the hypothesis against which this paper is written is that all United Kingdom courts in dealing with questions of custody are under a duty to treat the welfare of the child as the first and paramount consideration. Where the immediate intervention of the court is required our proposals for jurisdiction in cases of emergency[8] would meet the case. Moreover, while it may be true that the courts would seldom differ as to where the child is habitually resident, conflicting assumptions of jurisdiction could arise as between one court claiming jurisdiction on the basis of habitual residence and another court claiming jursidiction in matrimonial proceedings. If, moreover, provision is made for jurisdiction by consent of the parties, another possible source of conflict is added. Conflicts will be rare, but will be serious when they do arise. They would impair the effectiveness of the procedures which we recommend for the inter-United Kingdom enforcement of custody orders. There might then be a call for further legislation to resolve these conflicts.

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7 See s.33(3)(c). Part II of the 1975 Act has not yet come into force: see para. 3.98, n.142, above.

8 See para. 3.95, above.

5.12 There are various possible intermediate positions between a provision which imposes a duty on the court to order a stay and a provision which leaves it to the discretion of the court whether to impose a stay or not. For example, it might be provided that the court (instead of being under a duty to impose a stay ex proprio motu) should be under a duty to impose a stay, but only if one of the parties to the proceedings made an application to the court for that purpose. Again, it might be provided that the court should be under a duty to impose a stay ex proprio motu unless satisfied that there were special reasons why a stay should not be imposed. We are doubtful, however, whether a provision of either kind would have advantages over a provision conferring a general discretion on the court, bearing in mind that a discretion must be judicially exercised.

5.13 We invite views generally as to whether the provision for imposing a stay should take the form of a power or a duty.

Ancillary matters: duty to provide information

5.14 We think that if the proposed provisions for staying proceedings are to be effective, it will be necessary to impose on the parties to proceedings certain duties to provide information to the court. We propose that a duty should be imposed on the petitioner or pursuer and any other person who is a party to custody proceedings to disclose to the court, when he has knowledge of them, the existence of any subsisting custody order made by a United Kingdom court in respect of the child or of any concurrent custody or matrimonial proceedings in which an order might be made affecting the custody of the child and which are continuing in another United Kingdom country.

Ancillary matters: effect of a stay on interim orders

5.15 It is necessary to consider what should be the effect of a stay on interim orders made by the court prior to the stay. Clearly such orders should not automatically lapse immediately upon the imposition of a stay, for unless the other court has already made an order there would be a hiatus during which no order would be in force. The absence of an order might be crucial, as where the order includes a provision that the child must not be removed out of the jurisdiction.

5.16 We propose that an interim order affecting children made by the court staying proceedings should subsist until the court in whose favour the stay has been made makes an order in respect of the same subject matter, in which case the order of the staying court should lapse. In other words, an interim order affecting children made in proceedings which are stayed in favour of other concurrent proceedings in another United Kingdom country should cease to have effect:-

(a) on the date of the stay in cases where an order in respect of the same subject matter is in force in the concurrent proceedings;

(b) on the date of the coming into effect of an order in respect of the same subject matter made in the concurrent proceedings.

Provisional proposals

5.17 We summarise our provisional proposals as follows:-

(a) Stay of wardship or custody proceedings in favour of concurrent matrimonial proceedings

(1) Provision should be made for the stay of custody or wardship proceedings if before the trial or proof on the merits it appears that proceedings for divorce, nullity or

separation are continuing in another United Kingdom country.

(2) We invite views as to whether the provision should impose a duty or confer a discretionary power on the court to stay the proceedings.

(3) The court which has imposed the stay should, unless a custody order has been made or approved in the matrimonial proceedings, have power to discharge the stay when the matrimonial proceedings are stayed or concluded.

(b) Stay of wardship or custody proceedings in favour of concurrent wardship or custody proceedings

(1) To cater for cases where the child's habitual residence is in dispute, provision should be made for the stay of custody or wardship proceedings if before the trial or proof on the merits it appears that:-

(a) proceedings for custody or wardship are proceeding in another United Kingdom country; and

(b) the latter proceedings were begun before the commencement of the first-mentioned proceedings.[9]

9 For purposes of this rule the precise step in procedure denoting the beginning or commencement of the proceedings would be determined by the usual rules in each legal system. However, an application for variation should be treated as a fresh application.

(2) We invite views as to whether the provision should impose a duty or confer a discretionary power on the court to stay the proceedings.

(3) Where the court in which proceedings are continuing gives a decision on the merits, it should intimate its decision to the court in which proceedings are stayed and that court should then dismiss the proceedings.

(4) Where the court in which proceedings are continuing stays or concludes those proceedings without giving a decision on the merits, it should intimate its decision to the court in which proceedings are stayed, and that court may then remove the stay.

(c) Ancillary matters

Provisions as to the disclosure of information and as to interim orders should be made on the lines set out in paragraphs 5.14-5.16 above.

PART VI: ADMINISTRATIVE PROBLEMS INVOLVED IN THE ENFORCEMENT OF UNITED KINGDOM CUSTODY AND SIMILAR ORDERS

Introductory

6.1 It is a well known and unfortunate fact that cases from time to time arise where a court order relating to the custody or care and control of a child is frustrated by a party who succeeds in absconding with the child. As things are, there is no machinery in any of the law districts in the United Kingdom for enforcing custody or similar orders made in either of the other districts[1] and it is comparatively easy for an unsuccessful litigant to evade the order of a court by removing the child out of its jurisdiction into another law district.

6.2 Under the provisional proposals made in Part IV of this paper a custody or wardship order made in one law district of the United Kingdom will be enforceable in another United Kingdom law district, once the order is registered in the supreme court[2] of the law district where enforcement is sought. The order will thereby be converted, in effect, into a local decree and will become enforceable by such methods of enforcement as are available in the supreme court of the district of enforcement. Emergency provisions for the enforcement of unregistered orders are also discussed in Part IV above and we have made certain proposals in that Part as to emergency situations.

6.3 However, schemes for enforcement will only be of practical value if the facilities available for enforcement are effective. Accordingly, in this Part of the paper we

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1 See para. 4.1, above.

2 By "supreme court" is meant the High Courts in England and Northern Ireland, and the Court of Session in Scotland.

deal with the administrative problems involved in the enforcement in any jurisdiction in the United Kingdom of a custody or similar order made in another United Kingdom jurisdiction. We appreciate that the problem of enforcement arises also where the order has been made outside the United Kingdom, and, indeed, item (4) of our terms of reference[3] requires us to examine this aspect of the problem. But, as already indicated,[4] we propose to deal with the question of the recognition and enforcement of "international" custody and similar orders in a later working paper and we think that the associated question of the administrative problems relating to the enforcement of such orders must be dealt with in that context.

The scope of the administrative problems

6.4 The administrative problems relating to the enforcement of a custody or wardship order may be discussed in three contexts:-

(a) preventive action, i.e. preventing the child being removed from the jurisdiction;

(b) tracing action, i.e. where the child has vanished;

(c) enforcement of the order, i.e. where a known person in a known place has the child.

These aspects of enforcing an order for custody or wardship may be stated in more practical terms:-

(i) What help should be available from the immigration services and the police in preventing the child from leaving the jurisdiction?

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3 See para. 1.1, above.

4 See para. 1.3, above.

(ii) What help should be available from the courts, the police, government departments and the media in tracing a child who has vanished?

(iii) What improvements in procedure are desirable to compel a recalcitrant person to hand the child over to the person to whom the court has awarded custody or care and control?

We appreciate that these questions are closely interlinked and we have adopted the above classification merely as a convenient aid to exposition.

6.5 In dealing with the administrative problems, we have found it impossible to draw a rigid line of separation between problems which are purely administrative and problems which are associated with the powers of the courts to take action for the purpose of seeing that custody orders are obeyed. Accordingly, there will be some discussion of the powers of the courts to take such action in this Part of our paper. Both under our proposed registration scheme and in an emergency situation the enforcement in one part of the United Kingdom of custody orders made in another part is, in so far as the intervention of a court is required, a matter for the supreme court of that part of the United Kingdom in which the order is sought to be enforced. Accordingly in our discussion of the powers of the courts in this Part of the paper we are concerned only with the powers of the supreme court of that part of the United Kingdom where it is sought to enforce a custody order made in another part of the United Kingdom.

(A) PREVENTING REMOVAL OF THE CHILD FROM THE JURISDICTION

Powers of the court

(a) England

6.6 In England the High Court often includes a provision in a custody order that the child should not be removed out of the jurisdiction without the leave of the court except on such terms as may be specified in the order. Where the High Court makes an order relating to the custody or care and control of a child in matrimonial proceedings, that order will include such a provision unless the court otherwise directs.[5] In the case of wardship proceedings, a ward may not be removed out of the jurisdiction without leave even in the absence of a specific prohibitory order.

6.7 The power to restrict removal of the child from the jurisdiction may be exercised before the court actually makes an order for custody or care and control. In matrimonial proceedings either party may apply ex parte, at any time after the filing of the petition, for an order prohibiting the removal of the child out of the jurisdiction without leave of the court.[6] And the court may also grant an injunction restraining removal of the child even before the commencement of matrimonial or wardship proceedings, but in such a situation it will only do so where the case is one of urgency and on terms providing for the

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5 Matrimonial Causes Rules 1973, r. 94(2).

6 Ibid., r. 94(1).

commencement of the proceedings and such other terms as it may think fit.[7]

6.8 A divorce county court has power, analogous to that of the High Court, to grant an injunction restraining the removal of a child from the jurisdiction,[8] but this remedy is not available in a magistrates' court.[9]

(b) Scotland

6.9 In Scotland the Court of Session has power in matrimonial and independent custody proceedings to grant an interdict prohibiting the removal of a child furth of Scotland.[10] This may be granted by the court as soon as the petition is lodged. It is thought that the sheriff courts do not have such a power.

(c) Northern Ireland

6.10 In wardship and other proceedings in the High Court involving the custody of a child, it is invariably ordered

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7 In L. v. L. [1969] P. 25, Sir Jocelyn Simon P. held that the High Court has power under the Supreme Court of Judicature (Consolidation) Act 1925, s. 45, and under R.S.C., O.29, r. 1(3) to grant an injunction restraining removal of the children in cases of urgency, even though no divorce proceedings had been commenced. He granted an injunction on the petitioner's undertaking to commence divorce proceedings forthwith. In Re N. [1967] Ch. 512, Stamp J. held that the High Court has power, pursuant to R.S.C., O.29, r. 1, to grant an injunction in cases of urgency before wardship proceedings have been initiated. A breach of an injunction granted by the High Court is contempt of court and is punishable by committal or sequestration: R.S.C., O.45, r. 5.

8 See County Courts Act 1959, s.74 as amended by the Administration of Justice Act 1969, s. 6.

9 T. v. T. [1968] 1 W.L.R. 1887; but see para. 4.8, n. 7, above.

10 Matrimonial Proceedings (Children) Act 1958, s. 13; see also Burn-Murdoch, Interdict, pp. 390-1.

that the child shall not be removed out of the jurisdiction without the approval of the court. In wardship proceedings, this provision is included in both the primary order made after ex parte consideration of the petition and in the final order of the court. In matrimonial proceedings, in which custody of a child has been awarded, a provision that he is not to be removed out of the jurisdiction without the approval of the court is included in the decree absolute or, occasionally, is specifically ordered as a result of an ex parte application brought by virtue of Order 70, rule 60(1) of the Rules of the Supreme Court (Northern Ireland) 1936. The power to make preventive orders of this kind is confined to the High Court.

The existing administrative arrangements for preventing children from leaving the jurisdiction

(a) England

(i) The general nature of the steps available

6.11 In England administrative arrangements exist designed to prevent so far as practicable children being taken abroad contrary to the order of an English court. These arrangements may be invoked by giving notice to the Home Office when a child is:-

(a) a ward of court; or

(b) the subject of a custody order (or a care and control order) which provides that the child may not go or be taken out of the jurisdiction without leave of the court; or

(c) the subject of an injunction restraining one or more named persons from taking the child out of the jurisdiction.[11]

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11 See The Supreme Court Practice (1976), Vol. 1, p. 1308.

A caveat against the issue of a passport may be made as described in paragraphs 6.12, 6.17 and 6.18 below.

(ii) Passport Office: caveat against issue of passport

6.12 Passport facilities in respect of a child are granted in England on the consent of either parent unless a caveat has been accepted by the Passport Office. A caveat made in writing is accepted from a parent or other objector where it is based on a court order awarding the objector custody of, or care and control over, the child, or specifying that the objector's consent to the child leaving the jurisdiction is necessary. Where the Passport Office is given notice that a child is a ward of court, a passport will not be issued until the prescribed permission is given. A caveat is also accepted where a court order under the Guardianship of Minors Acts 1971 and 1973 upholds the objector's objection to the child having a passport or leaving the country. But there is no way in which passports already issued may be withdrawn and, because of the increase in travel, large numbers of children have passports, or are included in the passport of one or both parents.

(iii) The Home Office "stop list" procedure

6.13 Whether or not a current passport for a child already exists, the Home Office is prepared, on request, to lend its assistance in order to prevent the unauthorised removal of a child from England. Requests for action are normally made by solicitors[12] to the Home Office and the scope of this procedure is explained in a Practice Note as follows:-

> "The assistance of the Home Office should not be invoked merely as a precautionary measure but only when absolutely necessary, i.e., only when it is known that there is a real risk of the infant's being removed from the jurisdiction.

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12 Solicitors who wish to take advantage of this procedure must produce to the Home Office a copy of the injunction or order.

> When a name has been entered on the Home Office list, the measures taken by the Home Office are more likely to prove successful if the solicitors will communicate with the Home Office as soon as they receive any definite indication as to when, from which port, and for what destination the infant is likely to be removed. It does not help to notify the Home Office of a general suspicion that the infant is likely to be removed soon, or to request that all major ports should be alerted.
>
> The Home Office does what it can to vindicate the orders of the Courts; but the Home Office measures can be evaded and there can be no guarantee that they will succeed."[13]

6.14 The Home Office circulate particulars of the case to the immigration service at the ports. The immigration officer, if he identifies the child on the point of departure, draws the matter to the attention of a police officer. The police first try to persuade the child or escort that the child should not leave the country; then, if persuasion fails, the co-operation of the carrying company is sought and it is pointed out to the captain of the ship or aircraft that the company might be held to be in contempt of court if the child is removed by them; in the last resort the police use such force as is necessary to prevent embarkation. Solicitors are asked to inform the Home Office when precautions are no longer needed and all cases are reviewed initially after three months and thereafter every six months.

6.15 It is obvious that there are practical limitations on the efficacy of the assistance which the Passport Office and the Home Office are able to provide. For example, the child may be taken out of the jurisdiction to Scotland, Northern Ireland, the Channel Islands, the Isle of Man or the Republic of Ireland, for which journeys passports are

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13 The Supreme Court Practice (1976), Vol. 1, p. 1308. The Home Office have informed us that at present precautions at the ports are instituted in about 400 cases a year. In about 10 cases a year only is an actual attempt at removal made and over half these attempts are frustrated.

not needed and to which territories journeys may be made without passing through any control. Moreover, the immense increase in the number of passengers passing through the ports[14] has added to the difficulties of identifying children who are the subject of precautions. The task of identifying the children concerned can be carried out effectively only by comprehensive reference to the index. But the immigration officer must clear outgoing passengers quickly if unacceptable delays to ships and aircraft are to be avoided. There is accordingly a conflict between the need for speedy clearance and that of identifying children being unlawfully removed from the jurisdiction and their escorts.

6.16 We do not suggest that there is any change of system which would resolve this conflict satisfactorily, nor do we believe that an improved system could be devised without involving the travelling public in unacceptable delays. So far as journeys within the United Kingdom are concerned, it would, we think, be unacceptable to exercise any control at all; and the question of imposing controls on travel between the United Kingdom and the Republic of Ireland raises issues which are outside the scope of this paper.

(b) Scotland

6.17 The Home Office's "stop list" procedure does not extend to Scotland.[15] But the caveat system described in paragraph 6.12 above applies also to the issue of passports in Scotland.

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14 Since 1952, when the "stop list" procedure was introduced, the number of non-British passengers has increased from 1.6 million to 14 million in 1974. The number of British passengers has increased from 3.4 million to 26 million.

15 There are, however, recommendations for its extension to Scotland: see the Report of the Royal Commission on Marriage and Divorce (1956), Cmd. 9678, para. 424; the Hodson Report (1959), Cmnd. 842, para. 56.

(c) Northern Ireland

6.18 The Home Office's "stop list" procedure does not extend to include orders made by courts in Northern Ireland. Passport facilities on applications emanating from Northern Ireland are granted on the consent of either parent, unless a caveat has been accepted. A caveat made in writing is accepted from the legal guardian or from another objector based on a court order awarding the objector custody of or care and control over the child, or specifying that the objector's consent to the child leaving the jurisdiction is necessary. Where a child is a ward of court, the position is as described in paragraph 6.12 above.

Provisional proposal for extending the "stop list" procedure

6.19 Despite their limitations, the Home Office's arrangements for preventing the unauthorised removal of children from the jurisdiction perform a useful function and it seems desirable that these arrangements should be extended to Scotland and Northern Ireland. We therefore propose that the "stop list" procedure should be extended so as to include orders made by the Court of Session in Scotland and by the High Court in Northern Ireland. We further propose that, once the supreme court of any of the three law districts has made an order which prohibits the removal of a child from its jurisdiction, the "stop list" procedure should be available to prevent the child leaving the United Kingdom from any port in any of the three law districts.

The legal background to the "stop list" procedure

6.20 The legal basis on which action is taken by immigration officers and the police in England under the "stop list" procedure is that as officers of the Crown, they may be under a legal duty (or, if not under a duty, have a right either as officers of the Crown or as ordinary citizens)

to do what they reasonably can to prevent the unauthorised removal of a child from the jurisdiction of the English courts.

6.21 Legislation would be necessary in any case to enable custody orders made in one United Kingdom jurisdiction to be enforced in another and we suggest that when this is done the opportunity should be taken to put the powers of immigration officers and of the police in this matter on a clearer footing; we suggest that this might be done by providing in the statute that an immigration officer or constable taking action in good faith in purported execution or furtherance of an order of a United Kingdom court prohibiting the removal of a child from the United Kingdom should not be liable in respect of such action.

(B) TRACING THE CHILD

The enforcement machinery at the disposal of the court

(a) England

6.22 Generally speaking, when the court makes an order relating to the custody of a child, it is for the parties concerned to comply with the order and the court is not involved in matters of enforcement. Where, however, the order is not complied with, the aggrieved party may seek the aid of the court in enforcing the order.

6.23 In custody proceedings the High Court may make an order directing a person to deliver the child to the person, usually a parent, to whom it has entrusted custody or care and control.[16] Such an order may be included in the

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16 An order of the court which requires a person to do an act must specify the time within which the act is to be done: R.S.C., O.42, r. 2(1), and an order for the delivery of a child will also state the time when and the place at which the child is to be handed over to the person named in the order. For rules as to service, see R.S.C., O.45, r.7.

original order dealing with custody; but it may also be made subsequently on the application of the aggrieved party, e.g. where the other party refuses to comply with the order or where he has seized the child from the care and control of the applicant. Disobedience to a mandatory order is contempt of court and will attract the sanctions of committal, sequestration or fine.[17] It is not clear, however, whether the High Court has power to enforce an order for the delivery up of a child in matrimonial proceedings or independent custody proceedings by making an order for the recovery of the child, i.e. directing the Tipstaff to take possession of the child and then to deliver him to the person named in the order. As we point out below, the High Court has power to make such an order for the recovery of the child in wardship proceedings, and it is arguable (though the point has not been decided) that the effect of section 43 of the Supreme Court of Judicature (Consolidation) Act 1925 is that the High Court has power to make such an order in custody proceedings also.

6.24 Where the contemnor has gone into hiding, the order for committal cannot be enforced immediately and the problem is one of tracing his whereabouts. As a general rule the court has no power in civil proceedings to call witnesses without the consent of both parties, but it has been held that this does not apply to proceedings for committal;[18] accordingly, in such proceedings the court may of its own

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17 See R.S.C., O.45, r.5.

18 Yianni v. Yianni [1966] 1 W.L.R. 120; N. v. N. (1969) 113 S.J. 999.

motion order witnesses to attend and disclose their knowledge as to the whereabouts of the contemnor.[19]

6.25 In wardship proceedings the High Court exercises a parental and administrative jurisdiction and it may take whatever enforcement action it considers necessary in the interests of the ward. The court may, where necessary, order a person to return the child to the person entitled to his care and control and it may enforce its orders, not only by the sanctions available for contempt, but also by directing the Tipstaff[20] to take the child into his custody and to deliver him to the person named in the order.[21] Furthe it may summarily order any person who may be in a position to give information as to the whereabouts of the child to divulge to the court his knowledge of the matter;[22] and it may do so of its own motion, and even though no order for committal has been made against the absconder.

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19 In N. v. N. (1969) 113 S.J. 999, a husband failed to obey the court's order to hand the child over to the wife and an ex parte committal order was made against him. Neither he nor the child could be traced. Ormrod J. ordered that subpoenas be issued requiring the attendance before the court of the contemnor's mother, sister and employer. At a subsequent hearing Cairns J. directed that the Official Solicitor should call the witnesses so that counsel for the mother could cross-examine them as to the whereabouts of the contemnor and the child.

20 See R.S.C., O.90, r. 3A. Previously the proper officer to enforce an order of the High Court was the Sergeant-at-Arms.

21 G. v. L. [1891] 3 Ch. 126; see also Atkin's Court Forms (1975 Supplement), Form 120A at p. 429.

22 Burton v. Lord Darnley (1869) L.R. 8 Eq. 576n; Ramsbotham v. Senior (1869) L.R. 8 Eq. 575 (solicitor obliged to disclose information which may lead to the discovery of the ward); Mustafa v. Mustafa, The Times, 11 September 1967 (banker order to disclose address of client, who had absconded with the ward).

6.26 In both custody and wardship proceedings the welfare of the child is the first and paramount consideration; the order in each case is made not for the benefit of any party but for the benefit of the child concerned. In this sense, these cases differ from ordinary litigation where the interests of children are not involved. In wardship cases this distinction is already recognised and is reflected in the wide powers of the court to take whatever enforcement action it considers necessary in the interests of the ward. It seems to us that there is a strong case for conferring similar powers on the High Court in custody proceedings and we suggest that:-

(a) it should be made clear that the High Court can enforce an order for the delivery up of a child made in custody or matrimonial proceedings, by ordering the Tipstaff to take possession of the child and then to deliver him to the person named in the order;

(b) where the High Court has made an order relating to custody in such proceedings, it should be able, of its own accord, to order any person to disclose to the court his knowledge of the whereabouts of the missing child.

(b) Scotland

6.27 In Scotland the Court of Session has power to grant warrants to messengers-at-arms and other officers of the law to search for and take delivery of the child. Further, the court has very extensive powers to compel a person, who knows of the child's whereabouts, to appear at the bar and inform the court where the child is or to deliver him to the legal custodian. Failure to comply is punishable as a contempt of court and, in custody cases where the child has been concealed, the Court of Session has used its extensive powers to compel obedience to an order for delivery with

notable success. These powers include powers to impose fines or imprisonment; sequestration of the contemnor's assets in Scotland; and interdicts against trustees, employers and others prohibiting them from paying income to the contemnor until he obeys the order of the court.[23] Sequestration is used where the party disobeying the court order has left Scotland or has disappeared. Imprisonment is used where the party disobeying the order has not disappeared but is merely recalcitrant and, where a recalcitrant person has been called before the court, warrant for imprisonment will be granted even if the petitioner requests the court not to grant such a warrant but merely to grant warrant to search for and take delivery of the child.[24] Unless the legal custodian withdraws his petition, an order for delivery or to disclose the child's whereabouts must be obeyed. There is, however, no clear authority enabling the court in custody proceedings to order a person, who is not a party to the proceedings and has no direct connection with the child, to disclose to the court his knowledge of the whereabouts of the child. We think that such a power should be expressly conceded to the court.

(c) Northern Ireland

6.28 In Northern Ireland, there is an informal arrangement under which the Royal Ulster Constabulary assists the court by making enquiries to establish:-

(a) the whereabouts of the child; and

(b) the identity of the person having de facto custody of him.

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23 Ross v. Ross (1885) 12 R. 1351; Edgar v. Fisher's Trs. (1893) 21 R. 59. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s. 1 (which deals with enforcement of decrees ad factum praestandum) is not generally construed as applying to child delivery orders but the matter is not free from doubt and there may be a case for clarifying legislation.

24 E.g., Leys v. Leys (1886) 13 R. 1223 where the respondent appeared at the bar but refused to obey an order for delivery of the children.

When these enquiries are complete, the party to whom custody has been awarded applies to the court for an order requiring the party with de facto custody of the child to produce him within a specified time. If this order is not complied with, the party to whom custody has been awarded is granted a committal order under Order 44 of the Rules of the Supreme Court (Northern Ireland) 1936.

Assistance by the police

(a) England

6.29 Until recently the assistance of the police was not available on an official basis to secure the enforcement of custody or wardship orders made by the High Court except where the child was thought to be in danger or in need of care or where the order for the return of the child was coupled with a committal order against the absconding parent. This meant that the facilities for enforcing orders was in practice limited to the above cases since the High Court Tipstaff, whose job it is to secure compliance with the orders of the court, had neither the means nor the expertise to trace a child.

6.30 In 1973 the Association of Chief Police Officers agreed that, whenever the Tipstaff requested the assistance of the police in tracing a child whose return had been ordered by the High Court, a description of the child and brief details of the relevant circumstances should be included in the Police Gazette by the force from whose area the child had been taken and enquiries should be made by the police in the area where the child was thought to be[25]. A Home Office Circular describing the scope of these new arrangements states that:-

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25 These arrangements are without prejudice to the existing position whereby the police give, informally, any help they can to trace a child who is not yet the subject of a wardship or custody order.

> "The circulation should expressly state that police have no power of detention unless a committal order exists or the [child] is found in conditions where section 1 of the Children and Young Persons Act 1969 apply. If the [child] is traced, the Tipstaff should be informed immediately so that he can enforce the High Court order.... The length of time an entry remains in circulation in the Police Gazette is a matter for the Chief Officer of Police concerned, who may like to ensure that the Tipstaff is consulted before any entries are cancelled."[26]

(b) Scotland

6.31 Generally speaking, there are no formal arrangements whereby the police are involved in tracing missing children in respect of whom custody orders have been made. The arrangements referred to in paragraph 6.30 do not apply in Scotland. The police in Scotland do not assume responsibility for tracing children missing in these circumstances unless it is proposed to raise criminal proceedings for plagium (i.e. child theft). Their formal involvement is limited to assisting messengers-at-arms in enforcing a warrant for imprisonment or an order for the delivery of a child whose whereabouts are known. The messengers-at-arms, however, cannot effectively be employed in tracing missing children and, unless the aggrieved party has the funds to employ private inquiry agents, tracing will be difficult. We understand, nevertheless, that the police will, on request, give whatever informal assistance they can in tracing missing children. Solicitors and others making requests for tracing may do so direct to the Chief Constable of the police force concerned.

6.32 In principle, it would seem reasonable for the police in Scotland to assist in tracing children, where there is a court order for their delivery. Searching for missing persons is a task to which they are already accustomed and the task is usually beyond the resources of inquiry agents. Furthermore, the police

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26 Home Office Circular No. 174/1973, paras. 4 and 5.

have a national network and facilities for tracing which are not available to other organisations.

6.33 We would venture to express the view that the police in Scotland should lend their aid in tracing a child subject to a delivery order made by the Court of Session.[27] Accordingly we provisionally propose that formal arrangements should be introduced whereby, on request by a person having an interest, a description of a missing child and other relevant details can be published in the Scottish Police Gazette and enquiries made by the police in the area where the child is thought to be.

(c) Northern Ireland

6.34 As has already been mentioned,[28] the Royal Ulster Constabulary have been prepared to assist in establishing the whereabouts of children subject to custody orders. They have also been prepared to take positive measures where the legal position is clear-cut (as where a party tries to maintain de facto custody of a child, despite the existence of a committal order occasioned by his doing so). They are, however, concerned about the strict legality of their involvement in both the short-term and long-term enforcement of custody orders; and this involvement (and consequent concern) is magnified by the absence of any officer of the High Court with powers and duties akin to those of the Tipstaff (in England) or messengers-at-arms (in Scotland).

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27 We have restricted this proposal to cases where a custody order has been made and to Court of Session orders. We venture to hope that, if our proposal is accepted, the competent authorities would consider extending the arrangements to other cases.

28 See para. 6.28, above.

6.35 Despite these misgivings, the Royal Ulster Constabulary are prepared to issue a Force Order along the lines of the Home Office Circular referred to in paragraph 6.30 above. We suggest that this should be done.

Assistance by government departments

(a) England

6.36 In England arrangements exist for the disclosure of addresses from the records of government departments for the purpose of tracing the whereabouts of a missing ward of court or the person with whom he is alleged to be. Under a Practice Direction issued by the Senior Registrar of the Family Division on 28 November 1972[29] requests for such information, giving all relevant particulars,[30] may be made, through the Registrar, to the Department of Health and Social Security, the Passport Office and the Ministry of Defence.[31] Application may also be made to any other department, if the circumstances suggest that the address may be known to it.

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29 See [1973] 1 W.L.R. 60.

30 The possibility of identifying the record of a particular person will depend on what identifying particulars are furnished to the department and the Practice Note specifies the particulars which should, so far as possible, accompany the request for information.

31 The department most likely to be able to assist is the D.H.S.S., whose records are the most comprehensive and complete; applications should be made to the Passport Office or to the Ministry of Defence if either the records of the D.H.S.S. have failed to reveal an address or there are strong grounds for believing that the defendant may have made a recent application for a passport or that he is, or has recently been, a serving member of the Army, Navy or Air Force.

When any department is able to supply the address of the person sought it will communicate directly with the Registrar, who in turn will pass on the information to the applicant's solicitors (or to the applicant if acting in person) on an undertaking to use it only for the purpose of the proceedings.

6.37 These arrangements are similar to those whereby the address of a husband may be disclosed from the records of those departments for the assistance of a wife seeking to obtain or enforce an order for maintenance for herself or for any child of the family.[32]

(b) Scotland

6.38 In Scotland facilities, similar to those in England, exist for obtaining the address of certain aliment defaulters from the records of the Department of Health and Social Security, the Passport Office and the Ministry of Defence.[33]

(c) Northern Ireland

6.39 There are no specific arrangements for the disclosure of addresses by government departments to assist in tracing the whereabouts of a missing ward. But arrangements, similar to those outlined in paragraph 6.37 above, exist whereby the court may request the address of a husband from the records of the Department of Health and Social Services, the Passport Office and the Ministry of Defence to enable a wife to commence maintenance proceedings or to enforce an order for maintenance.

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32 See [1973] 1 W.L.R. 60.

33 Arrangements for the disclosure of addresses apply to any proceedings, either initial or for enforcement, which include a claim for aliment. Details of these arrangements are set out in 1971 S.L.T. (News) 183-184.

Provisional proposal for extension of present assistance by government departments

6.40 There are undoubted anomalies in the present arrangements. In England if a child vanishes there has to be a wardship application before a request can be made to a department for disclosure of the address of the child or of the person with whom he is alleged to be. This facility for disclosure is not available in Northern Ireland, even though the wardship jurisdiction exists there. And, while in all three jurisdictions there are arrangements for obtaining disclosure of addresses in maintenance proceedings, in none of those jurisdictions do similar facilities exist for obtaining the address of a child who is the subject of a custody order or of the person with whom he is alleged to be, even though in custody proceedings the welfare of the child is the paramount consideration.

6.41 To eliminate these anomalies, we propose that facilities, similar to those which exist in wardship proceedings in England[34] should be provided for tracing the whereabouts of a missing child in respect of whom a custody order has been made by a supreme court in the United Kingdom and of the person with whom he is alleged to be. We also suggest that these arrangements should extend to wardship proceedings in Northern Ireland.

Publicity as a means of tracing a missing child

(a) England

6.42 In England wardship and custody proceedings in the High Court are frequently heard in private and there are restrictions on the publication of such proceedings. It is

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34 See para. 6.36, above.

provided by section 12(1)(a) of the Administration of Justice Act 1960 that the publication of information relating to wardship and custody proceedings before any court sitting in private shall of itself be contempt of court. But that section does not impose an irremovable ban on the publication of such information, and it has been held[35] that the judge has an unfettered discretion to give leave for the publication of information relating to such proceedings heard in private; and that in exercising that discretion he will place the interests of the child in the forefront of his considerations. The High Court therefore has power to authorise the publication of such information whenever it is thought desirable to do so in order to assist in tracing a child who is the subject of an order made in such proceedings.

(b) Scotland

6.43 There are certain restrictions on the reports of consistorial proceedings,[36] and the court has power in any proceedings concerning a child or young person under 17 to direct that no newspaper report should reveal his name or details leading to his identification, or to publish his picture.[37] In practice, applications for custody are disposed of in open court, and it is doubtful whether the court has power to hear a custody case behind closed doors (viz., to exclude the press and other members of the public).[38]

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35 Re R. (M.J.) [1975] Fam. 89; cf. Re A., The Times, 5 May 1976, where it was held that, although the publication of information relating to wardship proceedings is absolutely prohibited by the Administration of Justice Act 1960, s.12, the court has power to authorise publicity in a proper case.

36 Judicial Proceedings (Regulation of Reports) Act 1926.

37 Children and Young Persons (Scotland) Act 1937, s.46, as amended by the Children and Young Persons Act 1963, s.57; the section applies also to sound and television broadcasts: 1963 Act, s.57(4).

38 Babington v. Babington 1955 S.C.115, 122; but cf. A. v. B. 1955 S.C.378, which suggests that the Court of Session has power, in exceptional circumstances, to relax the strict rules of procedure in custody proceedings.

The Hodson Report recommended that "all courts should have a discretion to hear in private applications concerning children".[39] Since the court may now limit the publicity given to custody proceedings, we think it unnecessary in this context to make any specific recommendation.

(c) Northern Ireland

6.44 In Northern Ireland, wardship proceedings are heard in private and the provisions of section 12(1) of the Administration of Justice Act 1960[40] apply. If the judge considers that publicity will be in the best interests of the child, he adjourns the matter into open court, where an appropriate statement can be made. While the Matrimonial Causes (Reports) Act (Northern Ireland) 1966 imposes restrictions on newspaper reports of divorce proceedings, it specifically excludes "the publication of any notice or report in pursuance of the directions of a court."[41]

Should the present restrictions on publicity be removed?

6.45 It has been said that publicity is the most effective means of tracing a missing child and that accordingly in England:-

> "where a child recovery order has been made, there should be no restriction on publicity until the order has been complied with and it should no longer be a matter for which leave need be sought."[42]

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39 (1959) Cmnd. 842, para. 60(viii); see also para. 59.

40 See para. 6.42, above.

41 See s.1(3)(b).

42 Memorandum of the Holborn Law Society on "Kidnapped Children" (23 October 1972) submitted to the Lord Chancellor.

For our part, however, we do not think it advisable to impose any such inflexible rule; to do so, and to allow unbridled publicity in every case where a child recovery order has been made, may well be prejudicial to the best interests of the child. We understand that the practice of judges has frequently been to authorise publication of details to the press to enable a missing child to be traced and we think that it must be left to the judge to decide whether the interests of a child would best be served by allowing publicity in a given case. Where it is a question of tracing a child who is the subject of a Scottish or Northern Irish custody order registered in England,[43] we think that the English High Court should have power to order such publicity as seems desirable for the purpose; we think that the High Court in Northern Ireland should have a corresponding power.

(C) RECOVERY OF THE CHILD

The question for consideration

6.46 The situation envisaged here is that the whereabouts of a child and of the recalcitrant party are known and the question for consideration is whether the present powers of the court are adequate to compel that party to hand over the child to the person entitled to his custody or care and control.

6.47 We have already referred[44] to the powers of the High Courts in England and Northern Ireland and of the Court of Session in Scotland to secure compliance with their orders. The court may, on the application of the aggrieved party, make an order directing that the child should be handed

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43 See para. 4.5, above.

44 See paras. 6.22-6.28, above.

over to the applicant. Failure to obey the order will be contempt of court and the contemnor may ultimately be coerced into obedience by the sanctions of committal or sequestration. Often the threat of such sanctions is enough to secure compliance with the order for delivery up of the child and the court has power to suspend the execution of the committal order for such period and on such terms or conditions as it may specify.

6.48 It is also open to the aggrieved party to take more direct steps to enforce the order for delivery up of the child. In Scotland the Court of Session may, on application, grant a warrant to messengers-at-arms and other officers of the law to recover the child and then to deliver him to the person named in the order. In England the High Court may give a similar order to the Tipstaff where the child is a ward of court, and our proposals, if implemented, will enable the aggrieved party to obtain such an order in respect of any child who is the subject of an order relating to custody made in the High Court.[45] In Northern Ireland, however, there are no corresponding officers of the court. Enforcement depends on the informal efforts of the Chief Clerk (whose office deals with the commencement and conduct of wardship proceedings), the Royal Ulster Constabulary, and officials of the appropriate welfare authority. Where a child has to be recovered, resort may eventually have to be had to the committal procedure outlined in paragraph 6.28 above.

Invitation for views

6.49 We make no proposals, apart from that in paragraph 6.26(a) above, but invite views as to whether any other improvements might be made.

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45 See para. 6.26(a), above.

(D) PROVISIONAL PROPOSALS FOR REFORM OF ADMINISTRATIVE PROCEDURES

6.50 Our provisional proposals covering this Part of the paper are as follows:-

The "stop list" procedure

(1) The "stop list" procedure should be extended so as to include orders made by the Court of Session in Scotland and by the High Court in Northern Ireland (paragraph 6.19).

(2) The "stop list" procedure should be available to prevent a child from leaving the United Kingdom from any port in any of the three law districts, once the supreme court of any of the three law districts has made an order prohibiting the removal of a child from its jurisdiction (paragraph 6.19).

(3) It should be provided by statute that an immigration officer or a constable taking action in good faith in purported execution or furtherance of an order of a United Kingdom court prohibiting the removal of a child from the United Kingdom should not be liable in respect of such action (paragraph 6.21).

The enforcement machinery at the disposal of the court

(4) It should be made clear that the High Court in England should be able to enforce an order for the delivery up of a child made in custody or matrimonial proceedings by making an order for the recovery of the child (paragraph 6.26).

(5) Where the High Court in England or the Court of Session in Scotland has made an order relating to custody, in custody or matrimonial proceedings, it should be able, of its own accord, to order any person to disclose

to the court his knowledge of the whereabouts of the missing child (paragraphs 6.26 and 6.27).

Assistance by the police

(6) In Scotland formal arrangements should be introduced whereby, on request by a person having an interest, a description of a missing child and other relevant details can be published in the Scottish Police Gazette and enquiries made by the police in the area where the child is thought to be (paragraph 6.33).

(7) In Northern Ireland, a Force Order along the lines of Home Office Circular No. 174/1973 should be introduced (paragraph 6.35).

Assistance by government departments

(8) Facilities, similar to those which exist in wardship proceedings in England, should be provided by government departments for tracing the whereabouts of a missing child in respect of whom a custody order has been made by a supreme court in the United Kingdom and of the person with whom he is alleged to be. These arrangements should extend to wardship proceedings in Northern Ireland (paragraph 6.41).

Recovery of the child

(9) Views are invited as to whether the powers of the court to secure compliance with an order for the recovery of a child need to be strengthened (paragraph 6.49).

PART VII: SUMMARY OF PROVISIONAL PROPOSALS[1]

7.1 We append here a summary of the provisional proposals made and questions raised in this working paper. We would welcome views on these proposals and questions.

Part III: Jurisdiction

Jurisdiction to make custody orders in matrimonial proceedings

1. Where a United Kingdom court has jurisdiction in proceedings for divorce, nullity or separation it should have jurisdiction, as under the present law, to make custody orders in the course of those proceedings (paragraph 3.34).

Other courts to decline jurisdiction

2. Except in the emergency cases to which we refer in proposal (7) below, a United Kingdom court should decline to exercise jurisdiction to entertain custody or wardship proceedings either:-

(a) while proceedings for divorce, nullity or separation are continuing in another United Kingdom court; or

(b) within six months from the date when another United Kingdom court has made its initial order as to custody in divorce, nullity or separation proceedings (paragraph 3.34).

Retention of jurisdiction after custody order in matrimonial proceedings

3. Where a United Kingdom court has made a custody order in proceedings for divorce, nullity or separation, it should retain jurisdiction to vary or revoke that order or to make a fresh custody order unless and until the court

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1 All the proposals in this paper are confined to United Kingdom cases, i.e., to cases where the child is habitually resident in some part of the United Kingdom: see para. 3.2, above.

of the child's habitual residence makes a custody order regarding the child (paragraph 3.34).

Jurisdiction in wardship and independent custody proceedings

4. (1) The general rule should be that a court in a United Kingdom country should have jurisdiction to entertain wardship or independent custody proceedings if, and only if, the child in question is habitually resident in that country at the date of the commencement of the proceedings.

(2) Unless it is established that the habitual residence of a child is in some other country, it should be presumed that his habitual residence is in the country where he has resided cumulatively for the longest period in the year immediately preceding the commencement of the proceedings.

(3) In cases where the child's residence has been changed without lawful authority[2] during the year immediately preceding the commencement of the proceedings, no account should be taken of the period of that changed residence in reckoning the periods of the child's residence for the purposes of (2) above (paragraph 3.78).

Jurisdiction by consent

5. Views are invited as to whether and if so subject to what conditions the parties should be able to confer by consent jurisdiction upon a court which is not in the country of the child's habitual residence (paragraphs 3.81 - 3.87).

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2 See para. 3.76, above.

Power to alter or supersede custody orders

6. A United Kingdom court which has made a custody order in wardship or custody proceedings on the basis of the child's habitual residence should retain jurisdiction to vary or revoke the order or to make a fresh order unless and until a court in another United Kingdom country makes a custody order:-

(a) in matrimonial proceedings between the child's parents; or

(b) in wardship or custody proceedings on the basis of the child's habitual residence in that country.

The order of the original court should then be treated as superseded by the new order (paragraph 3.91).

Jurisdiction in emergency cases

7. (1) Where a child is physically present in a United Kingdom country at the date of the commencement of the proceedings, the courts of that country should have jurisdiction to entertain wardship or custody proceedings if, and only if, the immediate intervention of the court is necessary for the protection of the child.

(2) Such an emergency order should be liable to be superseded at any time by the court of the place where the child is habitually resident or by a court in which matrimonial proceedings are continuing (paragraph 3.95).

Combined proceedings for custody and maintenance, aliment or financial provision

8. In combined proceedings for custody and maintenance, aliment or financial provision a court in the United Kingdom should be able to make a custody order only if the child is habitually resident within its jurisdiction; in addition, in such proceedings the court should have

jurisdiction to make an interim custody order on the basis of the child's physical presence within its jurisdiction if, and only if, the immediate intervention of the court is necessary for the protection of the child (paragraph 3.105).

Part IV: Recognition and enforcement of United Kingdom custody and wardship orders

The general scheme of enforcement

9. (1) Where an order for the custody of a child has been made by any court in one part of the United Kingdom ("the issuing court") it may be registered in the supreme court[3] of another part of the United Kingdom ("the registering court") on production of an authenticated copy of the order, together with a statement signed by the applicant stating that to the best of his knowledge and belief the order is still in force and that there is no later and competing order of a United Kingdom court relating to the child.

(2) On production of the above-mentioned documents, the officer of the registering court will forthwith register the order unless it is brought to his notice that there is a later and competing order of a United Kingdom court relating to the child.

(3) Views are invited on our provisional conclusion that the officer of the registering court should not be empowered to decline registration except in the circumstances referred to in (2) above.

(4) If there is a later and competing order of a United Kingdom court relating to the child but the applicant asserts that it was made without jurisdictional competence, the application for registration will be referred to a judge of the registering court. Registration of the earlier

3 By "supreme court" is meant the High Courts in England and Northern Ireland, and the Court of Session in Scotland.

order may only be effected if the judge decides that the later and competing order was made without jurisdictional competence.

(5) On being registered in accordance with the foregoing provisions, an order by the issuing court shall forthwith have effect in the country of registration as if it were an order made by the supreme court in that country, so far as it relates to rights of custody of and access to the child or regulates the child's education.

(6) Any party to the original proceedings before the issuing court may, for the purpose of securing the further enforcement of the registered order in the country of registration, apply to the supreme court of that country for an injunction, interdict, an order for the delivery of the child, or other ancillary orders. Such a remedy may at the discretion of the court be granted ex parte or after hearing such other parties as the court deems appropriate.

(7) The registering court may discharge the registration of the order on an application made to it for that purpose or of its own motion.

(8) The new registration procedure would extend to custody orders made under the emergency jurisdiction proposed in paragraph 3.95 above (paragraph 4.5).

(9) The above scheme of registration and enforcement should also apply to interim custody orders (paragraph 4.7).

Emergency enforcement

10. It should be provided by statute that where a court makes an order which prohibits or restricts the removal of a child from one part of the United Kingdom, that order should have the effect of imposing similar prohibitions or restrictions on the removal of the child from the United Kingdom (paragraph 4.9).

Enforcement of custody and wardship orders concerning minors over 16

11. (1) A wardship order made in England or Northern Ireland should not have the effect of preventing a person over 16 who is domiciled in Scotland from marrying in Scotland.

(2) In so far as a wardship order in respect of a person over 16 who is domiciled in Scotland imposes personal restraints on the ward otherwise than in respect of marriage (e.g., by providing that the ward shall not associate with a particular person) it should not be enforceable in Scotland except on a specific order of the Court of Session.

(3) The foregoing rules should not prevent the court which has made a wardship order from punishing any person who, having been forbidden by the court to associate with the ward, acts in breach of the court's order within the jurisdiction of the court, or assists the ward to leave the jurisdiction (paragraph 4.19).

(4) Custody orders made in England or Northern Ireland in respect of a child over 16 who is domiciled in Scotland should be enforceable in Scotland in accordance with the general scheme of enforcement outlined in paragraphs 4.5-4.9 above (paragraph 4.21).

Part V: Concurrent wardship or custody proceedings within the United Kingdom

Stay of wardship or custody proceedings in favour of concurrent matrimonial proceedings

12. (1) Provision should be made for the stay of custody or wardship proceedings if before the trial or proof on the merits it appears that proceedings for divorce, nullity or separation are continuing in another United Kingdom country.

(2) We invite views as to whether the provision should impose a duty or confer a discretionary power on the court to stay the proceedings.

(3) The court which has imposed the stay should, unless a custody order has been made or approved in the matrimonial proceedings, have power to discharge the stay when the matrimonial proceedings are stayed or concluded (paragraph 5.17).

Stay of wardship or custody proceedings in favour of concurrent wardship or custody proceedings

(4) To cater for cases where the child's habitual residence is in dispute, provision should be made for the stay of custody or wardship proceedings if before the trial or proof on the merits it appears that:-

(a) proceedings for custody or wardship are proceeding in another United Kingdom country; and

(b) the latter proceedings were begun before the commencement of the first-mentioned proceedings.

(5) We invite views as to whether the provision should impose a duty or confer a discretionary power on the court to stay the proceedings.

(6) Where the court in which proceedings are continuing gives a decision on the merits, it should intimate its decision to the court in which proceedings are stayed and that court should then dismiss the proceedings.

(7) Where the court in which proceedings are continuing stays or concludes those proceedings without giving a decision on the merits, it should intimate its decision to the courts in which proceedings are stayed, and that court may then remove the stay (paragraph 5.17).

Ancillary matters

(8) Provisions as to the disclosure of information and as to interim orders should be made on the lines set out in paragraphs 5.14 to 5.16 above.

Part VI: Administrative problems involved in the enforcement of United Kingdom custody and similar orders

The "stop list" procedure

13. (1) The "stop list" procedure should be extended so as to include orders made by the Court of Session in Scotland and by the High Court in Northern Ireland (paragraph 6.19).

(2) The "stop list" procedure should be available to prevent a child from leaving the United Kingdom from any port in any of the three law districts once the supreme court of any of the three law districts has made an order prohibiting the removal of a child from its jurisdiction (paragraph 6.19).

(3) It should be provided by statute that an immigration officer or constable taking action in good faith in purported execution or furtherance of an order of a United Kingdom court prohibiting the removal of a child from the United Kingdom should not be liable in respect of such action (paragraph 6.21).

The enforcement machinery at the disposal of the court

(4) It should be made clear that the High Court in England should be able to enforce an order for the delivery up of a child made in custody or matrimonial proceedings by making an order for the recovery of the child (paragraph 6.26).

(5) Where the High Court in England or the Court of Session in Scotland has made an order relating to custody, in custody or matrimonial proceedings, it should be able, of its own accord, to order any person to disclose to the court his knowledge of the whereabouts of the missing child (paragraphs 6.26 and 6.27).

Assistance by the police

(6) In Scotland, formal arrangements should be introduced whereby, on request by a person having an interest, a description of a missing child and other relevant details can be published in the Scottish Police Gazette and enquiries made by the police in the area where the child is thought to be (paragraph 6.33).

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Recovery of the child

(9) Views are invited as to whether the powers of the court to secure compliance with an order for the recovery of the child need to be strengthened (paragraph 6.49).

APPENDIX

Membership of the Joint Working Party

Chairman:	The Rt. Hon. Lord Justice Scarman, O.B.E.	
	The Hon. Mr. Justice Cooke) Mr. J. Churchill)	Law Commission
	Mr. A.E. Anton, C.B.E.) Mr. N.R. Whitty)	Scottish Law Commission
	Mr. R.K. Batstone	(Foreign and Commonwealth Office)
	Mr. D.A. Bennet	(Scottish Education Department)
	Mr. M.C. Blair	(Lord Chancellor's Office)
	Mr. G.P.H. Aitken[1]) Mr. G.C. Duke)	Scottish Courts Administration
	Mr. R.L. Jones	(Home Office)
	Mr. W.J. Pickering[2]	(Principal Registry of the Family Division)
	Mr. J.W. Wilson	(Assistant Secretary to Supreme Court of Northern Ireland)
Secretary:	Mr. A. Akbar	(Law Commission)

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1. Mr. Aitken resigned in August 1975 on transfer to other work; he was succeeded by Mr. Duke.

2. Mr. Pickering resigned in December 1975 on retirement from the Civil Service.

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