The Law Commission

Working Paper No. 83

and

The Scottish Law Commission

Consultative Memorandum No. 56

Polygamous Marriages
Capacity to contract a polygamous marriage
and the concept of the potentially polygamous marriage

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SECTION A

GENERAL INTRODUCTION

PART I

THE NATURE AND SCOPE OF THIS PAPER

A. INTRODUCTION

1.1 This consultative document deals with a number of problems concerned with polygamous marriages, and in particular with the law relating to capacity to enter polygamous marriages. It has been the practice of the Law Commission and the Scottish Law Commission, when examining problems arising in the field of private international law, to try to do so either as a joint exercise or, at least, in very close co-operation. The matters under review in this joint consultative document are no exception. However, although this is a joint exercise, it has been decided for a number of reasons not to produce a fully integrated joint consultative document. As a result some sections of this paper are jointly prepared, whilst others have been separately prepared by each Commission.

1.2 The reasons why we have not prepared a fully integrated joint paper are to be found in the differing legal bases in the two jurisdictions for the main issue with which the paper is concerned - namely capacity to enter

into a marriage abroad by means of a ceremony appropriate, under the law of the country in which it was celebrated, for polygamous marriages. Until 1972, the law on this issue was to be found in the case law of both jurisdictions. As will be seen in more detail in paragraphs 3.2-3.4 below, the rule in the law of England and Wales seems to have been that a person domiciled in England had no capacity to contract such a marriage. The rule in Scotland may have been that a person domiciled in Scotland could not contract such a marriage, but the law was not clearly settled (see paragraphs 6.1-6.4 below). This remains the position in Scotland as the matter has not been affected by statute. In England and Wales the common law rule was replaced in 1972 by a statutory provision, now embodied in section 11(d) of the Matrimonial Causes Act 1973. Until very recently, that provision has been generally regarded as embodying the common law rule and has been so acted on by a wide range of public bodies and officials, such as the Immigration and Nationality Department of the Home Office, the Passport Office, the General Register Office and the Department of Health and Social Security. The provision has recently been interpreted in a rather different way by the Court of Appeal, as we discuss in paragraphs 1.5-1.9, below. The point remains, however, that in England and Wales the difficulties are caused by a statutory provision whereas in Scotland they are caused by the common law. It is for that reason that Section B, prepared by the Law Commission, deals with the position in England and Wales whilst Section C, prepared by the Scottish Law Commission, deals with the position in Scotland.

1.3 A further justification for this approach has emerged at a very late stage in the preparation of this joint consultative document. On the day (June 24, 1982) that a final version of this paper was to be sent for printing, the Court of Appeal gave judgment in the case of Hussain v. Hussain, The Times, 28 June 1982, and we have been supplied

with a transcript of the judgment of the court, given by Ormrod L.J. That decision adopts a fundamentally different interpretation of section 11(d) of the Matrimonial Causes Act 1973 from that on which lawyers and officials have based their advice and decisions for the past decade. Being based on statutory provisions which do not apply in Scotland, it is not a decision which could readily be followed in Scotland. The result is that there may well now be a greater difference between English and Scots law than before.

1.4 The fact that Hussain v. Hussain was decided as this paper had been completed raised the question whether the general form and structure of the paper should be altered. We have decided that, in the circumstances, the most appropriate course is to provide in this Part of the paper a brief account of the decision and its general effect and then to leave Parts II to VI of the paper substantially unamended. This will enable the reader to see the background of the law as it has been thought to be until Hussain v. Hussain and of the practice based on that view of the law, and to appreciate the changes in that law which the Law Commissions recommend. The paper then concludes in Part VII with a detailed analysis of that decision and a fuller discussion of the issues to which it gives rise, none of which has caused the Commissions to alter their provisional recommendations as to the form which the law on this subject should take in the future, except in one respect. The exception relates to the date from which any legislation implementing our provisional recommendations should have effect, a matter which we consider in paragraphs 5.10 and 7.5-7.7, below.

B. HUSSAIN v. HUSSAIN

1.5 Section 11(d) of the Matrimonial Causes Act 1973 provides that no person domiciled[1] in England and Wales has the capacity to contract a polygamous marriage, whether that marriage is actually or potentially polygamous.[2] This had generally been thought to have the result that if, for example, a man who is domiciled in England but whose family comes from Pakistan goes to that country to marry there in a mosque in Muslim religious form, such marriage is regarded in this country as potentially polygamous and thus as void. This view of the validity of the marriage has a number of important practical consequences which we outline in Part IV. We regard these consequences as unsatisfactory, and we make proposals for reform which are to be found in Part V (for England and Wales) and Part VI (for Scotland). However, those Parts of this consultative document must all be read bearing in mind the views of the Court of Appeal in Hussain v. Hussain.

1.6 The facts of Hussain v. Hussain are straightforward. The husband and wife were both Muslims and they married in Pakistan in 1979 in accordance with the Muslim Family Laws Ordinance 1961, i.e. in a form appropriate for polygamous marriages. At the time of the marriage, the wife was domiciled in Pakistan and the husband was domiciled in England. On the subsequent breakdown of the marriage, the wife petitioned for a decree of judicial separation. The husband argued before the Court of Appeal that, as he was domiciled in England and the marriage was potentially

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1 The relevant parts of this section are set out in para. 3.5, below. Domicile is explained in paras. 2.7-2.8, below.

2 We explain in para. 2.2, below the meaning of this terminology.

polygamous in form, he lacked capacity to contract it by reason of section 11(d) of the 1973 Act and it was, accordingly, void. The Court of Appeal held that the marriage was to be regarded as monogamous, the husband did not lack capacity by reason of section 11(d), and the marriage was valid. The wife was accordingly entitled to the decree that she sought.

1.7 We consider below the detailed legal reasoning by which Ormrod L.J., giving the judgment of the court, reached this conclusion.[3] It will suffice here to point out that the approach adopted by the Court of Appeal produces the result, which may be thought anomalous, that section 11(d) on the one hand operates to render void a marriage between a woman domiciled in England and Wales and a foreign domiciled man whose personal law allows him subsequently to take another wife or wives; but, on the other hand, does not affect the validity of a marriage between a Muslim man domiciled in England and Wales and a foreign domiciled woman. This matter is considered further in paragraphs 1.9(iii) and 7.3 below.

1.8 In addition to reasons for their decision based on the interpretation of the relevant legislation, the Court of Appeal provided a further, broader justification for upholding the validity of the marriage in the case before them in that to do otherwise would have far-reaching and serious consequences. To invalidate such marriages would mean that "the repercussions on the Muslim community alone in this country would be widespread and profound."

1.9 It will be seen from the rest of this joint consultative document that we share the concern of the Court of Appeal if the law regarded as invalid marriages contracted in circumstances similar to those in Hussain v. Hussain. We

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3 See para. 7.3, below.

agreed that such a conclusion is undesirable in, to use Ormrod L.J.'s words, "an increasingly pluralistic society." We are, however, concerned as to whether the law, even in the improved state achieved by the Court of Appeal, is such that it can be left unaltered. We do not think that it would be right to leave it thus and that is why we have decided to publish this paper in very much the same form as it was before Hussain v. Hussain was decided. Hussain v. Hussain provides an interpretation of the law on capacity to contract polygamous marriages which runs counter to that on which reliance has been placed for a decade. There is likely to be a period of uncertainty on a matter affecting the status of the parties and, perhaps, of their children, whilst the implications of the decision are worked out in practice. Indeed, it is even possible that an appeal on this issue in some other case might be taken to the House of Lords. This has led us to the conclusion that review of this topic is now a matter of particular urgency and that publication of this paper should not be held up for the period of time that substantial redrafting might well involve. Although we provide a further analysis of this decision in Part VII which may enable the implications of the decision to be set against the detailed discussion in the body of this paper, we think that we should at this stage indicate in outline why we believe it to be unsatisfactory to leave the law in its present state. It will, we hope, be helpful to bear the following matters in mind when reading the rest of this paper:

(i) There is no equivalent in Scotland of section 11(d) of the Matrimonial Causes Act 1973. The law of Scotland on capacity to contract a polygamous marriage is uncertain but, on one view, is the same as the English common law on this question. If this view is correct then, on facts similar to Hussain v. Hussain, the marriage would probably be void had the husband been domiciled in Scotland. It would be extremely unsatisfactory

for any difference between the English and Scots views of the validity of the marriage to persist, when that issue may be of great importance for issues normally dealt with on a United Kingdom-wide basis, such as immigration, nationality, or social security - matters which are discussed in Part IV.

(ii) Section 11 of the Matrimonial Causes Act 1973 only applies to marriages contracted after July 1971. Marriages contracted before that date are, as we explain in paragraphs 3.2-3.4 below, governed by common law rules which would seem to regard as void a marriage contracted in circumstances such as those in Hussain v. Hussain. It is undesirable that there should be continuing uncertainty as to the validity of such marriages - an issue which is particularly pertinent to the question (discussed in paragraphs 5.10, 5.13 and 7.5-7.7, below) whether any statutory change in the law should be given retrospective effect.

(iii) The practical effect of the Court of Appeal's decision in Hussain v. Hussain is to restrict section 11(d) to a rule which effectively applies to invalidate certain marriages entered into by women, but not by men, domiciled in England and Wales. This might be regarded as discriminatory, and unsatisfactory for that reason. Ormrod L.J. suggests that the effect of section 11 is "to preserve the principle of monogamy for persons domiciled here." It does that for husbands, on the Court of Appeal's interpretation, by holding the marriage to be monogamous in character and thus valid, but if the wife is domiciled here her marriage is void, by reason of section 11(d), even if it is always monogamous in fact.

(iv) Difficult problems arise under the law as laid down in Hussain v. Hussain, to which the Court of Appeal did not advert in that case, if the husband who has married in, say, Pakistan, whilst domiciled in England, later abandons his English domicile and marries a second wife. The result of the decision seems to be that the first marriage is monogamous in character, though polygamous in form. This may cause considerable difficulty in determining the rights of the first wife, should this issue come before the English courts; the nature of those difficulties is discussed in paragraphs 5.15-5.25 and 7.9, below.

(v) The decision of the Court of Appeal is based upon the court's interpretation of Parliament's intentions in passing the predecessor of section 11(d) of the 1973 Act. The intention of Parliament as determined by the Court of Appeal is very different from that which is to be deduced from the views expressed during the Parliamentary debates on the relevant clause. As may be seen from paragraph 2.11 below, the expressed reason for the introduction of the clause was to embody in statutory form what was thought to be the common law rule as to incapacity to contract a polygamous marriage.

C. FORM OF THIS PAPER

1.10 As we have indicated already, we have divided this consultative document into separate sections. Section B, prepared by the Law Commission, deals with the position in England and Wales. Section C, prepared by the Scottish Law Commission, deals with the position in Scotland. It has

been possible to keep this section very brief by referring back to Section B in those areas where the situation is similar in both jurisdictions. Section D has been produced jointly. The provisional recommendations made by the two Commissions are in substance, though not necessarily in form, the same for both jurisdictions.

1.11 In detail, the structure of this consultative document is as follows:

Section A consisting of:

Part I: this General Introduction;

Section B relating to the law of England and Wales, subdivided into four Parts:

Part II: the Introduction to the subject;

Part III: an account of the present law;

Part IV: the practical application of the present law and criticisms that may be made of it;

Part V: proposals for reform of the law of England and Wales;

Section C consisting of:

Part VI: an examination of the same issues from the point of view of Scots law;

Section D consisting of:

Part VII: an analysis of Hussain v. Hussain and consideration of its implications in the light of the foregoing discussion in the paper;

Part VIII: a summary of the provisional recommendations of both Commissions.

1.12 The proposals for reform in this consultative document are only provisional. The purpose of the publication of the paper is to seek comment and criticism of the proposals, which may be sent to either Commission. In the light of the response to this consultative document, we shall then prepare a joint final Report.

SECTION B

THE LAW OF ENGLAND AND WALES

PART II

INTRODUCTION

2.1 This Section of this consultative document deals with one aspect of the rules of private international law of England and Wales which govern capacity to enter into marriage - namely, the capacity of parties to contract a polygamous marriage.[4] In particular, it is concerned to examine the merits of the present statutory rule that a person domiciled in England and Wales has no capacity to enter a polygamous marriage.[5]

2.2 There are two preliminary matters to which reference should be made at the outset. The first of these is the concept of the "polygamous marriage". For the purposes of this consultative document a polygamous marriage can be defined as a marriage under a system of law which permits one of the parties to the marriage to take another spouse at a later date even though the marriage still subsists. The term "polygamous marriage" includes:

(a) a potentially polygamous marriage, in which neither party has, at the relevant time, any other spouse, but in which one

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4 We include within the expression "polygamous marriage" both marriages in which the husband is allowed to have more than one wife (polygyny) and those in which the wife is allowed to have more than one husband (polyandry). The latter is, however, most uncommon and the examples given in this consultative document are based on the polygynous situation.

5 Matrimonial Causes Act 1973, s.11(d).

party is legally capable of taking another spouse even though the marriage was intended by the parties to be, and subsequently remained, in fact, monogamous; and

(b) an actually polygamous marriage, in which one party has, at the relevant time, more than one spouse.

Both these types of marriage are in law polygamous marriages and are regarded in this country as such.[6] The terms "potentially polygamous" and "actually polygamous" will be used to distinguish them where necessary.

2.3 The nature of a marriage as polygamous or monogamous is determined by the law of the country in which it is celebrated.[7] If a marriage is celebrated abroad in a polygamous form in a country whose law permits the particular parties in question to contract a polygamous marriage then it will be regarded in this country as polygamous. Whether it is also regarded here as a valid polygamous marriage will depend, as we discuss in paragraphs 3.1-3.10, below, on whether it satisfies our rules of private international law for determining the validity of such marriages.

2.4 If the marriage takes place in a country, the law of which does not permit polygamous marriage, including of course England and Wales, it cannot be regarded as polygamous in nature, whether or not the law of the

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6 Hyde v. Hyde (1866) L.R. 1 P. & D. 130, 133; Sowa v. Sowa [1961] P.70, 84; Ohochuku v. Ohochuku [1960] 1 W.L.R. 183; Cheni v. Cheni [1965] P. 85, 88.

7 See paras. 3.11-3.12, below; though see Hussain v. Hussain, The Times, 28 June 1982.

domicile of either or both of the parties permits polygamy. If both parties are unmarried at the time of the ceremony, the marriage will be monogamous in nature; whether it is also valid will depend on whether the relevant marriage laws, applicable under our rules of private international law, have been satisfied. If one of the parties is already validly married, then such a marriage will be void as being bigamous.

2.5 It might be helpful to indicate, at this stage, in a little more detail, the effect of any attempt to celebrate a marriage in England in polygamous form. The basic legal proposition is that "A marriage celebrated in England in accordance with polygamous forms and without any civil ceremony as required by English law is invalid, whatever the domicile of the parties."[8] The formal validity of marriages celebrated in England is entirely a matter of statute law. There is no longer any room for the principles of the common law to operate. There is no provision in the Marriage Act 1949 which could conceivably validate a "marriage" celebrated in England in accordance with polygamous forms. If a civil ceremony in an English register office is followed by a religious ceremony in an unregistered building, the religious ceremony does not supersede or invalidate the civil ceremony and is not registered as a marriage in any marriage register book.[9] Even if the husband's religion and personal law permit polygamy, the religious ceremony is a nullity so far as English law is concerned and the civil (monogamous) ceremony is the only marriage which English law can

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8 Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p. 314; R. v. Bham [1966] 1 Q.B. 159 (C.C.A.), overruling R. v. Rahman [1949] 2 All E.R. 165. See also Abdul Majad Belshah, The Times, 16 and 18 Dec. 1926, 14 and 18 Jan. 1927.

9 Marriage Act 1949, s. 46(2); Qureshi v. Qureshi [1972] Fam. 173, 186.

recognise. If there is a religious ceremony in a registered building (for example, a mosque which has been registered under the Marriage Act 1949, section 41) conducted in accordance with the essential requirements of the Act,[10] the civil marriage is recognised as a monogamous marriage, even if the religion permitted polygamy. Indeed, the ceremony may take any form provided it takes place in a registered building and the statements prescribed by the Marriage Act 1949[11] are uttered.[12]

2.6 We ought to point out, finally, that the nature of a marriage may, in law, be changed in character from being potentially polygamous and become monogamous. This may happen in a variety of ways, as we discuss in paragraph 3.12, below; but the most significant in the context of this consultative document is by a change of domicile and it was held in Ali v. Ali[13] that a potentially polygamous marriage became monogamous when the parties acquired an English domicile. Thus, if the parties were resident and domiciled in, say, Pakistan at the date of their marriage there in polygamous form, and subsequently came to live in this country then, as soon as they formed an intention to live here permanently and thus become domiciled here,[14] their marriage would cease to be potentially polygamous and become monogamous.

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10 Sect. 44.

11 Ibid.

12 Proposals for reform of the law as to the place and method for solemnisation of marriage are to be found in Law Com. No. 53 (1973), pp. 6-8, 37-56.

13 [1968] P. 564.

14 See paras. 2.7-2.9, below.

2.7 The second preliminary matter to which we would briefly refer here is domicile, a subject on which there is a substantial body of authority.[15] For the purpose of this consultative document, however, it is necessary only to refer in outline to certain features of the topic.

2.8 Broadly, a person is domiciled in the country (in the sense of a territorial unit with its own legal system) in which he has his home and intends to live permanently or indefinitely. Everyone has a domicile, which may be either a "domicile of origin", conferred at birth,[16] or a "domicile of choice", which may be acquired subsequently.[17] Formerly, the domicile of a married woman was automatically the same as her husband's, but this rule was abrogated as from 1 January 1974 by section 1(1) of the Domicile and Matrimonial Proceedings Act 1973[18] and a married woman can now acquire an independent domicile.

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15 See Dicey and Morris, The Conflict of Laws, 10th ed., (1980), pp. 100-141.

16 In general a legitimate child takes the domicile of his father, an illegitimate child that of his mother.

17 An unmarried child under the age of 16 cannot acquire a domicile of choice by his own act.

18 It is immaterial for this purpose that the marriage took place before 1974; section 1(2) of the Act enacts, by way of a transitional provision, that where a married woman had her husband's domicile by dependence she should retain that domicile until she acquired another; see Inland Revenue Commissioners v. Duchess of Portland [1982] 2 W.L.R. 367.

2.9 For a domicile of choice to be acquired a person must both (i) reside and (ii) intend to remain permanently or indefinitely in the relevant country.[19] According to the authorities it is difficult to establish that a domicile of choice has been acquired, since there is a very strong presumption of the continuance of a domicile of origin and it may be hard to prove the requisite intention, especially where it is the domicile of a deceased person that is in issue.[20]

2.10 We now turn to explain more specifically the nature of the main problem considered in this consultative document; and we take as our starting-point the Law Commission's Report on Polygamous Marriages which was published in 1971.[21] Recommendations were put forward in that Report for various reforms relating to polygamous marriages, but no recommendation was made concerning the law as to capacity to enter into such marriages, and the draft Bill annexed to that Report contained no provision in that respect. Reference was made to the rule that, in general, capacity to marry is governed by the law of the domicile of each of the parties; and it was pointed out that, in the relevant working paper,[22] the Law Commission had canvassed, but rejected, a possible new rule whereby

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19 In Inland Revenue Commissioners v. Bullock [1976] 1 W.L.R. 1178, it was held that a Canadian whose domicile of origin was Nova Scotia and who had lived in England for over forty years had not acquired an English domicile of choice, on the ground that he firmly intended to return to Canada if he should survive his English wife.

20 See, for example, Winans v. Attorney General [1904] A.C. 287 and Ramsay v. Liverpool Royal Infirmary [1930] A.C. 588. We refer further to defects in the law of domicile in paras. 5.34-5.35, below.

21 Law Com. No. 42.

22 Working Paper No. 21 (1968), paras. 16-20.

only the law of the place of celebration should govern the validity of a polygamous marriage and that consultations had confirmed this original view.[23] However, it was observed in the Report that, under the existing law relating to capacity to marry, if a person domiciled in this country "goes through a polygamous form of marriage abroad, that marriage will, under English law, be void, even if it was only potentially polygamous."[24] The Matrimonial Proceedings (Polygamous Marriages) Act 1972 subsequently implemented the recommendations in the Report on Polygamous Marriages. However, an additional provision, which became section 4 of the Act, was included in the Bill by its sponsors. That provision, which is now embodied in section 11(d) of the Matrimonial Causes Act 1973, added a new paragraph to section 1 of the Nullity of Marriages Act 1971 (now section 11(a)-(c) of the 1973 Act). That section set out a list of the only grounds on which a marriage celebrated after 31 July 1971 should be void. Section 11(d) of the 1973 Act provides as follows:

> "A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say ...
>
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other."

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23 Law Com. No. 42 (1971), paras. 18-19.

24 Ibid., para. 18; citing Re Bethell (1888) 38 Ch. D. 220; Risk v. Risk [1951] P. 50; Ali v. Ali [1968] P. 564, 576-577.

2.11 There was no debate on the Bill which became the 1972 Act on the floor of the House of Commons, and little debate on this issue on the floor of the House of Lords.[25] There was, therefore, no extended discussion of the relevant clause. However, it appears from the report of the Committee stage of the Bill's passage through the House of Lords[26] that the clause was introduced because the rest of the law of nullity had recently been codified in the Nullity of Marriage Act 1971[27] and its inclusion was intended merely to embody in statutory form the observation from our Report to which we have referred in the preceding paragraph; and the point has been made[28] that the clause was introduced by the sponsors of the Bill for the purpose of dispelling Parliamentary opposition based on the erroneous supposition that the Bill legalised polygamous marriages. However, whatever might have been the intention behind the introduction of the provision now embodied in section 11(d) of the 1973 Act, the provision was criticised when it was introduced[29] and criticisms have continued to be made since that date.[30]

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25 Hansard (H.L.),5 June 1972, vol.331, cols. 16-21; and 15 June 1972, vol. 331, cols. 1186-1202 .

26 Hansard (H.L.),15 June 1972, vol. 331, cols. 1190-1193; and see Report of Standing Committee C, 3 May 1972, cols. 6-7.

27 See now Matrimonial Causes Act 1973, s.11.

28 See Morris, The Conflict of Laws, 2nd ed., (1980), p.128, n.30.

29 Hartley (1971) 34 M.L.R. 305, 306-307; Cretney (1972) 116 S.J. 654; and see Hartley, (1969) 32 M.L.R. 155, 159.

30 For example, Poulter (1976) 25 I.C.L.Q. 475, 503-508; James (1979) 42 M.L.R. 533, 536 and see Palsson, Marriage and Divorce in Comparative Conflict of Laws (1974), pp. 154-155; Marriage in Comparative Conflict of Laws: Substantive Conditions (1981), pp. 202-203.

2.12 In 1979, further dissatisfaction with the effects of section 11(d) was expressed to us by practitioners; and we accordingly decided, for the purpose of ascertaining whether the provision gave rise to real difficulties, to seek the views of those who might have experience of its practical operation and effect. The situation on which we primarily sought information from the persons and organisations we consulted was the typical one of a Muslim man from, say, Pakistan who had come to this country and acquired a domicile here but who, following a common social custom of his immigrant community, returned on a visit to Pakistan for the purpose of marrying there a woman from the local community from which he had come.[31] Where, as would normally be the case, the marriage was in Muslim form and was regarded in this country, before the recent decision of the Court of Appeal in Hussain v. Hussain (The Times, 28 June 1982), as potentially polygamous, the fact that the husband was, at the date of such marriage, domiciled in this country would attract the operation of section 11(d) and the marriage would accordingly be regarded in this country as void.[32]

2.15 Each of those who assisted us by responding to our request for information and comment may, for convenience, be placed in one of four categories. The

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31 The situation might well arise also in the case of a man whose parents, immigrants from Pakistan, had acquired a domicile in England and Wales. In that case his English domicile would be his domicile of origin: see para. 2.8, above.

32 We would emphasise that a period of residence in this country prior to the marriage, however long such period might be, would not confer an English domicile upon him unless he had formed an intention to live here permanently: see para. 2.9, above. As we explain in paras. 3.2-3.9, below, the marriage would normally be valid if at the date of the marriage he still retained his domicile of origin in Pakistan.

first category comprises what may, broadly, be described as Government Departments - namely, the Immigration and Nationality Divisions of the Home Office, the Foreign and Commonwealth Office, the Department of Health and Social Security, the Board of Inland Revenue, the General Register Office and the Lord Chancellor's Office. Secondly, we received information from those concerned with the judicial or quasi-judicial issues that arise in this connection - that is to say, from the President of the Family Division, the National Insurance Commissioners (now the Social Security Commissioners), the Immigration Appeal Tribunal and the Justices' Clerks' Society. Then, thirdly, from legal practitioners, information was given by the Family Bar Association, The Law Society (through its Family Law Sub-Committee) and by individual practitioners. Finally, we received more specific detailed information as to the ways in which the present state of the law affects individuals, particularly members of the immigrant communities. We had three sources of such information. The first was a detailed submission to us by the Commission for Racial Equality, whose Community Relations Officers have direct experience in the field; the other two were in the form of surveys. The first is a survey conducted in 1975 in Birmingham into the effects of section 11(d) on, in particular, the law relating to nationality.[33] The second is a survey conducted between 1976 and 1978 by Dr. David Pearl, Fellow of Fitzwilliam College, Cambridge, under the auspices of the Social Science Research Council, into the effect of section 11(d) and of other legal rules on immigrant families in one particular part of the

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33 The short report of this survey "When is a wife not a wife?", written by Sylvia Whitfield, was published in August 1975 by the Birmingham Community Development Project.

country.[34] We are grateful to Dr. Pearl for making his research available to us at an early stage and for other assistance that he has given us.

2.14 In the light of the very helpful and informative comments we received in response to our request, we concluded that the present state of the law does indeed give rise to practical difficulties in some areas; and, as we explained in our Fifteenth Annual Report (1979-1980),[35] we decided, when resources permitted, to include the reform of this part of the law in our work in the fields of family law and private international law,[36] and, in accordance with our usual practice, to publish this consultative document containing our provisional recommendations, on which we invite comment.

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34 See "Legal Problems of Immigrants: A Case Study in Peterborough (U.K.)" (1980) 22 Journal of the Indian Law Institute 81.

35 Law Com. No. 107, para. 2.44.

36 The topic falls under Item XIX of our Second Programme: Family Law; and under Item XIX of our Third Programme: Private International Law.

PART III

THE PRESENT LAW

A Capacity to contract a polygamous marriage

(i) The general rules as to capacity to marry

3.1 The general rules concerning a party's capacity to marry are exclusively those of the common law. The traditional and more widely accepted theory is that a marriage is valid only if, according to the law of the domicile of both parties at the time of the marriage, each of them has capacity to contract that marriage.[37] There is, however, an alternative theory whereby the parties' capacity to marry is determined by the law of their intended matrimonial home.[38]

(ii) Capacity to contract a polygamous marriage before August 1971

3.2 Capacity to contract polygamous marriages entered into before August 1971[39] is governed by common law rules. So far as capacity to contract such marriages is concerned, the preponderance of authority supports the

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37 For convenience, we shall often use the term "orthodox" or "dual domicile" to refer to this theory.

38 More fully, this theory is that (i) there is a presumption that capacity is governed by the law of the husband's domicile, but (ii) this presumption is rebutted if it can be inferred that when they married the parties intended to establish their home in a different country and implemented their intention within a reasonable time: Cheshire and North, Private International Law, 10th ed., (1979), p. 331.

39 Marriages entered into after 31 July 1971 are now governed by the Matrimonial Causes Act 1973, s.11.

application of the dual domicile doctrine.[40] On that basis, the capacity of a person domiciled in England and Wales to contract an actually or potentially polygamous marriage abroad is governed by English law and it has been assumed that English marriage law denies such capacity. The Law Commission took this view of the law in 1971,[41] as did the Lord Chancellor during the passage through the House of Lords of the Bill which became the Matrimonial Proceedings (Polygamous Marriages) Act 1972.[42]

3.3 There exists a second theory concerning capacity to contract a polygamous marriage - namely, that reference need be made only to the law of the place where the marriage is celebrated.[43] It is unlikely that this approach represents the present law; and in 1965 it was specifically rejected by Cumming-Bruce J. in Ali v. Ali.[44]

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40 Re Ullee (1885) 53 L.T. 711, 712; Lendrum v. Chakravarti 1929 S.L.T. 96, 98-99; Crowe v. Kader [1968] W.A.R. 122; and see Re Bethell (1888) 38 Ch.D.220; Risk v. Risk [1951] P. 50.

41 Law. Com. No. 42, para. 18.

42 Hansard H.L. vol. 33, col. 1193 (1972).

43 Kaur v. Ginder (1958) 13 D.L.R. (2d) 465. Sara v. Sara (1963) 36 D.L.R. (2d) 499.

44 [1968] P. 564. In our Report on Polygamous Marriages, Law Com. No. 42 (1971), we expressed the view that there was no justification or reason for recommending the adoption of this principle. Academic opinion is divided. Support for the dual domicile approach can be found in Dicey and Morris, The Conflict of Laws, 8th ed., (1967), p. 254; Sinclair, (1954) 31 B.Y.B.I.L. 248, 259-263; Tolstoy (1968) 17 I.C.L.Q. 721, 729; whilst support for the law of the place of celebration may be found in Bartholomew, (1952) 15 M.L.R. 35, 42; Hartley, (1969) 32 M.L.R. 155, 159; and see James, (1979) 42 M.L.R. 533, 535-536.

3.4 A third theory is that the issue is governed by the law of the parties' intended matrimonial home, and Cumming-Bruce J. adopted this approach in 1972 in Radwan v. Radwan (No. 2).[45] In that case a woman domiciled in England went through a ceremony of marriage in polygamous form at the Egyptian Consulate-General in Paris with a man whose nationality and domicile were Egyptian. The parties intended that after their marriage, which was actually polygamous, they would live together in Egypt, and they did so for some years. Cumming-Bruce J. held that Egyptian law as the law of the parties' intended matrimonial home should determine the question of capacity to enter a polygamous marriage.[46] Under that law the marriage was valid and the judge made a declaration to the effect that it would be recognised as valid in England. This decision has, however, been greeted with almost universal disapproval.[47]

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45 [1973] Fam. 35.

46 He referred to a dictum of Denning L.J. in Kenward v. Kenward [1951] P. 124, which specifically supported his view ([1973] Fam. 35, 49), and to earlier authorities supporting it in relation to capacity to marry in general: Warrender v. Warrender (1835) 2 Cl. & F. 488, 535-536 (per Lord Brougham) and Brook v. Brook (1861) 9 H.L.C. 193, 207 (per Lord Campbell).

47 See, e.g. Dicey and Morris, The Conflict of Laws, 10th ed., (1980), pp. 318-319 (where it is submitted that the case is wrongly decided); Cheshire and North, Private International Law, 10th ed., (1979), pp. 349-450; Karsten, (1973) 36 M.L.R. 291; Pearl, [1973] C.L.J. 43; Wade, (1973) 22 I.C.L.Q. 571. It might be noted that Cumming-Bruce J. rather expected such a reaction, because he ended his judgment as follows: "I do not think that this branch of the law relating to capacity to marry is quite as tidy as some very learned authors would have me believe, and I must face their displeasure with such fortitude as I can command" ([1973] Fam. 35, 54). The only support for the decision, so far as is known, is to be found in Hassan v. Hassan [1978] 1 N.Z.L.R. 385, 389-390; Jaffey, (1978) 41 M.L.R. 38, 38-43.

(iii) Capacity to contract a polygamous marriage after July 1971

3.5 The account in the following paragraphs is of the law as it was thought to be before the recent decision in Hussain v. Hussain.[48] A party's capacity to contract a polygamous marriage after July 1971 is governed partly by two statutory provisions and partly by the common law principles referred to in paragraphs 3.1-3.4, above. The statutory provisions are as follows. First, in the Matrimonial Causes Act 1973, section 11(b) and section 11(d) (which replaces and embodies section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972) provide that:

> "A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say ...
>
> (b) that at the time of the marriage either party was already lawfully married ...
>
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other."

The second statutory provision is section 14(1) of the 1973 Act which provides that:

> "Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11 ... above shall -
>
> (a) preclude the determination of that matter as aforesaid; or

48 The Times, 28 June 1982.

(b) require the application to the marriage of the grounds ... there mentioned except so far as applicable in accordance with those rules."

3.6 The inter-relation of the choice of law rule (i.e. the rule for determining which law governs capacity to marry and, in particular, to contract a polygamous marriage) with these statutory provisions, on the assumption that the rule is represented by the dual domicile doctrine, is as follows. Where, at the date of an actually or potentially polygamous marriage,either party is domiciled in England and Wales, that party's capacity to contract the marriage is determined by English internal law as the law of the domicile. The relevant rule of that law is contained in section 11 which invalidates the marriage. If, however, neither party is domiciled here when the marriage is celebrated, then section 14(1) makes it clear that the general choice of law rule will operate, with the result that capacity to contract the marriage will be governed by the law of each party's foreign ante-nuptial domicile. The issue will therefore be determined by the laws of the relevant foreign countries, and section 11 will be inapplicable.

3.7 The effect of these statutory provisions is, however, different if the law of the parties' intended matrimonial home, as distinguished from that of their respective ante-nuptial domiciliary laws, is applied in accordance with Radwan v. Radwan (No. 2). Although Cumming-Bruce J. was not directly concerned with the statutory rules, since the relevant marriage took place in 1951, he examined the effect of the legislation, not as determinative of the case, but for the purpose of ascertaining what was the common law rule on the basis of which the legislation had been enacted. He accepted that Parliament had probably legislated on the basis of the orthodox view of the law governing capacity to enter into

polygamous marriages, but he considered that assumption to be founded upon a misapprehension about the common law, a misapprehension which, in his view, could not cut down the rights of the wife in the case before him.[49] He concluded that section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972 (the effect of which is now embodied in section 11(d) of the 1973 Act) appeared to have "little, if any, content".[50]

3.8 The effect of section 11(d) and section 14(1) of the 1973 Act, on the assumption that Radwan v. Radwan (No.2) correctly represents the choice of law rule for capacity to contract a polygamous marriage, is as follows. So far as a person domiciled in this country at the date of the marriage is concerned, the domestic law of the country of the parties' intended matrimonial home[51] will determine capacity to contract a polygamous marriage. If that country is England and Wales, then section 11(d) will apply and the marriage will be void. If, on the other hand, the intended matrimonial home of the parties is a country other than England and Wales, as in Radwan v. Radwan (No.2), the law of that other country will govern the position. Turning now to the position where, although the parties are domiciled abroad at the time of the marriage, their intended matrimonial home is this country, it would seem that the marriage is valid.[52] This is because, first, section 11(d)

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49 [1973] Fam. 35, 52.

50 Ibid.

51 If there is no evidence of the parties' intention, there is authority for applying the husband's antenuptial domicile: De Reneville v. De Reneville [1948] P. 100, 114. However, whether such a rule would be adopted now that a married woman may have a domicile independent of her husband's (Domicile and Matrimonial Proceedings Act 1973, s. 1) is open to doubt.

52 It may be that an actually polygamous marriage would be void by reason of s.11(b) of the 1973 Act.

will not apply, for the reason that neither party is domiciled here at the date of the marriage,[53] and secondly, the grounds on which a marriage may be declared void in this country, which are set out in section 11, appear to be exhaustive.[54]

3.9 As to the respective merits of the dual domicile doctrine and the approach adopted in Radwan v. Radwan (No. 2) there is some authority[55] since that decision for suggesting that the former approach represents the law; and most writers and commentators[56] think that it is, or should be, the correct one.

(iv) Summary of the circumstances in which a person domiciled in England and Wales lacks capacity to contract a polygamous marriage

3.10 If the relevant choice of law rule is based on the domicile of the parties at the date of the marriage, anyone domiciled here lacks capacity to contract a

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53 Sect. 14(1) is inapplicable because the question does not "fall to be determined by reference to the law of a country outside England and Wales."

54 If Radwan v. Radwan (No. 2) represents the law, the fact that either spouse lacked capacity to enter into the marriage under the law of his or her ante-nuptial domicile would be immaterial.

55 In National Insurance Decision No. R(G) 3/75, Radwan v. Radwan (No. 2)was not referred to, and the dual domicile test was applied; and in Zahra v. Visa Officer, Islamabad [1979-80] Imm. A.R. 48 the Immigration Appeal Tribunal applied section 11(d) on the simple ground that the man was domiciled in this country at the date of the marriage (again, without reference to Radwan v. Radwan (No. 2). A similar approach was adopted by Wood J. in Morris v. Morris, unreported, 22 April 1980, and by the Court of Appeal in Hussain v. Hussain, The Times, 28 June 1982. And see n. 165, below as to the uncertainty to which Radwan v. Radwan (No. 2) gives rise in practice.

56 E.g. Dicey and Morris, The Conflict of Laws, 10th ed., (1980), pp. 316-319; Karsten, (1973) 36 M.L.R. 291, 296-297; Pearl, [1973] C.L.J. 43.

polygamous marriage no matter where he or she intends to live after the marriage. However, if Radwan v. Radwan (No. 2) was correctly decided, all those who intend to make their matrimonial home in this country lack capacity under our law to contract such a marriage, but not those who have an intended matrimonial home abroad. This summarises the law as it was thought to be before the recent decision in Hussain v. Hussain.

B The law which determines the nature of a marriage

3.11 In some circumstances the preliminary question may arise whether a particular marriage was polygamous or monogamous at its inception. The point may call for determination, for example, if an issue arises concerning the validity of a marriage whereby a man has purported to take a second wife by means of a marriage ceremony which, if the marriage was polygamous, but not otherwise, created a valid second marriage. There is no direct and conclusive decision as to the law which should be applied to determine that issue; but the great preponderance of authority[57] (subject again to Hussain v. Hussain) and of academic opinion[58] suggests that the question should be determined by reference to the law of

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57 Re Bethell (1888) 38 Ch.D.220; Risk v. Risk [1951] P. 50; Qureshi v. Qureshi [1972] Fam. 173, 182; Radwan v. Radwan (No. 2) [1973] Fam. 35.

58 Dicey and Morris, The Conflict of Laws, 10th ed., (1980), pp. 309-310; Cheshire and North, Private International Law, 10th ed., (1979), pp. 301-302. Contrast Wade, (1979) 42 M.L.R. 533.

the place where the marriage is celebrated.[59] As we explained in para. 2.4, above, this will mean that all marriages celebrated in England and Wales are regarded as monogamous in nature.

3.12 According to earlier authorities, a marriage that was potentially polygamous at its inception could not, in law, subsequently become monogamous, even if the husband did not take a second wife during the subsistence of the marriage.[60] However, decisions in recent years have established that in some circumstances a marriage that started life as a potentially polygamous one may

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59 More precisely, reference is made to that law for the purpose of ascertaining the nature and incidents of the marriage according to its rules, and then English law as the law of the forum is applied in order to determine whether the marriage should be classified as monogamous or polygamous: Lee v. Lau [1967] P. 14, 20. Some authorities, however - all of them prior to the abolition of the rule that a woman's domicile automatically became on her marriage the same as her husband's (see para. 2.8, above) - suggest that reference should be made to the law of the matrimonial (i.e. the husband's) domicile: Warrender v. Warrender (1835) 2 Cl. & Fin. 488, 535; Kenward v. Kenward [1951] P. 124, 145; Russ v. Russ [1964] P. 315, 326. However, on this view a marriage celebrated in this country would have been polygamous if the husband was domiciled in a country whose law had so regarded the marriage; and the adoption of this approach would give rise today to the problem whether the husband's or the wife's domicile was in point where they did not have the same domicile.

60 Hyde v. Hyde (1866) L.R. 1 P. & D. 130; Sowa v. Sowa [1961] P. 70.

become monogamous by reason of subsequent events.[61] From a practical point of view, perhaps the most significant instance of the conversion of a potentially polygamous marriage into a monogamous union occurs when, as in Ali v. Ali,[62] the parties were domiciled at the date of the marriage in a country whose law permits polygamy but later acquire a domicile of choice in this country. This principle does not, however, extend to the situation where only the wife has changed her domicile.[63] We consider in paragraph 3.13 below the converse question - namely, whether a marriage which was originally monogamous can subsequently become polygamous.

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61 For example, if the law of the place where the marriage was celebrated subsequently forbids polygamy, as in Parkasho v. Singh [1968] P. 233; or if the parties are domiciled in a country whose law refers the nature of their marriage to their religious law, and they later change their religion to one that does not permit polygamy: The Sinha Peerage Claim (1939) 171 Lords Journals 350; [1946] 1 All E.R. 348n. There can be no conversion if the marriage has become actually polygamous: Onobrauche v. Onobrauche (1978) 8 Fam. Law 107; 122 S.J. 210; Re Sehota [1978] 1 W.L.R. 1506.

62 [1968] P. 564; see para. 2.6, above.

63 Onobrauche v. Onobrauche (1978) 8 Fam. Law 107; 122 S.J. 210. It is not clear whether, in view of the abolition of a wife's domicile of dependence by s.1 of the Domicile and Matrimonial Proceedings Act 1973 (see para. 2.8 and n.18, above), a change of domicile by the husband alone would now suffice.

C Can a marriage that is monogamous at its inception become polygamous?

3.13 There is no direct English authority on the question whether a marriage which is monogamous at its inception can subsequently become polygamous in character.[64] However, judicial observations in cases relating to the jurisdiction of our courts to grant matrimonial relief, decided before jurisdiction was conferred by statute[65] upon them in respect of polygamous marriages, support the view that a marriage that was monogamous at its inception remains monogamous, notwithstanding that a subsequent change of domicile or religion on the part of the husband permits him to take another wife;[66] and it has been pointed out that since "... a marriage celebrated in England in monogamous form between parties whose personal law permits polygamy is a monogamous marriage, it is difficult to see how a change of religion or domicile could convert a monogamous marriage into a polygamous one."[67] However, the position

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64 It was held by the Judicial Committee of the Privy Council in Attorney-General of Ceylon v. Reid [1965] A.C. 720, which concerned only the law of Sri Lanka, that a man domiciled in Sri Lanka who was already monogamously married could contract a polygamous marriage there; but the Judicial Committee specifically expressed no opinion as to what the situation would be in a "purely Christian country" (ibid., 734).

65 By the provisions now substantially embodied in the Matrimonial Causes Act 1973: see n. 72, below.

66 Mehta v. Mehta [1945] 2 All E.R. 690, 693; Cheni v. Cheni [1965] P. 85, 90; Parkasho v. Singh [1968] P. 233, 243-4.

67 Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p. 313.

is uncertain and, in particular, the effect upon a monogamous marriage of a subsequent valid polygamous marriage contracted by the husband abroad is not clear.[68]

D The areas in which polygamy is relevant

3.14 By reason of the decision of Lord Penzance in Hyde v. Hyde,[69] the matrimonial jurisdiction of the English courts was denied to a party to a polygamous marriage, a principle that extended even to the case where an English domiciliary sought a decree annulling such a marriage on the ground of her lack of capacity to contract it.[70] This strict rule was gradually eroded by a century of judicial development,[71] and it was finally abandoned in 1972 when the rule was abolished by statute in relation to both potentially and actually polygamous marriages.[72] Despite this important change in the law, however, polygamy remains of importance in relation to the

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68 We consider this issue further in paras. 5.15-5.25, below.

69 (1866) L.R. 1 P.D. 130. The case concerned an undefended petition for divorce in respect of a potentially polygamous marriage.

70 Risk v. Risk [1951] P. 50.

71 See North, Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland, p. 108; Poulter, (1976) 25 I.C.L.Q. 475, 491-503.

72 Matrimonial Proceedings (Polygamous Marriages) Act 1972, s.1, now embodied (with minor amendments) in the Matrimonial Causes Act 1973, s. 47. The abolition of the rule was made pursuant to the recommendations of the Law Commission: see our Report on Polygamous Marriages (1971), Law Com. No. 42.

circumstances in which a court will grant matrimonial relief (as distinguished from the question whether it has jurisdiction in that respect) and to other fields, such as immigration, citizenship, social security and taxation. We discuss these matters in Part IV.[73]

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73 See paras.4.6-4.39, below.

PART IV

PRACTICAL APPLICATION AND CRITICISMS OF THE PRESENT LAW

A. Introduction

4.1 Criticisms of the present law relating to capacity to contract a marriage abroad in polygamous form would seem to involve three separate issues. The first of these concerns the uncertainty as to what are at present the relevant choice of law rules. The second issue is the extent to which difficulties have arisen in practice from the operation of the rule that a person who is domiciled in England and Wales cannot contract a valid marriage in polygamous form;[74] and the third matter calling for examination is the principle that obtains under the present law whereby a marriage celebrated in that form is automatically classified as polygamous, irrespective of whether or not it is in reality a monogamous union.

B. The uncertainty concerning the relevant choice of law rules

4.2 The account, in paragraphs 3.2-3.10 of this consultative document, of the present state of the choice of law rules governing capacity to contract a polygamous marriage reveals a state of confusion and uncertainty, which arises from the conflict between the dual domicile doctrine on the one hand and the "intended matrimonial home" test applied in Radwan v. Radwan (No. 2)[75] on the other. If that decision correctly represents the law, considerable evidence exists that the rules now embodied in section

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74 Subject to Hussain v. Hussain, The Times, 28 June 1982.

75 [1973] Fam. 35; see paras. 3.4 and 3.8-3.10, above.

11(d) and 14(1) of the Matrimonial Causes Act 1973[76] were based upon the mistaken assumption that the underlying choice of law rules required the application of the dual domicile test.[77] Furthermore, on that basis it may be that the "intended matrimonial home" test governs only this aspect of choice of law as to capacity to marry, while other aspects are governed by the dual domicile doctrine.[78] However, the great body of academic opinion regards Radwan as wrong,[79] and there is some authority after that decision which supports the dual domicile approach.[80] We consider that this uncertainty as to the relevant choice of law rules is highly unsatisfactory and that, as some of those who assisted us on our consultation also suggested,[81] the law is in need of careful examination with a view to its restatement and reform. Whether this consultative document provides the appropriate context for that exercise is, however, a separate question, to which we return in Part V.[82]

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76 These provisions are set out in para. 3.5, above.

77 See paras. 3.2 and 3.7, above.

78 In Radwan v. Radwan (No. 2) [1973] Fam. 35, 51, Cumming-Bruce J. said: "It is arguable that it is an over-simplification of the common law to assume that the same test for purposes of choice of law applies to every kind of incapacity - non age, affinity, prohibition of monogamous contract by virtue of an existing spouse, and capacity for polygamy."

79 See paras. 3.4 and 3.9, and nn. 47 and 56, above.

80 See n. 55, above.

81 See paras. 2.12-2.13, above.

82 See paras. 5.27-5.31, below.

C Practical difficulties arising from the law concerning capacity to contract a polygamous marriage

(i) Introduction

4.3 The account in paragraphs 4.3-4.39 of the practical difficulties which may arise from the law on capacity to contract a polygamous marriage is necessarily based on the state of the law as it was thought to be prior to the decision in Hussain v. Hussain and as it would again be if that decision should be overruled in the House of Lords. It is convenient here to construct a situation exemplifying the circumstances in which such difficulties may arise. Our example concerns a marriage in Bangladesh, but of course it illustrates the effect of the relevant rules whenever someone resident in England and Wales goes through a ceremony of marriage in a country whose law regards the marriage as polygamous. In fact, polygamy is possible under the law of a number of countries, mainly those with a substantial Muslim population, where matters of status are referred to the parties' religious law, but also in some African countries where the law of marriage is governed by customary law.

4.4 The example is as follows. An unmarried man of Bangladeshi origin comes to this country to reside. On a visit to Bangladesh he marries a woman who is domiciled there. He then returns here with his wife, and never purports to take a second wife. If at the date of the marriage the man was domiciled in Bangladesh, the marriage, though potentially polygamous, is valid.[83] If the spouses

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83 This is because, if the dual domicile doctrine is applied, the law of Bangladesh as the law of the parties' ante-nuptial domicile governs their capacity (see paras. 3.2 and 3.5-3.6, above); and if capacity is referred to English law as that of the intended matrimonial home in accordance with Radwan v. Radwan (No.2) Fam. 35, s. 11(d) of the Matrimonial Causes Act 1973 (or, in the case of marriages celebrated before August 1971, in accordance with the corresponding common law principle) does not invalidate the marriage (see paras. 3.4 and 3.8, above).

substantially acquire a domicile of choice in England and Wales,[84] the marriage will lose its potentially polygamous character, becoming, in law as well as in fact, a monogamous union by reason of this change of domicile.[85] However, if the husband had acquired a domicile here before he married, the marriage will be void by virtue of section 11(d) of the Matrimonial Causes Act 1973 if it was celebrated after 31 July 1971[86] and at common law if it took place on or before that date.[87] In that case if the parties go through a ceremony of marriage with one another in this country which complies with the formalities of our law in, say, a register office, that marriage would be valid, and legally monogamous.[88]

4.5 As we have explained in paragraphs 2.12-2.13 above, we conducted a preliminary consultation in 1979 among persons and organisations whom we thought might have experience of the practical effect of the rule whereby an English domiciliary lacked capacity to contract a marriage abroad in polygamous form. When seeking their comments, we expressed the view that there might be difficulties of two kinds. In the first place (we pointed out), there would be the man who wished to marry in Bangladesh rather

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84 Residence here will not suffice, even for a long period of time, if and so long as the parties intend ultimately to return to Bangladesh. See para. 2.9 and n. 19, above.

85 Ali v. Ali [1968] P. 564: see para. 3.12, above.

86 See paras. 3.5-3.6, above; subject to the decision in Hussain v. Hussain, The Times, 28 June 1982.

87 See para. 3.2, above. Even if Radwan v. Radwan (No. 2) [1973] Fam. 35 represents the law, the marriage would be void because in the example referred to in the text English law would apply as the law of the parties' intended matrimonial home: see paras. 3.4 and 3.8, above.

88 See para. 2.4, above.

than in this country, but being aware of his lack of capacity to marry in Bangladesh in accordance with his religious law, was constrained to arrange for his intended wife to come to this country and to marry her here, a course of action that might be considered to be culturally unacceptable. Secondly, we referred to the situation of the man who, being unaware of the legal position, married in Bangladesh and came to live with the woman he thought to be his wife in this country, only to find subsequently that he was not in fact married to her. In the light of the informative response to our preliminary consultation,[89] and of the two surveys to which we have referred above,[90] we turn now to consider in detail the various matters which appear to give rise to difficulties in consequence of the rule.

(ii) The areas of difficulty caused by the operation of the rule concerning capacity to contract a marriage in polygamous form

(a) The rights of one spouse[91] as to succession and as to claims for family provision on the death of the other

Wills

4.6 If one spouse has executed a will in which he or she gives property to the other the question arises whether the fact that the parties were not married will affect the relevant disposition. This is a matter of construction of the will, the province of which is "... to ascertain the expressed intentions of the testator, i.e. the meaning which the words of the will, when properly

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89 See para. 2.13, above.

90 Ibid.

91 For convenience, we use the terms "spouse", "husband" and "wife", whether or not, in the situation under consideration, the marriage of the parties is void.

interpreted, convey."[92] If it is necessary in a particular case to determine the law whose canons of construction are applicable,[93] there is a presumption that reference should be made to the law of the testator's domicile at the time when he executed the will,[94] but this presumption may be rebutted where the testator has clearly manifested an intention that some other law should be applied.[95] It follows that, since by definition the situation with which we are here concerned concerns wills made by persons domiciled in England and Wales, the English rules of construction will normally govern the construction of the will.

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92 Cheshire and North, Private International Law, 10th ed., (1979), pp. 609-610.

93 Strictly speaking, no question of "construction" and hence no choice of law issue arises if the will is expressed in terms that unambiguously express the testator's wishes and do not leave a gap in his dispositions for which he has not made provision.

94 See, for example, Re Cunnington [1924] 1 Ch. 68; and s.4 of the Wills Act 1963 specifically provides that a change in the testator's domicile after execution of the will should not alter its construction.

95 This principle would appear to extend to immovables, subject to two qualifications - namely (i) that by using the technical language of the country where the immovables are situated the testator may have indicated an intention that the law of that country (the "lex situs") should govern the construction of his will and (ii) that, if the lex situs does not permit or recognise an interest in immovables that has been given by the will (as construed by the law of the testator's domicile or by such other law as the testator may have indicated that he wishes to govern questions of construction), the lex situs will prevail: see Cheshire and North, Private International Law, 10th ed., (1979), p. 515. However, neither qualification is likely to be significant in the context of this consultative document.

4.7 A question that arises in this context is if, say, the husband in a void marriage leaves property to "my wife", with or without reference to her name, what effect (if any) has the fact that the marriage is void upon that disposition.[96] As to this, the relevant principle is that "The circumstances may show that the word 'wife' refers to a partner in an invalid marriage whether or not the parties know of the invalidity."[97] In general, therefore, it would seem that gifts by will by one spouse to the other will not be affected by the fact

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96 Similarly, questions of construction may arise in respect of other dispositions expressed in terms of a valid marriage. For example, the wife may be given a right to income "during widowhood". In Re Gale [1941] Ch. 209 a gift in these terms was held to be void, whereas in Re Lynch [1943] 1 All E.R. 168 a gift in similar terms was declared valid on the ground that the testator had "provided his own dictionary", and the earlier decision was distinguished. However, these and the other relevant cases are not very easy to reconcile.

97 William's Law Relating to Wills, 5th ed., (1980), p. 608, citing among other authorities, Re Hammond [1911] 2 Ch. 342, "(where the parties, though they were aware of a remote possibility of the invalidity, thought the marriage valid and it was not found to be invalid until some years after the testator's death)". Similar rules apply in general to the description "husband": ibid., p. 609.

that the marriage is void.[98] Nevertheless, we appreciate that in practice the invalidity of the marriage might give rise to confusion and uncertainty on the part, for example, of the personal representatives of the deceased spouse in relation to their distribution of the estate,[99] and as this matter was not one of those on which we specifically canvassed views on our preliminary consultation,[100] we should particularly welcome comments on it now.

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98 The validity of the marriage may also be relevant to the question of revocation of a will. Section 18 of the Wills Act 1837, (both in its present form and as substituted by clause 18(1) of the Administration of Justice Bill now before Parliament) provides that a will is revoked by the subsequent marriage of the testator; but to have this effect the marriage must not be regarded in this country as void; see Mette v. Mette (1859) 1 Sw. & Tr. 416; Warter v. Warter (1890) 15 P.D. 152. (There is an exception to this principle in the case of a will expressed to be made in contemplation of a marriage: see the Law of Property Act 1925, s.177. Under the Administration of Justice Bill this provision is to be repealed, and replaced with a slightly wider principle which is set out in clause 18(3) and (4) of the Bill.)

99 Similar problems of construction arise also in the case of a testamentary gift by a third party to one of the spouses described in the will as the husband or wife of the other; and the principles referred to in this and the preceding paragraph of the text apply in that situation as well.

100 See paras. 2.12-2.13, above.

Intestacy

4.8 Intestate succession to movables (wherever situated) is governed by the law of the deceased's last domicile,[101] and to immovables by the lex situs.[102] It follows that, except in relation to immovables abroad, the English rules of intestacy will apply to the rights of succession on the death of a party to a potentially polygamous marriage who was domiciled here at death.

4.9 The English rules of intestacy[103] confer substantial benefits upon a surviving spouse. At present a husband or wife of the deceased is entitled, if the deceased left children or other issue, to a "statutory legacy" of £40,000[104] (with interest from the date of death), together with the "personal chattels"[105] of the deceased and a life interest in one-half of the residue of the estate. This "statutory legacy" is increased to £85,000[106] if the deceased left no issue but did leave certain specified near relatives, and in that case the spouse will take one-half of the residue of the estate

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101 Pipon v. Pipon (1744) Amb. 25, 799; Somerville v. Somerville (1801) 5 Ves. 750.

102 See e.g. Duncan v. Lawson (1889) 41 Ch. D. 394. It has been suggested that, since practically every country in the world (including England and Wales) now adopts one system of intestate succession for every kind of property, the law of the deceased's last domicile ought to apply to immovables as well as to movables: see Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p. 613.

103 Contained primarily in the Administration of Estates Act 1925 (as amended).

104 S.I. 1981, No. 255.

105 The expression in defined in s. 55(1)(x) of the Administration of Estates Act 1925 and signifies, broadly, articles of household or personal use or ornament, but it does not include articles used by the deceased at his death for business purposes, or money or securities.

106 S.I. 1981, No. 255.

absolutely; and if the deceased left neither issue nor such a relative, the spouse takes the whole estate absolutely.[107] None of these rights is available to a spouse whose marriage was void, although the effect of this total exclusion from the estate may be substantially mitigated by the power of the court to award financial provision.[108]

Family provision on death

4.10 Under the Inheritance (Provision for Family and Dependants) Act 1975[109] certain categories of relatives and dependants of a person who died domiciled in England and Wales may apply to the court on the ground that the disposition of his estate effected by his will, or the law of intestacy, or a combination of the two is such as not to make reasonable financial provision for them;[110] and the court, if satisfied of that fact, may make one or more of a wide range of orders, including the payment of a lump sum and the transfer of property by way of reasonable provision for the applicant.[111] An

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107 These rules are set out in s.46 of the Administration of Estates Act 1925 (as amended). The amounts of the "statutory legacies" may be altered from time to time by statutory instrument: Family Provision Act 1966, s.1(3) and (4). A surviving spouse is entitled to require a capital sum in lieu of his or her life interest (s.47A of the 1925 Act, added by the Intestates Estates Act 1952), and to require the matrimonial home to be appropriated in or towards satisfaction of any absolute interest that he or she may have in the estate: Intestates Estates Act 1952, Second Schedule.

108 See paras. 4.10-4.11, below.

109 The Act implements, with minor amendments, the recommendations in the Law Commission's Report on Family Provision on Death (1974), Law Com. No. 61.

110 Sect. 1.

111 Sect. 2.

application must normally be made within six months from the grant of representation, but the court has a discretion to extend this period.[112]

4.11 In the case of a surviving spouse, the expression "reasonable financial provision" is not limited to maintenance but signifies what "it would be reasonable in all the circumstances for a husband or wife to receive";[113] by contrast, other classes of applicant may be granted an order by way of maintenance only.[114] However, the Act specifically provides that references therein to a wife or a husband extend to a person who in good faith entered into a void marriage with the deceased.[115] It follows that in general the surviving spouse in the kind of void polygamous marriage with which this consultative document is concerned will be able to apply for financial provision on the basis of the more generous standard applicable to the surviving spouse of a valid marriage.

(b) Nationality

Introduction

4.12 From a social and practical point of view, nationality would appear to be the most important area in which difficulty has been experienced in consequence of the operation of the rule whereby English domiciliaries have been held to lack capacity to contract a marriage in polygamous form.

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112 Sect. 4.

113 Sect. 1(2)(a).

114 Sect. 1(2)(b).

115 Unless the marriage has been dissolved or annulled during the parties' joint lifetimes, the dissolution or annulment being recognised in England and Wales; or unless the applicant has remarried during the lifetime of the deceased: s.25(4).

This is because, we were informed on our preliminary consultation, the officials concerned have to consider in this connection the question whether the marriage in question is valid. We received much helpful information on this aspect from both the Home Office and the Commission for Racial Equality.

The present law and practice

4.13 Section 6(2) of the British Nationality Act 1948 provides that the wife of a citizen of the United Kingdom may herself register as a citizen.[116] When a wife applies for registration under that provision, the officials of the Immigration and Nationality Department of the Home Office have to consider the question whether at the date of the marriage the husband[117] had retained his domicile of origin, in which case the marriage would be valid[118] or whether he had then acquired a domicile in this country, with the result that the marriage is void.[119]

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116 When the British Nationality Act 1981 comes into force a wife will no longer be entitled to register herself as a citizen, although the validity of her marriage will continue to be an important factor in the requirements for naturalisation: see para. 4.17, below. However, by way of transitional provision, s.8 of the Act provides that, for five years after its commencement, a wife entitled to recognition as a citizen under s.6(2) of the 1948 Act immediately prior to the commencement of the new Act should continue to be so entitled if she remains married and her husband becomes a British citizen under the Act.

117 Doubt rarely arises concerning the wife's domicile as at that date, since few women in this type of case leave their country of origin before marriage.

118 See paras. 3.2 and 3.6, above. This would apply even if the marriage were actually polygamous, as well as to the situation in point here, where the parties' union is in fact monogamous.

119 See paras. 3.2 and 3.6, above; subject to Hussain v. Hussain, The Times, 28 June 1982.

4.14 When the wife is in the United Kingdom, the Home Office officials arrive at a conclusion on the basis of information appearing on the application form and on the basis of any other information available to the Home Office;[120] and they presume for this purpose that, in the absence of evidence to the contrary, the husband retained his domicile of origin at the date of the marriage. However, where such contrary evidence exists, a questionnaire is sent to him for completion. This document is designed to elicit information relevant to the issue of domicile, and the officials then decide the matter in the light of his answers to the questionnaire as well as of the other information in their possession. Should there then be any doubt as to whether the husband has acquired a domicile of choice in this country, or if the husband is dead, the issue is resolved by presuming that he had retained his domicile of origin at the date of the marriage. A similar procedure obtains where the wife is resident abroad provided that the marriage is not actually polygamous and that she has already been interviewed, in connection with an application for immigration, at a Foreign and Commonwealth Office post overseas.[121]

4.15 We understand that, when registration is withheld, the Home Office point out, in notifying the wife of their decision, that the validity of a marriage under our law is a matter that can be settled conclusively only

120 In this type of case the marriage will normally have been previously accepted for immigration purposes: see paras. 4.20-4.21, below.

121 Where the marriage is actually polygamous, it may be necessary for a domicile questionnaire to be sent to her, and in that case a final decision on the question of nationality would be reached on all the information available, including the answers to the questionnaire.

by our courts. Further, they suggest "in suitable cases" that the parties should consider going through a ceremony of marriage, such as a civil ceremony at a Register Office, in this country; and we were informed by the General Register Office in our preliminary consultation that there is no practical difficulty about conducting such a ceremony,[122] and that a special formula[123] is used for the description of the parties which avoids the possibly offensive use of the terms "bachelor" and "spinster".

Difficulties that arise from the present law and practice

4.16 On our preliminary consultation, the Commission for Racial Equality pointed out that the difficulty arising from the rule that an English domiciliary lacks capacity to contract a marriage in polygamous form might, more realistically, be expressed as arising through lack of comprehension of the concept of domicile, "an abstract concept of legal art". They referred also to two specific areas of difficulty. They drew attention, first, to the adverse effect upon parties advised by Home

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122 This does not apply, of course, if the original marriage was actually polygamous.

123 The formula is prescribed by the Registration of Births, Deaths and Marriages Regulations S.I. 1968, No. 2049, r.68(2)(c), which provides that the Registrar should, "if the marriage is between two parties who have previously been through a ceremony of marriage with each other (not being a marriage which is known to have been null and void), and neither of whom has since married a third person [and] if the ceremony was performed for the avoidance of doubt as to the validity of a previous ceremony", record the words "Previously went through a form of marriage on ... at ...".

Office officials that their marriage is void[124] and that, for their protection, they should go through a further ceremony of marriage in this country.[125] Secondly, the Commission expressed the view that the Home Office questionnaire which, together with information already "on the file", is used in some cases by Home Office officials for the purpose of ascertaining the husband's domicile at the date of the marriage[126] is objectionable, on the ground that the document neither explained its purpose nor indicated that it might be desirable for the person required to complete it to obtain advice before he did so.

The British Nationality Act 1981

4.17 Under the British Nationality Act 1981, which (apart from an immaterial exception) will come into force on a day to be appointed[127] and will then substantially replace the provisions of the 1948 Act, the spouse of a British citizen will no longer be entitled to citizenship. However, under section 6(1) of the new Act, the Secretary of State has a discretion to grant naturalisation to

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124 The issue of an "entry clearance" certificate for the purposes of entry into the United Kingdom does not of itself constitute acceptance of the validity of the parties' marriage: see para. 4.21, below.

125 See the last sentence of para. 4.15, above. We return to consider this point more fully in para. 4.39, below.

126 See para. 4.14, above. We understand from the Immigration and Nationality Department of the Home Office that the questionnaire is used less extensively than at the date of our preliminary consultation in 1979.

127 The Home Secretary stated in Parliament last year that "subject to the necessary preparatory work being completed in time" the Act would be brought into force on 1 January 1983: Hansard H.C., 10 Dec. 1981, vol. 14, Written Answers, col. 456.

anyone who satisfies certain conditions which are set out in paragraphs 1-2 of Schedule 1 to the Act; and section 6(2) confers on him a similar discretion in relation to a person of full age and capacity who is married to a British citizen and who satisfies the different, much less stringent, conditions in paragraphs 3-4 of that Schedule.[128] Clearly, therefore, the question whether the marriage of the wife of a British citizen is or is not valid will remain as an important factor in relation to applications for naturalisation.[129]

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128 For example, under s.6(1) an applicant must have a sufficient knowledge of the English, Welsh or Scottish Gaelic language, but not under s.6(2); and the period of residence prior to the application is five years under s.6(1) but only three years under s.6(2).

129 In addition, the transitional provisions in s.8 of the Act will maintain in force for five years after its commencement the effect of s.6(2) of the 1948 Act in relation to any wife entitled, under that subsection, to recognition as a citizen immediately prior to the commencement of the 1981 Act: see para. 4.13 and n.116, above.

(c) Immigration

The present law

4.18 The law and procedure relevant to immigration is contained in the Immigration Act 1971 and in the rules made by the Secretary of State under that Act.[130] The current rules were made in 1980.[131] The Act provides that certain persons (designated as "patrials"[132]) should have the "right of abode" in the United Kingdom - they comprise, broadly speaking, citizens of the United Kingdom and Colonies who (i) are connected with the United Kingdom by birth, adoption, naturalisation or registration, (ii) have a parent or grandparent with such connection, or (iii) have been lawfully settled here for five years (i.e., ordinarily resident here for that period without a restriction on the period of their stay), together with certain other Commonwealth citizens.[133]

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130 Under s.3(2), which confers power upon the Secretary of State to lay before Parliament statements of the rules (and of any changes in the rules) as to the practice to be followed in the administration of the Act for regulating the entry into, and stay in, the United Kingdom of those required to have leave to enter. Such "statements" are subject to disapproval by resolution of either House.

131 Statement of Changes in Immigration Rules, H.C. (Session 1979-80) 394. The statement embodies all the relevant rules and, for convenience, we refer to it hereafter as the "Immigration Rules". Although the rules are administrative directions, as distinguished from delegated legislation, they are often treated in practice as if they had statutory effect.

132 Sect. 2(6). When the British Nationality Act 1981 comes into force, "patriality" will cease to be an immigration status, but the right of abode will thenceforth attach to British citizenship, which is defined in such a way as to preserve many of the immigration consequences of the existing law.

133 Sect. 2.

4.19 Under the Immigration Rules the wife of a man who is settled in the United Kingdom or who is on the same occasion being admitted for settlement here is herself to be admitted for settlement.[134] Furthermore, provision is made in the Immigration Rules that:

> "A woman who has been living in permanent association[135] with a man has no claim to enter, but may be admitted ... as if she were his wife, due account being taken of any local custom or tradition tending to establish the permanence of the association."

The administration of the law and the rules

4.20 On our preliminary consultation[136] the Immigration and Nationality Department of the Home Office explained how the law and the rules concerning immigration were administered in practice. We were told that, where the actually or potentially polygamous marriage of a wife was thought likely to be recognised

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134 Subject to certain conditions, e.g. as to her maintenance and accommodation: para. 44. Certain Commonwealth wives have rights of entry under ss.1(5) and 2(2) of the Act (under the latter subsection as "patrials"). Registration as a wife under s.6(2) of the British Nationality Act 1948 (referred to in para. 4.13, above) after the 1971 Act came into force is specifically excluded from the ambit of s.2(1) of the latter Act.

135 Immigration Rules, para. 45. The expression "permanent association" applies only to actually monogamous unions: Jahanara Begum v. Entry Officer, Dacca TH/12361/77(1261) d 9.6.78 (unreported); and the rule itself goes on to provide that a woman in this situation is not to be admitted if the man has already been joined by his wife or by another woman admitted in accordance with this rule, "whether or not the relationship still subsists". The rule also excludes her admission if either party has previously been married, unless any previous marriage has permanently broken down.

136 See paras. 2.12-2.13, above.

as valid in any part of the United Kingdom, she would be admitted. On the other hand, where the marriage was likely to be regarded here as invalid on the ground that the husband was domiciled in England and Wales at the date of its celebration, the wife would normally be admitted only if the marriage, though potentially polygamous, was in fact monogamous.[137]

4.21 We understand that a wife who wishes to come to the United Kingdom as the wife of a man settled here must first obtain an "entry clearance certificate" and that for the purpose of determining her eligibility in that respect she is interviewed by an entry clearance officer. If the latter finds that either party has, or has had, one or more other marriage partners, he investigates the subsistence of any such relationship. In general it is unnecessary for the entry clearance officer to go further if the wife may be admitted in accordance with the policy as to de facto monogamous marriages described in the preceding paragraph. However, where the husband's domicile (and hence the validity of a marriage celebrated abroad in polygamous form) is in doubt, the officer is advised to warn the parties that the issue of an entry clearance certificate does not imply that the marriage will be accepted in this country.

4.22 The Home Office made the general point with regard to their procedures relating to the admission of wives of polygamous marriages that the approach of their officials was pragmatic in that it is the nature, rather

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137 Apart from any other consideration, the wife would fall within the ambit of para. 45 of the Immigration Rules: see para. 4.19, above.

than the legal status, of the relationship which calls for assessment; but they emphasised that considerable effort was expended in difficult cases for the purpose of ascertaining the position.

4.23 It may be helpful to cite here, by way of exemplification of the kind of situation that may arise, the decision of the Immigration Appeal Tribunal in Zahra v. Visa Officer, Islamabad.[138] In that case A, a citizen of Pakistan, came to England in 1962, followed in 1963 by B, his wife. She returned to Pakistan in 1969. A visited Pakistan on four occasions - in 1969, 1972-3, 1974 and 1976. On the second of such visits he married C, in 1973. In 1977 the visa officer interviewed A and C, enquiring in particular into the facts relating to A's domicile, and found that A was domiciled in England at the time of his purported marriage to C, so that section 11(d) of the 1973 Act applied and the marriage was accordingly void. It was held on appeal that, first, there was sufficient evidence on the facts to support the visa officer's findings as to A's domicile in 1973; and secondly, that the predecessor of paragraph 45 of the Immigration Rules 1980,[139] though conferring a discretion upon the immigration authorities, dealt only with a "monogamous" situation, and "if it were otherwise an oriental pasha with a harem of several wives might be entitled to bring them all to this country, even if he were domiciled here ..."[140] Accordingly, it was held, discretion should not be exercised in favour of admitting C to this country to join A.

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138 [1979-80] Imm. A.R. 48.

139 See para. 4.19, above.

140 [1979-80] Imm. A.R. 48, 51. A similar approach had been adopted in the previous decision referred to in n.135 above, which was cited with approval on this point.

4.24 We have indicated in paragraph 4.21 above that quite often, when investigating the question whether a wife should be allowed to settle here, the officials of the Immigration and Nationality Department of the Home Office do not in fact consider the question of domicile and that they grant permission to the wife. The result is that problems may arise subsequently when she applies for registration as a citizen; and we were informed by the Commission for Racial Equality and the Immigration Appeal Tribunal that in such cases the question of domicile would be investigated if a second wife subsequently attempted to join the husband.

(d) Social security benefits

4.25 Formerly, in the case of an actually or potentially polygamous marriage a wife was held not to be entitled to maternity benefit or widow's benefit under the National Insurance Acts,[141] on the ground that on its true construction the relevant legislation extended only to marriages in monogamous form. Subsequently, however, this rule was modified,[142] and the present rule is that a polygamous marriage is treated for the purposes of the Social Security Act 1975[143] and the Child Benefit Act

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141 By decisions of Commissioners under those Acts: see e.g. Decision No. R(G) 18/52. The Commissioners subsequently decided, however, that a marriage entered into in polygamous form might subsequently become monogamous by operation of law: Decision R(G) 2/56 and R(G) 12/56. They thereby anticipated Ali v. Ali [1968] P. 564, as to which see para. 3.12, above.

142 The original legislation was drafted in terms that denied benefit in the case of a marriage which, though actually monogamous, had formerly been actually polygamous: see, for example, the Family Allowances and National Insurance Act 1956, s.3.

143 Under the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975, S.I. 1975, No. 561, made under s.162(b) of the Act.

1975[144] as having the same consequences as a monogamous marriage for any day throughout which it is in fact monogamous.

4.26 On our preliminary consultation we were informed by the Department of Health and Social Security that the rule whereby an English domiciliary lacked capacity to contract a marriage in polygamous form did not often give rise to problems, because in practice the Department operated on the basis of a very strong presumption of the validity of a marriage where the marriage ceremony appeared to be in order and the parties had subsequently lived together as man and wife. However, the Department did draw our attention to some cases in which the operation of that rule had given rise to difficulty,[145] and they pointed out that the relevant system of adjudication below the level of Commissioner is not well suited to the investigation and determination of difficult questions of domicile. And it appears that problems can arise in other areas of social security, such as national insurance contributions, widow's benefit, death grant and maternity allowances.

4.27 So far as supplementary benefit is concerned, however, the position is different, since in that context it is generally the nature of the relationship between the man and woman who are members of the same household, rather than the validity of a marriage, that is in

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144 Child Benefit (General) Regulations 1976, S.I. 1976 No. 965, r.12, made under the power conferred by s.9(2)(a) of the Act.

145 It has been suggested to the Department, they inform us, that their officials should inform leaders of the Pakistani community that its members ought to go through a monogamous civil ceremony in Pakistan, as well as a religious ceremony, when they return on a visit to that country for the purpose of marrying there.

point.[146] This principle extends even to cases of actually polygamous marriages and actually "polygamous" unmarried cohabitation between members of the same household, the relevant principle being that two members of the relationship are treated as a married, or unmarried couple (as the case might be) and the requirements and resources of all the members of the relationship are treated as "those of such members of that couple as may be appropriate in the circumstances".[147]

(e) Taxation

4.28 In response to our preliminary consultation we were informed by the Board of Inland Revenue that no real difficulties have been experienced by those concerned either with income tax, capital gains tax and capital transfer tax in general or with questions of domicile and residence in particular. Thus, in the field of capital transfer tax the officials of the Inland Revenue presume the validity of a marriage in the absence of knowledge to

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146 Supplementary Benefits Act 1976 (which, as amended by the Social Security Act 1980, is set out in Part II of Schedule 2 to the 1980 Act) refers to the aggregation of the requirements and resources of two persons who are "a married or unmarried couple", terms which are defined in s.34(1).

147 Supplementary Benefit (Aggregation) Regulations 1981, S.I. 1981, No. 1524, r.8; Supplementary Benefit (Requirements) Regulations 1980, S.I. 1980, No. 1299, Sch. 2, para. 11 (added by S.I. 1980, No. 1774, r.3 and Schedule, para. 16(b)).

the contrary.[148] Again, in the case of income tax, if a question arises of a married taxpayer's entitlement to the higher personal allowance provided for by section 8(1) of the Income and Corporation Taxes Act 1970[149] the rule whereby an English domiciliary lacks capacity to contract a polygamous marriage is not invoked for the purpose of denying the allowance in respect of a de facto monogamous marriage. The result is that, by administrative practice, a "wife" for the purposes of section 8(1) is treated as including a party to a marriage which is invalid because it was contracted by a man who was at the date of its celebration domiciled in this country.

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148 Dispositions between husband and wife, whether inter vivos or on death, are completely exempt from capital transfer tax except in the rare situation where the transferor is domiciled in some part of the United Kingdom, but his or her spouse is not, in which case the exemption is restricted in amount: Finance Act 1975, Sched. 6, paras. 1(1) and (2) (as amended); and for the purposes of that tax, subject to certain exceptions, a notional domicile in a part of the United Kingdom is attributed to certain specified classes of persons (for example, those so domiciled within the three years immediate preceding the relevant time): Finance Act 1975, s.45(1).

149 This provides that a claimant should be entitled to this allowance if he proves that during the relevant year of assessment his wife is living with, and is wholly maintained by, him. No entitlement to the allowance exists in the case of an actually polygamous marriage in relation to any of the wives: Nabi v. Heaton [1981] 1 W.L.R. 1052. However, in giving judgment in that case, Vinelott J. stated that he saw no reason why a potentially polygamous marriage should not be recognised for the purpose of entitlement to the higher personal allowance, and he referred with implicit approval to the practice of the Inland Revenue in this respect: ibid., 1059.

(f) Matrimonial relief in magistrates' courts

4.29 In general, our courts now have jurisdiction to grant matrimonial and ancillary relief, irrespective of whether the character of the relevant marriage is monogamous, potentially polygamous or actually polygamous.[150] Accordingly, if either or both of the parties to a marriage celebrated in, say, Bangladesh in polygamous form which was void because at the date of the marriage the man was domiciled in this country, the High Court or a divorce county court here could grant a decree of nullity in respect of that marriage and make orders as to financial matters and the custody of the children.[151]

4.30 However, the domestic jurisdiction of magistrates' courts, under the Domestic Proceedings and Magistrates' Courts Act 1978, to make orders by way of matrimonial relief may of course only be exercised where a valid marriage subsists between the parties. On our preliminary consultation[152] we sought to elicit information as to whether the fact that a marriage contracted in polygamous form by an English domiciliary was void had given rise to difficulties in this context, but the response from all but one of the persons and organisations we consulted indicated that problems had not apparently

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150 Matrimonial Causes Act 1973, s.47(1) re-enacting (with minor amendments) the Matrimonial Proceedings (Polygamous Marriages) Act 1972. See para. 3.14, above.

151 Under the Matrimonial Causes Act 1973 (as amended by the Domestic Proceedings and Magistrates' Courts Act 1978, s.63).

152 See paras. 2.12-2.13, above.

arisen[153] in this respect. Indeed, the Commission for Racial Equality explained that members of the Asian community do not in practice avail themselves of their right to take proceedings for matrimonial relief, although, they pointed out, this situation may change within the next two or three generations. However, a practising member of the Bar with experience in this field had, we were informed, encountered more than one case in which the rule had given rise to difficulties, and cited an instance in which the husband had successfully resisted an order in favour of the wife, on the ground that the rule applied to his marriage.[154]

(g) Legitimacy

The present law and practice

4.31 At common law the child of the parties to a void marriage was automatically illegitimate. However, the present rule, embodied now in section 1 of the Legitimacy Act 1976, confers the status of legitimacy upon such a child if (i) either or both of his parents reasonably believed at the date of his conception (or, if later, at the date of the marriage) that the marriage was valid and (ii) the father was domiciled in England

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153 The Justices' Clerks' Society pointed out that s.27 of the 1978 Act enables justices to refuse to make an order if they form the opinion that any matter in issue would be more conveniently dealt with by the High Court, and that, if the issue arose in a particular case, the justices would probably make no order, in accordance with that provision.

154 The wife was then advised to apply for an order under the Guardianship of Minors Acts 1971 and 1973.

and Wales at the time of the birth.[155] It would seem, therefore, that a child of a marriage in polygamous form which is void because his father was domiciled here at the date of the marriage but which his father or mother believed to be valid should be regarded as legitimate, but of course the position would presumably be otherwise if the child is conceived after the father and mother have been informed[156] that the marriage is, or may be, invalid.

4.32 For the purpose of the provision referred to in the previous paragraph, it would seem, although the point is not entirely clear, that a mistake of law, as well as one of fact,[157] is capable of giving rise to a reasonable belief in the validity of a void marriage.[158] In their

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155 It should be borne in mind that, in the kind of situation with which we are concerned in this consultative document, if the father was not domiciled here at the date of the marriage, the child will be legitimate since the parents' marriage will be valid.

156 By, for example, officials of the Immigration and Nationality Department of the Home Office (see para. 4.15, above) or of the Nationality and Treaty Department of the Foreign and Commonwealth Office (see para. 4.37, below).

157 In Hawkins v. Attorney-General [1966] 1 W.L.R. 978 (about which, however, there was no foreign element) the marriage was entered into after a petition for divorce filed by the mother's husband by a previous marriage had been served on her, but before a decree of dissolution of that previous marriage had been granted. It was held "as a plain question of fact" (ibid., 986) that, even if the parents believed that they were free to marry when they did, they did not do so on reasonable grounds, the test of which was objective.

158 This view of the law is taken by the Foreign and Commonwealth Office in relation to the issue of passports: see para. 4.37, below.

comment on our preliminary consultation[159] the Commission for Racial Equality indicated that no problem arose in the "straightforward" case of a person who, having acquired an English domicile, returned to (say) Bangladesh for the purpose of marrying there. However, the Commission also referred to another type of situation which in their view gave rise to difficulties. It arises when a person of Asian ethnic origin, domiciled in an African country the domestic law of which prescribes monogamy, visits his country of origin for the purpose of marrying and subsequently acquires a domicile in this country. In such cases, the marriage would be void at common law,[160] and the children born prior to his acquisition of an English domicile would, they believe, be illegitimate, a fact which would create a significant social problem, although they are not aware of its extent.[161] But this problem would of course remain unaffected by any amendment to, or the repeal of, section 11(d) of the Matrimonial Causes Act 1973, since that provision relates only to the capacity of those persons who are domiciled in England and Wales to contract a marriage in a polygamous form.

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159 See paras. 2.12-2.13, above.

160 Because the father would lack capacity under the law of his domicile to contract a marriage in polygamous form: see paras. 3.2 and 3.6, above.

161 Many of the former disadvantages of illegitimacy in relation to property were removed by Part II of the Family Law Reform Act 1969. Thus, for example, a gift by a will made today to "my children" will, unless a contrary intention appears, include the testator's illegitimate children under s.15(1)(a) of that Act; and under s.14(1), on the death intestate of either parent of an illegitimate child, that child will take an interest in his deceased parent's estate as if he had been legitimate.

The recommendations in our forthcoming Report on illegitimacy

4.33 Our Report on Illegitimacy, which, together with a draft Bill to implement our recommendations, is to be published shortly will contain three recommendations that are relevant in the present context. In the first place, we shall recommend the removal of the present disadvantages that accompany the so-called status of illegitimacy. Secondly, we shall recommend the creation of a presumption, in relation to the application of section 1 of the Legitimacy Act 1976 to children born after the Bill accompanying our Report has come into force, that at least one of the parties to it reasonably believed in its validity unless the contrary is shown. And, thirdly, the report will contain a recommendation whereby it is to be made clear that, for the purposes of that provision, a mistake of law is capable of giving rise to a reasonable belief in the validity of a void marriage.

(h) Other areas of difficulty

General

4.34 We have identified, and now briefly consider, a small number of comparatively minor matters which may arise in the context of the operation of the rule that an English domiciliary lacks capacity to contract a marriage in polygamous form.

Nullity petitions

4.35 Some evidence appeared from the response to our preliminary consultation[162] that, in respect of marriages contracted after 31 July 1971, decrees of nullity have in fact been granted on the ground that the marriage was void

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162 See paras. 2.12-2.13, above.

by reason of section 11(d) of the Matrimonial Causes Act 1973,[163] and in respect of marriages before that date, by virtue of the relevant common law principles.[164]

Capacity to contract a subsequent marriage with a different spouse

4.36 On our preliminary consultation we raised the question whether, in the case of a marriage of a person domiciled in this country which was apparently void by reason of section 11(d) of the Matrimonial Causes Act 1973 (or as to a marriage celebrated before August 1971, the relevant common law rule), practical problems were experienced by registrars if one of the parties should wish to go through a ceremony of marriage with a person other than the party to the original marriage. We were informed by the General Register Office that the problem had "very rarely been presented to us", but, they went on to explain, their practice would be to refuse to accept notice of the intended marriage until a decree of nullity had been granted in respect of the original marriage if the circumstances suggested that the intended matrimonial home of the parties to the original marriage was a country which would recognise its validity.[165]

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163 The relevant part of this section is set out in para. 3.5, above.

164 See paras. 3.2-3.4, above.

165 On the principle applied in Radwan v. Radwan (No. 2) [1973] Fam. 35. See paras. 3.4 and 3.7, above. The General Register Office emphasised the administrative difficulty to which the uncertainty introduced by that decision gave rise; and they explained that it was thought preferable to "err on the side of caution, rather than run the risk of allowing a marriage to take place that might subsequently be found to be bigamous".

Passports

4.37 The Passport Office and the Nationality and Treaty Department of the Foreign and Commonwealth Office have explained to us the procedure adopted when an application is made for passport facilities in respect of the child of an actually or potentially polygamous marriage whose claim to citizenship of the United Kingdom and Colonies (and hence to passport facilities) is based on descent and whose father appears to have been domiciled in a part of the United Kingdom at the date of his marriage.[166] In such cases a letter is sent to both parents, accompanying the passport, explaining that apparently their marriage would not be regarded as valid in English law but that, as it appeared that the parents reasonably believed the marriage to be valid, the child was legitimate by reason of section 1 of the Legitimacy Act 1976[167] and was accordingly a citizen of the United Kingdom and Colonies by descent. The letter goes on to point out, however, that this provision would not apply to children born subsequently, since the parents were "now aware of our view that the [relevant] marriage ceremony ... was invalid"; and it contains a suggestion that they might "wish to consider going through a monogamous form of marriage which would be recognised in our law", which would enable the children of such a marriage to claim citizenship of the United Kingdom and Colonies by descent.

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166 Reference is made to the Immigration and Nationality Department of the Home Office for any relevant information on their file.

167 See para. 4.31, above.

(i) Conclusion

4.38 It is clear from the various matters which we have considered in paragraphs 4.3-4.37 above that the rule whereby a person domiciled in England and Wales lacks capacity to contract a potentially, as well as an actually, polygamous marriage has given rise to serious problems, in particular for members of Asian communities settled in this country, which in practice, though not perhaps in theory, appear to be much more significant in certain areas, such as those of nationality[168] and immigration[169] than in the context of others, for example, that of income tax.[170] However, we should be grateful for information and comment relating to any area of the law to which we have not referred and in which the rule has proved to be a source of difficulties, and as to how widespread may be any problems to which it gives rise.[171]

4.39 Finally, we would refer to the possible "cure", by means of a ceremony of marriage in this country between the parties to the potentially polygamous marriage, of their problems created by the rule. We have referred, in paragraph 4.15 above (in the context of nationality), to the advice to that effect given to the parties by officials of the Home Office; and, as we pointed out there, there appear to be no difficulties from the point of view of the registrars about conducting such a

168 Paras. 4.12-4.17, above.

169 Paras. 4.18-4.24, above.

170 Para. 4.28, above.

171 In the survey conducted by Dr. David Pearl of a very small sample of immigrant families in Peterborough under the auspices of the Social Science Research Council (see n. 34, above), 27 of the 40 people who responded to his questionnaire had been married abroad; and the validity of the marriages of 5 of that 27 had been put in question by the authorities.

ceremony in a register office, especially since a formula which avoids the use of the terms "bachelor" and "spinster" is available. Nevertheless, the evidence from those with direct experience of immigrant communities in this country clearly indicates that such a solution is seen as offensive;[172] and, indeed, it seems that in many instances the parties prefer to remain legally unmarried than undergo what they consider to be a humiliating procedure. Moreover, it would seem that, once the spouses have been notified that their marriage was, or might be, invalid, any child of theirs subsequently conceived would be illegitimate.[173] In our view, the fact that spouses may go through a ceremony of marriage in this country does not provide an adequate solution to the problems to which the rule gives rise. We have concluded, therefore, that legislative reform of this rule is desirable. We consider, in Part V below, the possible forms that such reform ought to take.

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172 On our preliminary consultation, the Commission for Racial Equality emphasised the distress, "indeed trauma", which this advice caused to the families affected. This point was also made by other commentators. For example, in the survey published by the Birmingham Community Development Project (see n.33, above) it was pointed out in relation to a wife's application for citizenship that, although a ceremony of marriage in this country usually provides a solution, such a course of action "entails confusion, bitterness, a marriage, time-consuming form-filling, and the extra expense of re-applying for registration"; and that the ceremony here has the effect of "formalising the number of years when the marriage was not a marriage". They commented that the Home Office was threatening the validity of thousands of marriages celebrated before, as well as on or after, 1 August 1971 (when s.11(d) of the Matrimonial Causes Act 1973 came into force), and that "this in turn has long-term implications for the whole field of Race Relations".

173 See paras. 4.31 and 4.37, above.

D The concept of potentially polygamous marriage

(i) Civil law

4.40 We turn now to consider the wider question of identifying the areas of law in which the law treats as polygamous a marriage which though celebrated in polygamous form is at all relevant times actually monogamous in character. There are three different categories of situation in which a potentially polygamous marriage may fall to be examined. The first is where the law treats all marriages in the same way irrespective of whether they are monogamous or actually or potentially polygamous. This has, as we have seen,[174] been the tendency of the law over the years in relation to the jurisdiction of our courts to grant matrimonial relief. It is the approach adopted in section 47 of the Matrimonial Causes Act 1973, under which the High Court and a divorce county court (though not a magistrates' court)[175] were given matrimonial jurisdiction over polygamous marriages. This tendency has been reflected, too, in related areas of law. For example, it has been held recently that a polygamous marriage is recognised for the purposes of section 17 of the Married Women's Property Act 1882,[176] which provides a summary procedure for determining disputes as between husband and wife during (and for three years after the dissolution of[177]) their marriage,[178] and, in relation to applications for

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174 See para. 3.14, above.

175 See paras. 4.29-4.30, above.

176 As extended by the Matrimonial Causes (Property and Maintenance) Act 1958, s.7.

177 Matrimonial Proceedings and Property Act 1970, s.39.

178 Chaudhry v. Chaudhry [1976] Fam. 148 (where the marriage happened to be potentially, not actually, polygamous).

an order for family provision on death, for the purposes of the Inheritance (Provision for Family and Dependants) Act 1975.[179] Again, the rights conferred upon a spouse by the Matrimonial Homes Act 1967 which, broadly speaking, relates to occupation rights in the matrimonial home were recently declared[180] to extend to the spouses both of potentially and of actually polygamous marriages. It has also been suggested that the wives of a polygamous union would be entitled to claim under the Fatal Accidents Acts to the extent of their dependence on the deceased husband.[181] In the wide variety of cases in which polygamous and monogamous marriages are treated in the same way, the distinction between an actually and a potentially polygamous marriage has no significance.[182]

4.41 There is a second category of case in which the law may accord recognition to a polygamous marriage provided that it is in fact monogamous in nature. Thus, as we have explained in paragraph 4.25 above, regulations[183] made under section 162(b) of the Social Security Act 1975 provided that

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179 Re Sehota [1978] 1 W.L.R. 1506. In this case the plaintiff's wife, the deceased and his second wife had all acquired a domicile in this country after the celebration of the marriage to the second wife, to whom he had left his estate by will. For the application of this Act to the different situation where the relevant marriage is void but was entered into in good faith, see paras. 4.10-4.11, above.

180 By the Matrimonial Homes and Property Act 1981, s.3.

181 See our Report on Polygamous Marriages (1979), Law Com. No. 42, para. 124; Hartley (1969) 32 M.L.R. 155, 169-170.

182 For example, succession by spouses (see para. 4.42, below), matrimonial relief, and the legitimacy of and succession by children (ibid.). See further, Dicey and Morris, The Conflict of Laws, 10th ed., (1980), pp. 320-326.

183 S.I. 1975, No. 561.

a valid polygamous marriage shall be treated as a monogamous marriage for any day on which it is in fact monogamous. A similar approach was adopted by the Law Commission in its recommendations relating to co-ownership of the matrimonial home.[184] We made it clear that, though our proposals applied to potentially polygamous marriages, they should not extend to a marriage which at the relevant time was actually polygamous.[185] With regard to income tax, in practice the Inland Revenue appear to adopt a similar approach.[186]

4.42 The third type of case is that in which the law continues to distinguish between monogamous marriages on the one hand and actually and potentially polygamous marriages, on the other, treating actually and potentially polygamous marriages in the same way. One such case is, of course, section 11(d) of the Matrimonial Causes Act 1973.[187] It is, however, difficult to identify many other instances. Indeed, it has been suggested judicially[188]

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184 Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978), Law Com. No. 86.

185 Ibid., paras. 1.74-1.81, and (at p. 138) clause 1(2) of the draft Matrimonial Homes (Co-ownership) Bill annexed to the Report. Our proposals in relation to rights over household goods were extended to actually, as well as potentially, polygamous marriages: ibid., paras. 3.89-3.101, and clause 10 of the draft Matrimonial Goods Bill annexed to the Report (see at p. 400).

186 See para. 4.28, above and the remarks of Vinelott J. in Nabi v. Heaton [1981] 1 W.L.R. 1052, 1059, referred to in the concluding sentence of n. 149 to that paragraph.

187 Subject to Hussain v. Hussain, The Times, 28 June 1982.

188 Chaudhry v. Chaudhry [1976] Fam. 148, 152-153; Re Sehota [1978] 1 W.L.R. 1506, 1511.

that the rule in Hyde v. Hyde[189] (whereby the parties to an actually or potentially polygamous marriage are not, "as between each other ... entitled to remedies, the adjudication, or the relief" of English matrimonial law) was totally abolished by the statutory provision now embodied in section 47 of the Matrimonial Causes Act 1973;[190] though it has also been suggested, more cautiously, that the wife of a polygamous marriage "should be treated as a wife unless there is some strong reason to the contrary."[191] There are, however, one or two instances where a polygamous marriage may be denied effect even though it is actually monogamous in character. The first arises in the context of succession. Although, perhaps, the surviving wife of a polygamous marriage could succeed to the husband's property on his death intestate[192] (assuming of course that the marriage is valid), and there is little doubt that in general the children of a valid marriage which is either potentially

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189 (1866) L.R. 1 P. & D. 130.

190 This section re-enacts (with minor amendments) the Matrimonial Proceedings (Polygamous Marriages) Act 1972: see para. 4.29, above.

191 Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p. 325.

192 Under the Administration of Estates Act 1925 (as amended): see para. 4.9, above. There is, however, no direct authority on the matter. In Coleman v. Shang [1961] A.C. 481, the Judicial Committee of the Privy Council decided that, under Ghanaian law, the widow of a potentially polygamous marriage was entitled to a grant of letters of administration although the law of Ghana, the deceased's last domicile, provided that two-thirds of the estate was distributable in accordance with the English Statute of Distribution 1670. It may be, therefore, that the term "spouse" in the 1925 Act extends to the surviving wife of a potentially, or even an actually, polygamous marriage; as to the latter situation, the Privy Council stated that difficulties arising where there was more than one widow could be dealt with as they arose (ibid., 495).

or actually polygamous can succeed, on their father's death intestate, to property in England and Wales[193] and are regarded as legitimate,[194] the position may be different in the rare case of succession as an "heir" to real property in this country,[195] to entailed

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193 Bamgbose v. Daniel [1955] A.C. 107 (P.C.). The decision was based on the law of Nigeria, where the deceased was domiciled at his death, but the rights of the children of nine polygamous marriages were governed by a provision requiring distribution in accordance with the English Statute of Distribution 1670. It would therefore appear that the word "issue" in the Administration of Estates Act 1925 extends to such children. See also National Insurance Decision R(G) 11/53.

194 Baindail v. Baindail [1946] P.122, 127-8; Hashmi v. Hashmi [1972] Fam. 36. The question whether a child is legitimate is of much less significance now than it was formerly, because of ss. 14 and 15 of the Family Law Reform Act 1969: see n. 161, above.

195 The rules as to intestate succession to real property that obtained before 1926 were in general abolished by the Administration of Estates Act 1925, so that the concept of the heir is largely obsolete. There may be, however, some rare cases in which succession as an heir may still occur. For example, where property is expressly limited to the heir of a deceased person, the grantee is ascertained according to the general law in force before 1926: see Megarry and Wade, The Law of Real Property, 4th ed., (1975), pp. 531-532.

interests[196] and to titles of honour. In the Sinha Peerage Claim[197] the Committee of Privileges held that a son of parents whose marriage was in fact monogamous, though contracted in polygamous form, could succeed to his father's peerage. In fact, the husband had, after the marriage, changed his religion and joined a monogamous sect, a fact on which Lord Maugham placed considerable emphasis.[198] However, it may well be that he was as much concerned with the question whether the marriage was monogamous in fact, rather than whether it had subsequently become monogamous in nature, for he said:

> "It seems desirable also clearly to state that nothing in our decision of this petition is intended to apply to a case where the petitioner is claiming as a son of a parent who has in fact married two wives, e.g., a Hindu or a Mohammedan who has had a plurality of

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196 Entailed interests are excluded from the ambit of s.14 of the Family Law Reform Act 1969, whereby an illegitimate child's relationship with his parents is assimilated in certain respects to that of a legitimate child for the purposes of intestate succession (s.14(5)); and the presumption created by s.15(1) of that Act to the effect that dispositions inter vivos or by will by reference to the relationship of one person to another include "illegitimate" relationships does not extend to the construction of the word "heir", to any expression used to create an entailed interest or to any disposition limited to devolve along with a dignity or title of honour (s.15(2) and (5)). However, s.1 of the Legitimacy Act 1976, which confers legitimacy upon the child of a void marriage at least one of whose parents reasonably believed at the date of the child's conception (or, if later, at that of the marriage) that the marriage was valid applies to, and to property limited to devolve with, a dignity or title of honour in respect of a child born after 28 October 1959.

197 (1939) 171 Lords' Journals 350; [1946] 1 All E.R. 348n.

198 [1946] 1 All E.R. 348, 349.

> wives. It is apparent that great difficulties may arise in questions relating to the descent of a dignity where the marriage from which heirship is alleged to result is one of a polygamous character, using the word polygamous as meaning a marriage which did not forbid a plurality of wives, and where there has been in fact a plurality of wives. If sons were born of more than one of them, it might be difficult to reconcile one of these sons with English ideas of "heirship", which must be involved in the words contained in a Patent granted by the King in a well known form and dealing with a British dignity which, it will be remembered, entitles the holder to sit and vote in the House of Lords. If there were several wives, the son of a second or third wife might be the claimant to a dignity to the exclusion of a later-born son of the first wife. Our law as to heirship has provided no means for settling such questions as these."

Lord Maugham did, however, suggest that, though the marriage would be recognised for the purposes of enabling the son to succeed to the peerage, it would be prudent of him to express no view on whether the marriage in question, which was actually monogamous, would be regarded as valid for the purposes of "inheritance of real estate before the Law of Property Act, 1925, of the devolution of entailed interests as equitable interests before or since that date, and some other exceptional cases."[199] The argument against allowing the issue of a valid polygamous marriage from succeeding to such property is the one given by Lord Maugham in the passage cited above, namely that of a contest between the first-born son of the second wife and the later born son of the first wife. That problem could not arise in the case of a potentially, rather than actually, polygamous marriage and it may be that the courts, in the more liberal atmosphere of the late twentieth century, might allow a child of such a marriage to succeed as heir.

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199 Ibid. See n. 195, above.

4.43 It should be mentioned, finally, that although the areas of law in which a potentially polygamous marriage is treated differently from a monogamous marriage are now very few indeed, this does not mean that the two kinds of marriage can necessarily be regarded as identical. It may be that a wife who goes through a ceremony of marriage in monogamous form has different expectations from the wife who marries in polygamous form. The wife who marries in polygamous form might be thought to have accepted that her husband might take a second wife whereas the wife who marries in monogamous form might take a very different view.[200] Indeed, the Privy Council has held[201] that, according to the law of The Gambia, a wife who married in England in monogamous form could bring divorce proceedings against her husband on the ground of his adultery with his second wife whom he had married in polygamous form. Had the first marriage been a valid potentially polygamous marriage, the court might well have taken a different view. The question arose recently before Vinelott J. in Nabi v. Heaton.[202] In that case the man, who had at all material times retained his domicile of origin in Pakistan, settled in England, where he married his first wife in a civil ceremony. Subsequently he returned on a visit to Pakistan, there marrying his second wife in polygamous form at a Muslim ceremony. The income tax commissioners had found that the second marriage was void on the ground that it followed a marriage celebrated in England in English form. Vinelott J., however, based his decision on another ground, which applied even if the second

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200 We have pointed out, in para. 1.9(iv), that this issue was not considered by the Court of Appeal in Hussain v. Hussain, The Times, 28 June 1982.

201 Drammeh v. Drammeh (1970) 78 Ceylon Law Weekly 55.

202 [1981] 1 W.L.R. 1052. The case concerned a claim for higher personal income tax allowance in respect of a wife who, the taxpayer contended, was his actually polygamous wife: see n.149 to para. 4.28, above.

marriage was valid, and he specifically refrained from expressing an opinion as to the validity of the second marriage or as to its effect upon the first,[203] though he stated that it was implicit in the commissioners' finding that the first marriage had not, under Muslim law, been dissolved at the time of the second marriage.[204]

4.44 We would repeat, by way of conclusion that, except for the significant exception of section 11(d) of the Matrimonial Causes Act 1973, there are very few cases where the civil law distinguishes between monogamous and potentially polygamous marriages. If, as we have indicated above, there is a powerful case for reform of section 11(d), this must raise for consideration the question, which we examine in paragraphs 5.11-5.25, below, whether the concept of the potentially polygamous marriage can be eradicated wholly from the civil law. There is, in our view, much force in the conclusion that the "use of the concept of a potentially polygamous marriage ... involves an unnecessary and undesirable complication in an area of law which is sufficiently difficult without it."[205]

(ii) The crime of bigamy

4.45 Section 57 of the Offences against the Person Act 1861 provides that the crime of bigamy is committed by any person who "being married, shall marry any other person

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203 [1981] 1 W.L.R. 1052, 1057.

204 Ibid., 1056-1057.

205 Palsson, Marriage and Divorce in Comparative Conflict of Laws (1974), p. 155; and see his Marriage in Comparative Conflict of Laws: Substantive Conditions (1981), p.203.

during the life of the former husband or wife."[206] The section is expressed to have extra-territorial effect. The essence of the offence is that there must be a valid first marriage followed by a second "bigamous" marriage, but, broadly, in respect of a second or subsequent marriage contracted outside England or Ireland only by "a subject of Her Majesty". The question arises as to the position where the first marriage, though valid, is polygamous in form,[207] as to which it has been held[208] that such a marriage will not support an indictment for bigamy if the husband later goes through a second ceremony of marriage. In the few cases in which the question of bigamy and polygamy has arisen, the first marriage relied on to support a prosecution for bigamy has been potentially, rather than actually,polygamous. Nevertheless, the courts have said that though such a marriage may be valid for the purposes of the civil law, it is not such a marriage as will found a charge of bigamy.[209] The reason for such an approach would seem to be that: "if for the purpose of a prosecution for bigamy, a potentially polygamous

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206 Review of the crime of bigamy has been excluded from the Criminal Law Revision Committee's examination of Offences Against the Person: Fourteenth Report (1980) Cmnd. 7844, para. 1.

207 This matter was left open in Baindail v. Baindail [1946] P. 122, 130. If the marriage is monogamous in form, then the husband commits bigamy if he goes through another monogamous ceremony, even though his personal law permits polygamy: R. v. Naguib [1917] 1 K.B. 359.

208 R. v. Sarwan Singh [1962] 3 All E.R. 612; and see R. v. Naguib [1917] 1 K.B. 359, 360. In R. v. Sagoo [1975] Q.B. 885, the Court of Appeal approved the principle that "the marriage which is to be the foundation for a prosecution of bigamy must be a monogamous marriage", but held that R. v. Sarwan Singh was wrongly decided in that the first marriage in that case had become monogamous by reason of change of domicile.

209 Unless at the time of the second "bigamous" ceremony, the first marriage has become monogamous by, e.g. change of domicile: R. v. Sagoo [1975] Q.B. 885.

marriage were recognised, then, in view of the fact that the offence of bigamy can be committed wherever the second marriage takes place, whether in England or any other part of the world, a man who married under a ceremony of polygamy a second wife might in some circumstances be liable for prosecution for bigamy."[210] This view has been criticised[211] and indeed the problems created by it have been described as "largely academic" because it is thought inconceivable that a person whose personal law permitted polygamy would be prosecuted in England for bigamy if he married two wives in the country of his domicile.[212] The major criticism of the present state of the law relating to bigamy and polygamy has more to do with the former than with the latter. It has been suggested that the phrase "shall marry" in section 57 of the Offences against the Person Act 1861 clearly means "shall attempt to marry". That interpretation would mean that a man who contracted two valid marriages could not be guilty of bigamy.[214]

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210 R. v. Sarwan Singh [1962] 3 All E.R. 612, 615.

211 Carter, (1962) 38 B.Y.B.I.L. 483; Polonsky, [1971] Crim. L. Rev. 401; Leslie, [1972] Jur. Rev. 113; Morse, (1976) 25 I.C.L.Q. 229.

212 Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p. 321.

213 Carter, (1962) 38 B.Y.B.I.L. 483, 485.

214 The problems created by s.57 of the 1861 Act arise primarily because the section is expressed to have extra-territorial effect. See Polonsky, [1971] Crim. L. Rev. 401; and Glanville Williams, (1965) 81 L.Q.R. 395, 402-408.

4.46 However, it would, in our view, be inappropriate in the context of this consultative document to make any proposals, albeit provisional, relating to the effect of potentially polygamous marriages in the criminal law of bigamy. If and when the law of bigamy is reviewed, the question can be considered as part of that review.

PART V

PROPOSALS FOR REFORM

A. Introduction

5.1 Three main policy matters arise from our examination, in Parts III and IV, of section 11(d) of the Matrimonial Causes Act 1973 and related areas of the law as to polygamous marriages and of the criticisms which may be made of these rules of law and of the way in which they work in practice. These three main policy matters are, in the order in which they will be treated in this Part:

(i) The scope of section 11(d);

(ii) Wider reform of the law relating to potentially polygamous marriages;

(iii) The question of reform of the choice of law rules relating to capacity to enter a polygamous marriage.

There are also a number of other matters which were raised in our preliminary consultation which relate to the law of domicile and to the administration of the law, rather than to the law itself. These are considered briefly at the end of this Part. It should again be emphasised that this Part has been prepared without reference to the recent decision of the Court of Appeal in Hussain v. Hussain, which is considered further in Part VII, below, and on the basis that the law is what it was thought to be before that decision.

B. Section 11(d)

(i) The problem and the need for reform

5.2 It may be convenient to repeat here, briefly, the problem which arises from the operation of section 11(d) of the Matrimonial Causes Act 1973. Under that provision, a person domiciled in England and Wales has no capacity to enter a potentially or actually polygamous marriage. The nature of a marriage as monogamous is determined by the law of the place of celebration. This means that in the common

case of a husband, who is domiciled in England but who, or whose family, comes originally from Pakistan or Bangladesh, and who marries in that country, the marriage will be regarded in England as void if it takes place in polygamous, e.g. Muslim, form. Section 11(d) has that effect even though it is the spouses' first and only marriage, i.e. even if the marriage is and remains monogamous. We have outlined in Part IV the criticisms that have been made of the present state of the law. These criticisms include not only the comments we received in response to our preliminary consultation, but also the conclusions which may be drawn from the surveys which have been conducted into the practical operation of the present law and include critical comments which have been made ever since the forerunner of section 11(d) appeared on the statute book. It is, perhaps, worthy of note that on our preliminary consultation, not only was reform thought to be desirable by the lawyers who commented to us, it was also strongly urged upon us by the Commission for Racial Equality and was supported by comments from officials in those Government Departments with the broadest experience of the problems to which section 11(d) may give rise. We have reached the conclusion that the problems created by section 11(d) in the different areas examined in Part IV show a clear need for reform of the law.

(ii) The options for reform

5.3 It appears to us that there are two main options for reform of the principle embodied in section 11(d).[215] One is more radical than the other. The two options are these:

Option 1 Abolish the present rule, thus permitting a person domiciled in England to contract either a

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215 For a different approach, see James, (1979) 42 M.L.R.533.

potentially or an actually polygamous marriage.[216] This is the more radical solution.

Option 2 Amend section 11(d) so that it applied only to actually polygamous marriages. This would have the following result in a case, such as that discussed in paragraph 5.2 above, where an English domiciled husband returned to Pakistan to marry in polygamous form: if the husband was unmarried at the time of the marriage ceremony in Pakistan, the marriage (though in law potentially polygamous) would be regarded in England as valid. If, however, the husband, while still domiciled in England, went through a ceremony of marriage with a second wife, having again returned to Pakistan so to marry, that second marriage would, as now, be regarded as void by reason both of section 11(b) and of section 11(d) which, though amended in accordance with this option, would still deny the husband capacity to enter an actually polygamous marriage.

5.4 A variety of arguments have been,[217] or might be, advanced in favour of the more radical option of permitting an English domiciliary to contract a marriage in polygamous form, whether or not it is actually polygamous in character. They relate both to principle and to the incidence or effect of any change in the law. As to principle, it is argued that English law recognises actually polygamous marriages for many (though not all) purposes and it is therefore

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216 This option would also require some amendment of s.11(b) of the 1973 Act. The common law rules on capacity to contract a polygamous marriage, discussed above, paras. 3.2-3.10, would not revive because the grounds of nullity listed in the Matrimonial Causes Act 1973, s.11, are exhaustive.

217 Hartley, (1971) 34 M.L.R. 305, 306-307; Poulter, (1976) 25 I.C.L.Q. 475, 504, 506-507.

consistent with this increasing recognition to confer capacity to enter such marriages even on those who are domiciled in England. After all, persons domiciled abroad who contract an actually polygamous marriage are regarded in this country as validly married and our courts now have jurisdiction to dissolve one or all of the marriages.[218] So far as the incidence or effect of any radical change is concerned, it has been suggested that the effect of the abolition of the present rule on actually polygamous marriages would be very small: "it cannot be emphasised strongly enough that the number of persons who fall within the jurisdiction of the English courts who are parties to marriages which are actually, as opposed to merely potentially polygamous, is minute."[219] The argument that to abolish the rule would allow a domiciled Englishman validly to contract a series of actually polygamous marriages abroad has been countered by the opinion[220] that few Englishmen would take advantage of such a right because of the economic burdens involved, the social pressures against such conduct and the ease with which divorces can be obtained in this country.

5.5 We are not at the moment persuaded by these arguments. The argument that to confer capacity on English domiciliaries to contract actually polygamous marriages is acceptable because few will wish to take advantage of such a right is not in our opinion a convincing argument. It could just as well be said that the fact that few would be affected by such a change indicates that no change should be made unless it was manifest that such an extension of

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218 Matrimonial Causes Act 1973, s.47(1), (2)(a) and (4).

219 Poulter, (1976) 25 I.C.L.Q. 475, 506-507.

220 Ibid., 507.

capacity was generally acceptable to society in this country. So far as principle is concerned, whilst we accept the fact that this country is "an increasingly plural society,"[221] it is not a polygamous society. The clear weight of opinion from our preliminary consultation indicated that such a radical change, as is envisaged in Option 1 in paragraph 5.3, above, would not generally find favour. We should, however, very much welcome views on whether it is thought to be appropriate for a person domiciled and resident in England, whatever his cultural or racial background, to be capable of contracting actually polygamous marriages.

5.6 So far, we have considered exclusively the problem of whether a man domiciled in England should have capacity to enter an actually polygamous marriage. Although the practical problems to which section 11(d) gives rise appear to have arisen primarily in the context of the determination of the validity of polygamous marriages entered into by men domiciled in England, it is perfectly possible for a polygamous marriage entered into abroad by a woman domiciled in England to be rendered void by reason of section 11.[222] It might, at first sight, be thought that such a case provides stronger support for the more radical Option 1, in paragraph 5.3, above, namely total abolition of the present rule. After all, although the woman will, in the case of an actually polygamous marriage, be one of several wives, she will have only one husband. Why should she not be capable of contracting such a marriage if she so wishes, even though she is domiciled in England? We believe that it is

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221 R. v. Lemon [1979] A.C. 617, 658, per Lord Scarman; and see Ormrod L.J. in Hussain v. Hussain, The Times, 28 June 1982.

222 Radwan v. Radwan (No.2) [1973] Fam. 35, discussed above, para. 3.4, was concerned with the capacity of a woman domiciled in England to contract an actually polygamous marriage, intending thereafter to live in Egypt. If that decision represents the law, then s.11(b) and (d) will only be relevant if the woman contracts an actually polygamous marriage abroad intending to live in England. This seems to be a rather unlikely eventuality.

misconceived so to analyse the situation. The marriage will be no less an actually polygamous marriage whether it is viewed from the standpoint of the husband who has more than one wife or of any particular wife who, though she has only one husband, is one of several wives married to the same man. As we have said in paragraph 5.5, above, we do not think that a rule which conferred capacity on a polygamist husband domiciled and resident in England would generally find favour; nor do we believe that a rule which conferred on an English domiciled woman capacity to contract an actually polygamous marriage would be any more acceptable. We would welcome views on this particular issue, which was not raised in our preliminary consultation.

5.7 Our present view is that the criticisms which have been voiced as to the operation of section 11(d) in practice relate almost exclusively to its effect in rendering void a marriage which is and always remains monogamous, just because it was contracted in polygamous form. We are not persuaded that there is any practical need to confer capacity to enter actually polygamous marriages on those domiciled in this country and we seriously doubt whether such a change in the law would meet with general approval.[223] It must also be borne in mind that all marriages celebrated in England are regarded as monogamous in character. We would find it difficult to justify a state of the law in which a person domiciled in England could contract an actually polygamous marriage which would be regarded in this country as valid, provided the marriage was not celebrated in England but in polygamous form in a country where (assuming that the other spouse had capacity under the law of his or her domicile)

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223 Such a change would also, in our view, be likely to increase the problems caused in determining the rights of a first wife who marries (probably in England) in monogamous form when her English domiciled husband then contracted an actually polygamous marriage; see paras. 5.15-5.25, below.

such form of marriage was regarded as legally effective. Our provisional conclusion is, therefore, to reject the option of changing the law in such a way as to enable a person domiciled in England and Wales to contract an actually polygamous marriage.

5.8 We believe that amendment of section 11(d) so that it will no longer invalidate potentially polygamous marriages entered into by English domiciliaries will provide an appropriate and generally acceptable solution to the criticisms of the present law outlined in Part IV. Our preliminary consultation indicated considerable support for such a reform.[224] This approach has the consequence of aligning the law on capacity to contract a polygamous marriage much more closely with the law of social security.[225] Indeed, the approach we propose has been adopted in Australia, whose law in this respect is otherwise substantially similar to ours.[226] It also would have the advantage of bringing some consistency to the law relating to the conversion of marriages from polygamous to monogamous in nature. At the moment a potentially (but of course not an actually[227]) polygamous marriage is converted into a monogamous marriage if both spouses[228] become domiciled in

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224 And see Jaffey, (1978) 41 M.L.R. 38, 42, n.13.

225 See paras. 4.24-4.27, above.

226 This is because s.51(2) of the federal Family Law Act 1975, which corresponds to s.11 of our Matrimonial Causes Act 1973, contains no counterpart of s.11(d). If an unmarried man who is domiciled in Australia contracts a marriage abroad in potentially polygamous form, the marriage will be valid, and it will take effect as a monogamous one, since a subsequent marriage would be void under s.51(2) as being contracted by a person who was "lawfully married to some other person."

227 Re Sehota [1978] 1 W.L.R. 1506.

228 Change of domicile by one spouse is probably insufficient: e.g., Onobrauche v. Onobrauche (1978) 8 Fam. Law 107.

England.[229] But under section 11(d) such a marriage is void if one party was domiciled in England at the time of its celebration. This illogicality disappears if, in accordance with Option 2 in paragraph 5.3 above, section 11(d) is confined to actually polygamous marriages.

5.9 Our provisional conclusion is that there is neither need nor justification for the complete abolition of the present rule that an English domiciliary lacks capacity to contract a marriage in polygamous form. We do, however, make the provisional recommendation that section 11(d) should be amended so that it applies only to actually polygamous marriages, with the consequence that a person domiciled in England should have capacity to enter a potentially polygamous marriage.

5.10 There is one final matter to be raised in connection with the provisional recommendation which we made in the previous paragraph, namely whether any change in the law should be retrospective in effect. In other words should the limitation of section 11(d) of the 1973 Act to actually polygamous marriages have the effect of rendering valid the potentially polygamous marriages of English domiciliaries already entered into at the date on which our recommendation is implemented, or should the recommendation have effect only in relation to marriages entered into after that date? There are arguments in favour of both courses. There might be thought to be a number of problems created by the retrospective conferring of capacity to marry, involving the retrospective validation of marriages. One or both of the parties might have married again, acting on the sound advice that the first marriage was void; property might have been distributed on the same assumption. The rules necessary to resolve some, at least, of the problems which retrospectivity

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229 Ali v. Ali [1968] P. 564.

could create, might have to be fairly complex in form and effect. On the other hand, the social problems to which section 11(d) gives rise would continue to exist in the case of many purported marriages if our recommendation had only prospective effect and, indeed, it is not unknown for family law legislation to be given retrospective effect.[230] The provisional conclusion which we had reached before the recent decision in Hussain v. Hussain[231] was that our recommendations should not be given retrospective effect. We have reconsidered that conclusion in the light of that decision and now recommend, for the reasons given in paragraph 7.7, below, that our proposed reform of section 11(d) should apply to marriages celebrated both before and after any legislation implementing our proposal comes into force.

C The concept of potentially polygamous marriage

(1) General

5.11 The issue to be examined here is whether the concept of the potentially polygamous marriage continues to serve any useful purpose in the law. Both of the options for reform of the principle embodied in section 11(d) of the Matrimonial Causes Act 1973 which we have canvassed[232] would mean that, in that context, potentially polygamous marriages would cease to be of any significance. From our earlier discussion of the present law in paragraphs 4.40-4.44, above, it would seem that there are very few areas of the law, other than section 11(d), in which the concept of potential polygamy remains relevant. It appears to be of possible continuing significance to succession as an "heir" -

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230 E.g., Recognition of Divorces and Legal Separations Act 1971, s.10(4).

231 The Times, 28 June 1982.

232 See paras. 5.3-5.10, above.

i.e., to titles and to entails.[233] It could possibly be of significance in legislation which refers to "wife" or "wives", though every time the interpretation of such legislation has come before the courts since the changes in the law relating to polygamy in the early 1970s, the liberal interpretation to include at least potentially polygamous marriages seems to have been favoured.[234]

5.12 We are not aware of any instance where it is either necessary or desirable to treat a potentially polygamous marriage differently in law from a monogamous marriage. We mentioned in the previous paragraph that it might be thought that the distinction could be of relevance to succession as an "heir". Whilst we accept that practical difficulties could possibly be caused in the case of an actually polygamous marriage if the issue of such a marriage could succeed as an "heir",[234] the number of cases where entitlement as "heir" will be in issue is likely to be very small indeed. Furthermore, we do not believe that any difficulties could arise in this context from regarding a potentially polygamous, but actually monogamous, marriage as in law monogamous. It seems to us that practical problems of succession as an "heir" could only arise in the case of actually polygamous marriages.[236]

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233 See para. 4.42, above.

234 See, e.g., Chaudhry v. Chaudhry [1976] Fam. 148; Re Sehota [1978] 1 W.L.R. 1506.

235 This is the problem of a contest between the first born son of the second wife as against the later born son of the first wife; see para. 4.42, above.

236 It might be noted that American courts seem only to regard as polygamous marriages which are actually so: see Royal v. Cudahy Packing Co. (1922) 190 N.W. 427, 428 (Iowa); and see Bartholomew, (1964) 13 I.C.L.Q. 1022, 1073-1075; Palsson, Marriage and Divorce in Comparative Conflict of Laws (1974), pp. 151-152. Palsson also points out, at p. 125, that a similar approach is adopted in most European countries, though there is little case law on the topic.

5.13 We have been unable to identify any other case of possible difficulty though we would welcome comments on this matter and, in particular, evidence of practical problems arising in this area of the law. The movement in favour of recognising polygamous marriages for very many purposes in our plural society is now so broad that we have reached the provisional conclusion that the concept of a potentially polygamous marriage today serves no useful purpose in the law. We provisionally recommend that no marriage should be regarded as polygamous, irrespective of the form of the marriage ceremony and its effect under the law of the place of celebration, unless that marriage is actually polygamous. For reasons similar to those stated in paragraphs 5.10, above and 7.7, below, we now think that this change in the law should be given retrospective effect.

(ii) Two particular problems

5.14 We considered in Part IV[237] two particular problems relevant to the issue whether a potentially polygamous marriage is now to be treated exactly as if it were a monogamous marriage. The first problem was whether, if a husband contracted a valid actually polygamous marriage, the position of the first wife vis-a-vis the husband and the second wife depended on the nature of her marriage, i.e., whether it was in polygamous or monogamous form. The second problem was whether consideration should be given to the law of bigamy in the present context of reform of the law relating to polygamous marriages.

(a) The effect of an actually polygamous marriage on a prior marriage

5.15 If there is general acceptance of our provisional recommendation in paragraph 5.13, above, namely, that no marriage should be regarded as polygamous, irrespective of

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237 See paras. 4.43, 4.45-4.46, above.

the form of the ceremony, unless it is actually polygamous, there still remains a further related issue for examination. This concerns the effect on a first marriage, whether in monogamous or polygamous form, of a later valid marriage entered into by the husband. The present position is that, if a husband domiciled in Pakistan there marries his first wife, also a Pakistan domiciliary, in polygamous form, that marriage is regarded in England as a valid potentially polygamous marriage. If the husband, whilst still domiciled in Pakistan,[238] there marries a second wife in polygamous form, that marriage and indeed also the first marriage are regarded as valid but as actually polygamous. Should some or all of the parties come to England, they will be regarded as validly married and, indeed, in many respects the position of the wives will not be very different in law from the position of the sole wife in a monogamous marriage. There are, however, still some practical differences as, for example, in the field of social security.[239]

5.16 If the husband, though domiciled in Pakistan, married his first wife, whom we shall assume to be an English domiciliary, in England, then that marriage will be regarded in England as valid and as monogamous in form.[240] If the

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238 If the husband was domiciled in England at the time of the second marriage, the second marriage would be regarded in the eyes of English law as void, by reason of s. 11(d) of the Matrimonial Causes Act 1973; and would continue to be so regarded under our recommendation in para. 5.9, above because it would be an actually polygamous marriage.

239 See paras. 4.25-4.27, above.

240 Provided, of course, that it was a valid marriage under the formal requirements of the Marriage Act 1949. For the circumstances in which a marriage may be celebrated in, for example, a mosque in England, see para. 2.5, above.

husband then marries a second wife, domiciled in Pakistan, in polygamous form in Pakistan, it would appear[241] that this second marriage would be regarded in England as valid because both parties had capacity to enter a polygamous marriage under the law of their domicile. There is then, however, a problem as to the effect, on the position of the first wife, of the husband's second, valid, actually polygamous marriage. The first wife was a party to a monogamous English marriage.[242] Is she to have the nature of her marriage changed by the fact that her husband has contracted a second valid marriage? The question of the effect on a monogamous marriage if the husband later contracts an actually polygamous marriage was discussed in Part IV.[243] There is no direct authority on this issue, but there is some authority for the view that the position of the wife should not be prejudiced by the second marriage. It has been suggested that she should be able successfully to petition for divorce on the ground that the marriage had irretrievably broken down, such breakdown being evidenced either because the conduct of the husband constituted adultery,[244] or that it was behaviour by the respondent such that the petitioner could not

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241 See Drammeh v. Drammeh (1970) 78 Ceylon Law Weekly 55.

242 The same problem could arise where the first marriage had been in Pakistan in polygamous form if the parties then later acquired an English domicile, thereby changing the nature of the marriage from polygamous to monogamous; Ali v. Ali [1968] P.564; but the second marriage would only be valid if, before it was celebrated, the husband had re-acquired his Pakistan domicile.

243 See para. 4.43, above.

244 Matrimonial Causes Act 1973, s.1(2)(a); and see Drammeh v. Drammeh (1970) 78 Ceylon Law Weekly 55. Compare Onobrauche v. Onobrauche (1978) 8 Fam. Law 107, where the first marriage was potentially polygamous.

reasonably be expected to live with him.[245] There might also be problems in relation to intestate succession. Whilst it is generally thought that the surviving wives of actually polygamous marriages, the first marriage being in polygamous form, are entitled on intestacy to succeed to, and to share equally in, the deceased husband's estate,[246] it is unclear whether the first wife could successfully contend that, as a party to a monogamous marriage, she should not be required to share on intestacy with the second wife.[247] In relation to the matrimonial home, there would (as the law now stands) be few, if any, problems. As a result of amendments to the Matrimonial Homes Act 1967 effected by the Matrimonial Homes and Property Act 1981[248] the 1967 Act applies as between a husband and wife notwithstanding that the marriage in question was entered into under a law which permits polygamy (whether or not either party to the marriage in question has for the time being any spouse additional to the other party). Hence the wife will retain her rights of occupation (although there might in theory be difficulty for the courts in deciding

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245 Matrimonial Causes Act 1973, s.1(2)(b); Poon v. Tan (1973) 4 Fam. Law 161; and see Dicey and Morris, The Conflict of Laws, 10th ed., (1980) pp. 330-331. The first wife would continue to be entitled to financial relief, whether in divorce proceedings (or matrimonial proceedings in a magistrates' court) or in proceedings based on her husband's neglect to maintain her.

246 The Six Widows Case (1980) 12 Straits Settlements L.R. 120; Yew v. A-G for British Columbia [1924] 1 D.L.R. 116. And see n. 192, above.

247 Though there is no doubt that a wife who is a party to an actually polygamous marriage is to be regarded as a "wife" within the meaning of the Inheritance (Provision for Family and Dependants) Act 1975: Re Sehota [1978] 1 W.L.R. 1506. See para. 4.40, above.

248 Sect. 1(10) of the 1967 Act, inserted by s.3 of the 1981 Act.

(for example) which part of the matrimonial home she should be entitled to occupy). Moreover, there would seem to be few problems likely to arise if the first wife sought injunctive relief against her husband (or his second wife) in relation to the matrimonial home. In such cases the courts have not taken very much account of the precise juristic relationship between the parties.[249]

5.17 If, under the present law, the first wife who contracted her marriage in monogamous form is in a different legal relationship vis-a-vis her husband, and his later wives, from the position of the first wife who contracted her marriage in polygamous form, we have to ask what effect, if any, our recommendation in paragraph 5.13 above that no actually monogamous marriage should ever be treated as polygamous will have on this situation.[250] If the first marriage is, in fact, always the sole marriage, no problem can arise from treating it in law as monogamous irrespective of its nature under the law of the place of celebration. If, however, the first marriage is to continue to be regarded as having the incidents and effects of a monogamous marriage notwithstanding any later valid marriage, we would be affecting the marital position between all first wives, their husbands and the other wife or wives, even though that first marriage was celebracted abroad in a a polygamous form in the country in which the first wife

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249 Nanda v. Nanda [1968] P. 351.

250 As we pointed out in para. 1.9(iv), above, this issue was not considered by the Court of Appeal in Hussain v. Hussain, The Times, 28 June 1982.

was domiciled and she has had no connection with any other country.

5.18 We have been told that the incidence of actually polygamous marriages in this country is small and so the problem of the effect of a second valid marriage on the legal position of the first wife is unlikely to cause many practical difficulties in this country. We should welcome information on this matter. Nevertheless, it is possible for problems to arise and we must consider whether any change in this area of the law is called for consequential upon the recommendation to treat as monogamous all marriages which are in fact monogamous, irrespective of the form in which they are entered into.

5.19 There appear to us to be a number of approaches that we could adopt:

(1) Make no provision for the problem.

(2) Treat all first marriages in law as monogamous.

(3) Treat first marriages differently, depending upon the closeness of the spouses' connection with this country.

We shall examine these in turn; though it must be borne in mind that we are only concerned here with the case where the first marriage is in polygamous, rather than monogamous, form.

(1) Make no provision for the problem

5.20 There are two arguments in favour of this approach. The first is this. The problem of a marriage monogamous in form followed by a valid polygamous marriage has in the past caused little or no practical difficulty. That being so, the problem of a marriage in polygamous form followed by a later actually polygamous marriage is also unlikely to cause difficulty, even if the first marriage, had it remained in fact monogamous, would have been regarded in law as monogamous. The second argument is that to do nothing will enable the courts to examine the marital assumptions on which the first marriage was entered into. If it was in polygamous form , and has not become in law monogamous by, for example, acquisition of an English domicile by the parties prior to the husband's second marriage, then such questions as whether the second marriage provides evidence of the breakdown of the first marriage in terms of adultery or unreasonable behaviour should be decided, case by case, by reference to the expectations of the parties. This would mean that the courts would be free to hold that, if the first marriage was monogamous in form or had become monogamous by for example change of domicile, the rights of the first wife would be different from those of a first wife who had contracted a potentially polygamous marriage which had become in fact polygamous. On the other hand, a disadvantage of this approach is that no clear rule is laid down.

(2) Treat all first marriages in law as monogamous

5.21 It might be thought to be a logical consequence of our recommendation, in paragraph 5.13, above, to treat a potentially polygamous marriage in all respects as if it were a monogamous marriage that such a marriage should continue to be regarded as monogamous in nature so far as the first wife is concerned, even after the husband has later contracted a

valid actually polygamous marriage.[251] The first wife would, on this approach, be regarded in England in exactly the same way vis-à-vis the husband and any other wives as a wife whose marriage was monogamous in form and in fact.

5.22 We would not favour this approach. It would have too sweeping an effect on the way in which English law regards foreign marriages in polygamous form.[252] It would mean, for instance, that a first wife, domiciled in Pakistan, who there married in polygamous form a husband also domiciled in Pakistan who later contracted valid polygamous marriages, would be regarded by the English courts as a party to what in law was to be regarded as a monogamous marriage, even though she had never visited England in her life. This might be of practical importance if the question arose of intestate succession to immovable property in England.

(3) Treat first marriages differently, depending on the closeness of the spouses' connection with this country

5.23 On this approach, whether the first marriage is to be regarded in this country as monogamous or polygamous in character would depend on the closeness of the connection with this country evidenced by the parties. The connecting

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251 We consider separately, in paras. 5.23-5.24, below, whether a marriage in polygamous form, entered into by a person domiciled in England, should be regarded as monogamous until he acquires a domicile in a country which permits polygamy.

252 It might also have a significant practical effect in the field of social security. At the moment a marriage which is monogamous in fact is treated as being monogamous for social security purposes but actually polygamous marriages are not regarded as valid marriages for such purposes, irrespective of whether it is the position of the first or subsequent wives which is under consideration (see paras. 4.25-4.27, above). If one regarded the first wife as being a "monogamous wife" for all purposes, this would have the result, which might well be thought unfortunate, of discriminating, for social security purposes, on grounds of seniority between the wives of an actually polygamous marriage.

factor that would be utilised would almost certainly have to be domicile, with all its defects, because it seems to us inappropriate to adopt the concept of habitual residence in the field of marriage law, in advance of the review of choice of law in marriage which we hope to undertake.[253] It might be helpful to try to explain this approach by a series of examples, using H for husband, W1 for the first wife and W2 for the second wife.

(a) H and W1 are domiciled in Pakistan. They marry there in polygamous form. They then acquire an English domicile. H goes back on a short visit to Pakistan where he goes through a ceremony of marriage with W2.

W1's marriage is valid. It becomes monogamous in law by reason of the acquisition of an English domicile. W2's marriage is void because H lacks capacity to contract an actually polygamous marriage, being domiciled in England. Under our main recommendations W1's marriage will have been treated in all respects as monogamous as it has in fact always been monogamous.

(b) H and W1 are domiciled in England where they marry in monogamous form. H later acquires a Pakistan domicile and marries W2 polygamously. The position of W1 as a party to a monogamous marriage should not be affected by H's later valid[254] polygamous marriage.

(c) H and W1 are domiciled in Pakistan where they marry in polygamous form. W1 then acquires a domicile in England. H remains domiciled in Pakistan and marries W2 in polygamous form. The nature of

253 See para. 5.31, below.

254 It is assumed that H's second marriage would be regarded as valid ; see para. 5.16, above.

W1's marriage would not appear as a matter of law, to be changed into a monogamous marriage by her unilateral change of domicile.[255] Should W1 nonetheless be allowed to regard her marriage as monogamous vis-à-vis H and W2?

(d) H is domiciled in Pakistan, W1 is domiciled in England. They marry in Pakistan in polygamous form. The marriage would be valid if our recommendations for amendment of section 11(d) of the 1973 Act are implemented. W1 returns to England. H stays in Pakistan and marries W2 in polygamous form. Should W1 be allowed to regard her marriage as monogamous vis-à-vis H and W2?

5.24 It is for consideration, in the light of these examples, whether every marriage entered into by a person domiciled in England should be regarded in law as a monogamous marriage, even though in polygamous form, unless and until he or she acquires a domicile in a country which permits polygamy. This would mean that, in effect, an English domiciliary only has capacity to marry monogamously. The case of the foreign domiciled wife who marries in polygamous form and then acquires an English domicile[256] is more difficult. Under the present law the nature of her marriage does not appear to be affected by a unilateral change of domicile and it would clearly be wrong for her change of domicile to change the nature of the husband's right under the law of his domicile to marry polygamously.

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255 Onobrauche v. Onobrauche (1978) 8 Fam. Law 107.

256 A foreign domiciled husband who then acquired an English domicile would lose his capacity to marry polygamously by reason of both s.11(b) and s.11(d), even as amended under our proposals.

Conclusion

5.25 We are clear that it would be wrong to change the law so that all first marriages, irrespective of the nature of the ceremony and the domicile of the parties, were regarded in England as conferring on the wife the rights of a wife under a monogamous marriage. We are undecided whether any change in the law as to the effect on a first marriage of a later actually polygamous marriage is called for, having regard to our earlier recommendation in paragraph 5.13, above, that a marriage should be regarded as, in law, monogamous if it is and always has been in fact monogamous. If change is thought to be desirable then it might be limited to a proivision that a marriage entered into by a person domiciled in England is to be regarded as, in law, monogamous, unless or until that person acquires a domicile in a country which permits polygamy. In reaching a conclusion on this issue, we should be greatly helped by any evidence as to whether this matter is, or is likely to be, significant in practice, and we would welcome views as to whether it is thought desirable to regulate this matter by legislation.

(b) Bigamy

5.26 We have pointed out in paragraph 4.46, above that it would be inappropriate in this consultative document to make any recommendations for the reform of the law of bigamy in relation to polygamous marriages. We do not, therefore, discuss bigamy further.

D Choice of law rules for capacity to enter a polygamous marriage

5.27 The present state of the law as to the choice of law rules relating to capacity to enter a polygamous marriage is, as we said in paragraph 4.2, above, one of

confusion and uncertainty. There is doubt as to whether Radwan v. Radwan (No.2)[257] truly represents the law on this issue. If it does, then this aspect of choice of law as to the essential validity of marriage appears to be governed by one rule - the intended matrimonial home test - whilst all other aspects would seem to be governed by the dual domicile test. If Radwan is right, then there is considerable evidence that section 4 of the Matrimonial Proceedings (Polygamous Marriages) Act 1972[258] was based on a mistaken assumption as to the underlying common law choice of law rules. There is, however, a substantial body of opinion which regards Radwan as wrong.[259] All of this uncertainty in the choice of law rules relating to capacity to enter a polygamous marriage is, as we have said, unsatisfactory and this area of the law is in need of review and reform.

5.28 The major issue for consideration here is whether we should attempt to restate in this consultative document, the choice of law rules as to capacity to enter a polygamous marriage as part of the law relating to polygamous marriages, or whether this problem should be regarded as an aspect of the wider question of reform of choice of law rules relating to marriage generally.

5.29 It might be argued that, if we do not deal with the Radwan problem in this Paper, we shall not be tackling fully the social problems arising from section 11(d) of the Matrimonial Causes Act 1973. The argument is that, because of Radwan, section 11(d) does not apply to all persons domiciled in England, but only to those to whose capacity to

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257 [1973] Fam. 35.

258 See now the Matrimonial Causes Act 1973, s. 11(d); and see s.14.

259 See n. 47, above.

marry English domestic law (the Matrimonial Causes Act 1973) applies under English choice of law rules. According to Radwan, such persons are those who marry intending that England shall be their matrimonial home. We do not see much force in this argument, because the cases in which the major social problem arising from section 11(d) is to be found are those where the husband is domiciled in England, marries abroad and brings his wife back to England. In such a case, England is the intended matrimonial home and, under the Radwan rule, English law, including section 11(d), would apply. The one case in which the Radwan rule reaches a conclusion different from that of the orthodox dual domicile test is where, as in Radwan itself, an English domiciliary marries abroad in polygamous form, intending to make a matrimonial home abroad. No very obvious practical social problem arises if, as a result of Radwan, that person's capacity to enter a polygamous marriage is governed, not by section 11(d), but by the foreign law.

5.30 Our conclusion is that reform of the choice of law rules on capacity to enter a polygamous marriage - the Radwan problem - should not be examined in isolation from the wider issues relating to choice of law in marriage. This is an issue to which the Law Commission turned its attention as long ago as 1970.[260] Work was suspended in 1973 when we said that "We, and the Scottish Law Commission with whom we are collaborating, are convinced that satisfactory reform in this field can only be achieved with international agreement. We hope that The Hague International Law Conference will put on its agenda the law concerning the recognition of foreign marriages and of decrees of nullity".[261] These matters were indeed placed on the agenda of The Hague Conference on Private

260 Fifth Annual Report (1969-1970), Law Com. No. 36, para. 58.

261 Eighth Annual Report (1972-1973), Law Com. No. 58, para. 49.

International Law. No progress was made with the formulation of a convention relating to recognition of foreign nullity decrees. We have had to abandon the hope expressed in 1973 that international agreement would be the best way forward and we have resumed work, jointly with the Scottish Law Commission, on the preparation of a Working Paper on the recognition of foreign nullity decrees.[262] The Thirteenth Session of The Hague Conference on Private International Law, in 1976, was however, more productive in the field of marriage and, at that Session was completed the Convention on Celebration and Recognition of the Validity of Marriages (1976) which was opened for signature in October 1977.

5.31 Unfortunately, this has not proved to be one of the more successful of the Hague Conventions. It is not yet in force, having been signed by only 5 states[263] and ratified by none. It has received a somewhat critical reception both in the common law[264] and civil law worlds;[265] and we understand that the Government does not propose that the United Kingdom should sign or ratify the Convention. It seems likely that, as with the recognition of foreign nullity decrees, the hoped-for international reform and harmonisation will continue to prove elusive. The choice of law rules relating to marriage are not the one remaining major issue of family law in the field of private international law actively to be considered by the Law

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262 See Sixteenth Annual Report (1980-1981), Law Com. No. 113, para. 2.73.

263 Australia, Egypt, Finland, Luxembourg, Portugal.

264 E.g., Reese, (1979) 20 Virginia J. of Int. Law 25, 35-36; and see (1977) 25 Am. Jo. Comp. Law 393, 394; North, (1980) 166 Hague Recueil, 92-98; (1981) 6 Dalh. L.J. 417, 430-433.

265 E.g. Batiffol, (1977) Rev. crit. dr. int. privé 66, 451, 467-482; Lagarde, (1978) 34 Annuaire Suisse de droit international 31.

Commission. It is our intention to turn our attention to this matter as soon as our resources permit. We believe that the Radwan problem should be examined in that context because it raises the same issues as will have generally to be considered there - namely what should be the choice of law rule or rules for marriage and whether such rule or rules should vary according to the particular issue of validity before the court and according to whether the marriage takes place in England or elsewhere. We recommend, therefore, that further consideration of the choice of law rules relating to capacity to enter a polygamous marriage - the Radwan problem - should be carried out in the context of a general review of choice of law relating to marriage.

E Other Matters

(a) Administrative problems

5.32 Not only did our preliminary consultation on the effect in practice of the operation of section 11(d) of the Matrimonial Causes Act 1973[266] produce comments on the matter directly in issue but also our attention was drawn to what our commentators viewed as practical difficulties in the administration of those areas of the law which may be affected by section 11(d). In the field of immigration, it is said that there was excessive delay in administering immigration applications, both by entry clearance officers and by the Home Office itself.[267] One of the problems in the area of social security law and practice to which the Commission for Racial Equality drew attention in their comments to us concerned the forms used by the Department of Health and Social Security (Forms BF 194 and 195) to ascertain whether the parties in question are validly married. It was said that some of the questions,

266 See paras. 4.12-4.37, above.

267 Pearl (1980) 22 Journal of the Indian Law Institute 81, 92 et seq.

despite co-operation between the Department and the former Race Relations Board, are seen to be offensive by many persons of Asian origin in this country.[268] It was also suggested to us that further examination be given to the effect of actually polygamous marriages on the social security system.[269] Indeed the general point was made to us by the Commission for Racial Equality that not only should the law in the field under review be reformed, but the administrative practice in applying the law should be standardised. It is said that the differences in such administrative practice as between various government departments are a source of very considerable concern and distress.

5.33 Whilst we think that it is desirable for us to draw attention to the administrative difficulties which our preliminary consultation, and comments and research on the law and its administration in the field of polygamous marriages, have revealed, these cannot be dealt with as matters of law reform and fall outside our present exercise.

(b) The law of domicile

5.34 One of the essential elements in section 11(d) of the Matrimonial Causes Act 1973 is that of domicile. A person will not be held, by reason of that provision, to be incapable of entering a polygamous marriage unless he is shown to be domiciled in this country. The complexity of

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268 The use of Form BF 195 has recently been the subject of Parliamentary questions to the Secretary of State for Social Services, see Hansard (H.C.) 15 December 1981, Written Answers, cols. 109-110.

269 This suggestion seemed to us to be pre-eminently a matter for consideration in the first instance by the appropriate department and, accordingly, we have referred this matter to the Department of Health and Social Security. The present position is discussed in paras. 4.25-4.27, above; and see Pearl, (1978-79) J.S.W.L. 24.

the present law of domicile and the difficulty of determining whether a domicile of choice has been acquired have two major effects in the context of section 11(d). The first is, as some of our consultees pointed out, that it may in practice be difficult to prove that a man who came to this country as an immigrant from, say, Pakistan, has in fact acquired an English domicile of choice. If he has not, then section 11(d) does not render void any marriage which he contracts in polygamous form. So, in a way, the difficulties inherent in the law of domicile might be thought to mitigate the problems arising under section 11(d). On the other hand, there is the second effect to be considered - namely, the great uncertainty caused by the present law. If parties are unable to determine with any confidence where they are domiciled, they will equally be unable to determine whether their marriage is invalid by reason of section 11(d).

5.35 We believe that these difficulties outweigh any advantages that the present state of the law of domicile might be thought to bring in the particular context of section 11(d). We share the concern voiced by some of our consultees as to the present state of the law of domicile but it would not be appropriate to undertake a detailed examination of this area of the law in this consultative document. Just as the question whether domicile should continue to be the major connecting factor for choice of law in marriage or whether it should be replaced by some other connecting factor such as habitual residence is a matter to be examined in the context of a general review of choice of law in marriage,[270] so should reform of the law of domicile be regarded as a law reform exercise quite separate from the present one.

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270 See paras. 5.28-5.31, above.

We believe that a review of the law of domicile is now opportune and, in our view, any practical problems relating to domicile to which section 11(d) gives rise should be examined in that context. We hope that such a law reform project may be undertaken, on a United Kingdom wide basis,[271] as soon as is reasonably practicable.

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271 See Scottish Law Commission Consultative Memorandum No: 53, Family Law: Illegitimacy (1982), para. 10.8.

SECTION C

THE LAW OF SCOTLAND

PART VI

THE SCOTTISH POSITION

A Capacity to contract a polygamous marriage

6.1 The development of the law on polygamous marriages has been broadly similar in Scotland and in England[272] and much of what has been said in Parts II to V applies equally to Scotland. There is, however, no equivalent in Scotland of section 11(d) of the Matrimonial Causes Act 1973, with the result that the question of the capacity of someone domiciled in Scotland to enter into a polygamous marriage abroad depends on the common law. Just what the common law is on this point is a matter of doubt and uncertainty.

6.2 It may be that the common law in Scotland is to the same effect as section 11(d) was thought to be before the Court of Appeal decision in Hussain v. Hussain,[273] and that, accordingly, a person domiciled in Scotland does not have capacity to enter into a potentially polygamous marriage abroad.[274] If so, the discussion, in Part IV above, of the situation in relation, for example, to immigration, nationality, social security and taxation is equally relevant to Scotland.[275] For any of these purposes, a man of, say, Pakistani origin and Muslim religion, who had

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272 See Anton, Private International Law, pp. 267-273; Clive and Wilson, The Law of Husband and Wife, pp. 146-149.

273 The Times, 28 June 1982.

274 There is an obiter dictum by Lord Mackay in Lendrum v. Chakravarti, 1929 S.L.T. 96, 99 to the effect that a woman domiciled in Scotland could not enter into a marriage which was "not a Christian marriage or a monogamous one".

275 Indeed problems in relation to nationality have arisen in Scotland. See MacEwan, "Potentially Polygamous Marriages of Immigrants", 1979 Scolag Bulletin 169.

settled here and had then returned to Pakistan to marry a local woman under the local form of marriage, might find that his wife was not recognised as such in this country even though his marriage was factually monogamous. There could also be difficulties where a "wife" claims aliment and is met by a plea that the marriage is void because it was entered into abroad and in polygamous form at a time when the husband was domiciled in Scotland. Under the present law, too, a child of a marriage void because of this rule could be illegitimate, even if the parents went through the marriage in good faith because of an error of law.[276] There could also be difficulties in the law of succession. The problems would therefore be essentially the same in Scotland as in England. Parties whose marriage was, or might be, void because of this rule could, of course, be advised to marry again in Scotland. Specific provision for this type of marriage ceremony is made in section 20 of the Marriage (Scotland) Act 1977. As noted in Part IV, however, this procedure is likely to be offensive and embarrassing to people who believe they have been validly married for some time. It is also possible that a couple whose marriage was invalid might become married by cohabitation with habit and repute if they continued to live together as man and wife in Scotland.[277] This, however, would be an unsatisfactory remedy as, for practical purposes, a declarator of marriage would have to be obtained from the Court of Session. It would also be likely to be "perceived as insulting and degrading" to the parties[278] as the clear implications of the proceedings would be that they had never been "properly" married.

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276 Purves's Trs. v. Purves (1895) 22 R. 513. This would be remedied if the suggestion in para. 11.3 of the Scottish Law Commission's Consultative Memorandum on Illegitimacy (Memo. No. 53, 1982) were adopted and if the child of any void marriage were regarded as legitimate.

277 Cf. De Thoren v. Wall (1876) 3 R. (H.L.) 28.

278 See MacEwan, 1979 Scolag Bulletin 169, 170.

6.3 It may be, on the other hand, that the common law in Scotland does not have any rule to the effect that a person domiciled in Scotland does not have capacity to enter into a potentially polygamous marriage abroad.[279] If this is the case then there may be no need for substantive reform. It would still, however, in our view, be desirable to clarify the law by legislation. It would be particularly unfortunate if English law were to be reformed on the lines proposed earlier in this consultative document and if a Scottish court were then to hold that Scots law was to the same effect as English law prior to the decision in Hussain v. Hussain (1982).

6.4 In short, Scots law on capacity to enter into a polygamous marriage is at best uncertain and may well be the same as the English rule criticised in Part IV. On either view reform is desirable. For the reasons given in Part V we would prefer a reform which was limited to capacity to enter into a potentially polygamous marriage and which did not confer capacity on an unmarried[280] Scottish domiciliary to enter into an actually polygamous marriage with someone who already had a wife or husband. As section 11(d) of the Matrimonial Causes Act 1973 does not apply to Scotland the appropriate reform would be not an amendment of that section but the enactment of a rule in general terms. Our provisional recommendation is that a person domiciled in Scotland should not be regarded as lacking legal capacity to enter into a marriage outside the United Kingdom by reason

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279 The dictum of Lord Mackay in Lendrum v. Chakravarti, 1929 S.L.T. 96, 99 cannot be regarded as settling the law.

280 A person domiciled in Scotland and already married would, of course, lack capacity to enter into a second marriage simply because he or she was already married.

only of the fact that the marriage is, or is to be, celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy, provided that at the time of the marriage neither party is already married.

B The concept of potentially polygamous marriage

6.5 Although the introduction of the concept of the potentially polygamous marriage into Scots law has been criticised as being both unnecessary and contrary to principle,[281] the fact remains that the concept has been used in at least one Scottish case[282] and in legislation applying to Scotland as well as England.[283] Although the statutory treatment of polygamous marriages in social security law and revenue law is the same in Scotland as in England, the Scottish common law on the circumstances in which a polygamous marriage (whether actually or potentially polygamous) will or will not be recognised as a legal marriage is as yet unclear. Although there are early dicta suggesting that a polygamous marriage would not be recognised in Scots law,[284] in a more recent case Lord President Cooper

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281 See Anton, "The 'Christian Marriage' Heresy", 1956 S.L.T. (News) 201.

282 Muhammad v. Suna, 1956 S.C. 366. The actual decision in this case has now, however, been superseded by the Matrimonial Proceedings (Polygamous Marriages) Act 1972.

283 Matrimonial Proceedings (Polygamous Marriages) Act 1972, s.2; Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 (S.I. 1975, No. 561); Child Benefit (General) Regulations 1976 (S.I. 1976, No. 965).

284 An obiter dictum by Lord Brougham in Warrender v. Warrender (1835) 2 Sh. & MacL. 154, 201 could be read as suggesting that a polygamous marriage would not be recognised in Scotland, but this view must now be regarded as somewhat dated. The dictum is, in any event, open to different interpretations. See Blaikie, "Polygamy - A New Approach", 1970 Jur. Rev. 135.

somewhat guardedly remarked -

> "It may be that the learned editors of Walton on Husband and Wife (3rd edn., p.3) are right in hazarding the prophesy that the Scottish courts would be prepared to recognise a polygamous marriage 'for some purposes provided (a) that it was valid by the lex domicilii and lex loci celebrationis and (b) the man has in fact taken only one wife.' "285

The question, therefore, whether the law should continue to treat a marriage as polygamous where there has in fact been only one spouse arises in much the same way in Scotland as in England. We agree with the view in paragraph 5.13 above that the concept of the potentially polygamous marriage serves no useful purpose. So long as the marriage is in fact monogamous there is no reason for not treating it as having the incidents of an ordinary monogamous marriage. To treat it in any other way can give rise to unnecessary difficulties, may defeat the expectations of parties who have always regarded themselves as married and could give rise to resentment. Our provisional recommendation is therefore that the fact that a marriage was entered into outside the United Kingdom under a law which, as it applies to the particular ceremony, and to the parties thereto, permits polygamy should not preclude the marriage being regarded by Scots law as having the incidents of a monogamous marriage if it is not and does not become polygamous.

C Other matters

6.6 There is no Scottish authority on the legal position of a woman, married monogamously or treated as married monogamously, whose husband retains or acquires a domicile in a country permitting polygamy and enters into a valid second marriage there in polygamous form. The issues discussed in

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285 Prawdzic-Lazarska v. Prawdzic-Lazarski, 1954 S.C.98, 102.

paragraphs 5.14 to 5.25 arise equally in relation to Scots law. We have formed no concluded view on these issues and merely invite comments.

6.7 We do not think it is necessary or appropriate to deal with the Scots law of bigamy in this consultative document beyond noting that it seems doubtful whether the much-criticised English rule that a man cannot be convicted of bigamy if his first marriage was potentially polygamous applies in Scotland.[286]

6.8 For the reasons given in Part V we do not think that we should attempt in this consultative document to deal with the Scottish choice of law rules on capacity to marry,[287] or with the law of domicile.[288] These are matters best tackled as separate law reform projects on a United Kingdom basis.

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286 See Leslie, "Polygamous Marriages and Bigamy", 1972 Jur. Rev. 113. In the unreported case of Mohammed Shafi 17 and 18 Aug. 1977 a man who had a wife and five children in Pakistan was convicted of bigamy in Glasgow sheriff court in respect of his marriage to a Scottish girl. His first marriage was potentially polygamous.

287 See paras. 5.27-5.31, above.

288 See paras. 5.34-5.35, above.

SECTION D

THE IMPLICATIONS OF HUSSAIN v. HUSSAIN; AND SUMMARY OF OUR PROVISIONAL RECOMMENDATIONS

PART VII

THE IMPLICATIONS OF HUSSAIN v. HUSSAIN

A. INTRODUCTION

7.1 We indicated, in paragraph 1.3 above, that the Court of Appeal decision in Hussain v. Hussain[289] was given just as a final draft of this joint consultative document had been completed. We explained in paragraph 1.9 above that we have decided to publish this paper without substantial rewriting because further consideration of the issues examined in this paper has become a matter of urgency in the light of the new interpretation of the statutory position in England and Wales provided by the Court of Appeal in that case. In this Part, we shall first consider Hussain v. Hussain itself, and then go on to re-examine the provisional recommendations made in Parts V and VI in order to determine whether any of them ought to be altered in the light of that decision.

B. HUSSAIN v. HUSSAIN[290]

7.2 For ease of reference we here set out again the relevant parts of section 11 of the Matrimonial Causes Act 1973, of which section 11(d) replaces and embodies section 4

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289 The Times, 28 June 1982.

290 Ibid. The facts of the case are set out in para. 1.6, above.

of the Matrimonial Proceedings (Polygamous Marriages) Act 1972:

> "A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say ...
>
> (b) that at the time of the marriage either party was already lawfully married ...
>
> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage may be polygamous although at its inception neither party has any spouse additional to the other."

7.3 The reasoning by which Ormrod L.J., giving the judgment of the court in Hussain v. Hussain, reached the conclusion that the marriage in Pakistan between a man domiciled in England and a woman domiciled in Pakistan was valid was as follows. Since the Matrimonial Proceedings (Polygamous Marriages) Act 1972 (section 4 of which is the predecessor of section 11(d) of the 1973 Act) it has no longer been necessary to characterise a marriage as polygamous or monogamous in character according to the law of the country in which it was celebrated.[291] This is because the courts in England and Wales were given jurisdiction by section 1 of the 1972 Act (see now section 47 of the 1973 Act) to grant matrimonial relief in the case of both potentially and actually polygamous marriages.[292] Accordingly, the only question now for the courts "is whether the marriage under consideration is valid by English law, which is a question of capacity." In answering that question, Ormrod L.J. had to construe the

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291 See paras. 3.11-3.12, above.

292 See para. 3.14, above.

provisions of the Matrimonial Causes Act 1973 relating to capacity to marry and to polygamous marriages. He concluded that it was not the intention of Parliament "to prevent persons domiciled in England and Wales from entering into marriages under the Muslim Family Laws Ordinance, or under other similar laws which 'permit polygamy.'"[293] He decided that "the language used by the draftsman is, at least, consistent with" the following construction. In the case of persons domiciled in England, there is no capacity to enter an actually polygamous marriage because section 11(b) of the 1973 Act renders a person who is already married incapable of marrying again. This means that the purpose of section 11(d) is to prevent a person domiciled in England and Wales, who is not already married, from entering a polygamous union, whether potentially or actually so, and "a marriage", according to Ormrod L.J., "can only be potentially polygamous if at least one of the spouses has the capacity to marry a second spouse." The result of this reasoning is that, if a man domiciled in England has no capacity to have more than one wife (by reason of section 11(b) of the 1973 Act) and a wife is not allowed by Muslim law to have more than one husband, the marriage in the instant case could not be regarded as potentially polygamous and did not fall within section 11(d). On this approach, section 11(d) only operates to render void a marriage between a woman domiciled in England and Wales,

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293 As we pointed out in para. 2.11, above, the expressed intention in Parliament was to codify what had been thought to be the common law rule as to capacity to contract a polygamous marriage. This was thought to be necessary because the law on nullity had recently been codified in the Nullity of Marriage Act 1971, but the Matrimonial Proceedings (Polygamous Marriages) Act 1972 had then for the first time conferred jurisdiction on the courts, inter alia, to entertain nullity petitions in relation to polygamous marriages.

who as she will only have one husband does not fall within section 11(b), and a foreign domiciled man whose personal law allows him to have more than one wife.

C. CAPACITY TO CONTRACT A POLYGAMOUS MARRIAGE

7.4 We have made it clear throughout this joint consultative document that, if it is the law that a person domiciled in England and Wales, or in Scotland, lacks capacity to contract a potentially polygamous marriage, then the law ought to be reformed. The Court of Appeal in Hussain v. Hussain has adopted a similar approach[294] and we welcome and support the general social effects of that decision. It might then be asked whether the Law Commissions should abandon this exercise and leave the law as it has been declared to be by the Court of Appeal. For three reasons, we do not believe that this would be right. The first is that there is no certainty that the conclusion reached by the Court of Appeal with regard to the law of England and Wales would be reached by the courts in Scotland, there being no equivalent statutory provision in Scots law.[295] We are firmly of the view that the law of the two jurisdictions, indeed throughout the United Kingdom, ought to be the same on this issue. Secondly, the structure of the legislation interpreted by the Court of Appeal is such that the court was led to the conclusion that a man domiciled in England was capable of contracting a valid

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294 Though the court made no reference to such earlier authorities as there are which adopt the view that a person domiciled in England is incapable of contracting a potentially polygamous marriage; see, e.g. Zahra v. Visa Officer, Islamabad [1979-80] Imm. A.R. 48; Nabi v. Heaton [1981] 1 W.L.R. 1052.

295 Though Scottish courts were given jurisdiction by statute over actually and potentially polygamous marriages by a similar provision to that which conferred such jurisdiction on the English courts: see para. 6.5 and n.283, above.

marriage even though it was celebrated abroad in polygamous form, but that a woman in similar circumstances was not. We do not believe that it is right to draw such a distinction and our provisional recommendations in paragraphs 5.9 and 6.4 do not distinguish between men and women in this way. Thirdly, in the light of the discussion of these issues in the Court of Appeal, the interrelation of the two most relevant provisions of the Matrimonial Causes Act 1973, namely of section 11(b) dealing with bigamous marriages with section 11(d) dealing with polygamous (including actually polygamous) marriages, does not seem to be entirely felicitous. This may be of some particular significance in the context of choice of law rules which we discuss below,[296] and the opportunity for clarification of the position ought to be taken. For these reasons, we would confirm our provisional recommendations[297] that it should be made clear by statute that a person domiciled in England and Wales, or in Scotland, has capacity to contract a marriage even though celebrated in a form which, under the law of the place of celebration, permits polygamy, provided the marriage was not actually polygamous.

7.5 In making these recommendations, consideration was given to the question whether any changes in the law should be retrospective in effect. For a variety of reasons, which are discussed in paragraph 5.10 above, the provisional conclusion was reached that any changes should not have retrospective effect. Further consideration has needed to be given to this issue in the light of Hussain v. Hussain. That decision in effect declares that, so far as the law of England and Wales is concerned, section 11 of the Matrimonial Causes Act 1973

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296 See para. 7.10, below.

297 See paras. 5.9 and 6.4, above.

has always had the effect given to it by the Court of Appeal with regard to marriages falling within that section. The section applies to marriages celebrated after 31 July 1971. Even though marriages entered into in circumstances such as those in Hussain v. Hussain had, until that decision, been thought to be void, the effect of the decision is that they are, and always have been, valid. To that extent the decision is retrospective in effect. It is, however, far from clear what the effect of the decision is on similar marriages celebrated on or before 31 July 1971 for they are governed by the common law rules on capacity to contract a polygamous marriage. If they are, in fact, still to be regarded as potentially polygamous and thus void, then the validity of this type of marriage will vary according to the date of celebration. This might seem to strengthen the argument in favour of further reform, such as has been recommended in this paper, but that reform will only be effective to cure the discrepancy between the validity of marriages celebrated before and after 31 July 1971 if our proposals are given retrospective effect.

7.6 These considerations are relevant to English law. As far as Scots law is concerned the main problem is the uncertainty of the present law. In so far as a statutory provision on capacity to contract a polygamous marriage merely removed a doubt in the law, we do not see any objection to its having retrospective effect. In so far as it might be regarded as changing the law so as to render valid, for the first time, marriages such as the one in Hussain v. Hussain, we would see advantages in retrospective effect. If the change had only prospective effect, the law in the two jurisdictions would continue to be different with regard to marriages celebrated between 1 August 1971 and the date on which legislation implementing our proposals is brought into effect.

7.7 We indicated in paragraph 5.10 that rules to resolve some of the problems caused by retrospectivity might have to be fairly complex in form and effect. Whilst we are still of that view, we cannot avoid the fact that Hussain v. Hussain has, in effect, changed the law retrospectively so far as England and Wales are concerned and with no provision to deal with the problems that retrospectivity brings. On balance, we believe that the likelihood that the necessary provisions to deal with retrospectivity will be complex is outweighed by the confusion and complexity which would result if our proposals were not given retrospective effect. We would very much welcome comments on this difficult issue, but for the reasons just given, we have decided now to recommend that our proposed reforms of the law relating to capacity to contract polygamous marriages should apply to marriages celebrated both before and after any legislation implementing our proposals comes into force.

D. THE CONCEPT OF POTENTIALLY POLYGAMOUS MARRIAGE

7.8 We have concluded that, although it would not be appropriate in this paper to make recommendations in relation to the crime of bigamy, in the context of the civil law[298] the concept of the potentially polygamous marriage serves no useful purpose.[299] We have provisionally recommended that no marriage should be regarded as polygamous, irrespective of the form of the marriage ceremony and its effect under the law of the place of celebration, unless that marriage is actually polygamous.[300] Nothing in the decision in Hussain v.

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298 See paras. 4.45-4.46, 5.26 and 6.7, above.

299 See paras. 5.13 and 6.5, above.

300 Ibid.

Hussain has caused us to wish to alter that provisional recommendation.

7.9 In the context of discussing potentially polygamous marriages generally, we also examined[301] the difficult issues that may arise if a couple marry monogamously and then the husband, after changing his domicile, contracts an actually polygamous marriage. We indicated various ways in which this matter might be considered, and though we made no positive recommendation for reform, we invited views on whether it would be desirable to regulate this matter by legislation.[302] The decision in Hussain v. Hussain has not caused us to alter our conclusion on this matter but the decision is particularly relevant to this issue and, indeed, may make this issue of more practical significance in the future than it has been in the past. Following Hussain v. Hussain, a marriage in Pakistan between an English domiciled Muslim man and a Pakistani domiciled Muslim woman is to be characterised as a monogamous marriage and thus not invalid by reason of section 11(d) of the 1973 Act. If, after the couple have lived in England for some time, the man abandons his English domicile and returns to Pakistan where he marries a second wife, is the first wife to be able to rely upon the monogamous character of her marriage (even though it was in polygamous form and she was domiciled in Pakistan at the time of the marriage) for the purpose of petitioning the English courts for divorce, alleging adultery or such behaviour by the husband that the wife cannot reasonably be expected to live with him?[303] This is one of the issues arising from Hussain v. Hussain which is very relevant to the issue whether the abolition of the

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301 See paras. 5.15-5.25 and 6.6, above.

302 See paras. 5.25 and 6.6, above.

303 See para. 5.16, above.

concept of potentially polygamous marriage would create practical problems and on which we would welcome comments.

E. CHOICE OF LAW RULES FOR CAPACITY TO ENTER A POLYGAMOUS MARRIAGE

7.10 We have indicated[304] that the choice of law rules relating to capacity to enter a polygamous marriage are confused and uncertain but that any reform thereof should be carried out in the context of a general review of choice of law relating to marriage. Although Hussain v. Hussain was not directly concerned with choice of law rules, the outcome of the decision leaves the law, at least in England and Wales, even more uncertain and confused. There are two reasons for this. First, on the facts of the particular case, it is clear that the husband's ante-nuptial domicile was in England, the wife's in Pakistan; but no indication is given as to the country of the spouses' intended matrimonial home. It must be assumed to be England; but if Radwan v. Radwan (No.2)[305] (which was not referred to by Ormrod L.J. in his judgment) is correct, English law was relevant to the case only by reason of the fact that England was the spouses' intended matrimonial home. Secondly, and perhaps more important, the court decided that the capacity of a man to contract an actually polygamous marriage depended on section 11(b) of the Matrimonial Causes Act 1973.[306] This has significant choice of law consequences if Radwan v. Radwan (No.2) represents the law. It will mean

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304 See paras. 5.27-5.31 and 6.8, above.

305 [1973] Fam. 35; see paras. 3.4 and 3.8, above.

306 In fact, section 11(b) is also apt to cover the case of an unmarried woman contracting an actually polygamous marriage because it states that the marriage is void if either party was already lawfully married. Such reliance on section 11(b) seems to deprive section 11(d) of any effect in relation to actually polygamous marriages.

that, in the case of an actually polygamous marriage abroad between spouses who intend to live in England, the marriage will be void by reason of section 11(b) wherever they may be domiciled, but void by reason of section 11(d) only if one spouse is domiciled in England. It is hard to believe that Parliament intended this difference in result depending upon the paragraph of section 11 on which the petitioner chooses to rely. These issues have reinforced our earlier conclusion that the choice of law rules relating to capacity to enter a polygamous marriage are in need of reform and that this should be undertaken as part of a general review of choice of law in marriage.

PART VIII

SUMMARY OF OUR PROVISIONAL RECOMMENDATIONS

8.1 We conclude with a summary of the provisional recommendations which we have made and the main questions which we have raised in this consultative document on which we invite views and comments:

A The law of England and Wales

(1) Reform of the law relating to the capacity of a person domiciled in England and Wales to contract a marriage in polygamous form is desirable, notwithstanding the recent decision of the Court of Appeal in Hussain v. Hussain (1982). We do not, however, favour a change in the law to permit an English domiciliary to contract an actually polygamous marriage.

(paragraphs 1.9, 5.2-5.7, 7.4)

(2) Section 11 of the Matrimonial Causes Act 1973 should be amended so that it would apply only to actually polygamous marriages, with the consequence that a person domiciled in England and Wales would have capacity to contract a marriage that, though polygamous in form, was only potentially polygamous in fact.

(paragraphs 5.8-5.10, 7.4)

(3) No marriage should be regarded as polygamous, irrespective of the form of the relevant marriage ceremony and of the effect of such marriage under

the law of the place where it is celebrated, unless it is actually polygamous.

(paragraphs 5.11-5.13, 7.8-7.9)

(4) Recommendations (2) and (3) should apply to marriages celebrated both before and after any legislation implementing our proposals comes into force.

(paragraphs 7.5-7.7)

(5) We raise the question of the effect upon a first marriage (which is either monogamous or only potentially polygamous) of a later valid marriage contracted by the husband. As to this issue:

(i) we do not favour the adoption of a principle whereby the first wife should in every case have the rights of a wife under a monogamous marriage, irrespective of the nature of the ceremony and the domicile of the parties;

(ii) We are undecided whether any change in the present law is desirable in this respect and whether it is desirable to regulate this matter by legislation;

but if such change is thought to be desirable

(iii) we tentatively propose a limited rule whereby a marriage contracted by a person having an English domicile should be regarded as having a legally monogamous character, until that person should acquire a domicile in a country whose law permits polygamy. We should particularly welcome evidence as to whether this issue is, or is likely to be, significant in practice.

(paragraphs 5.15-5.25, 7.9)

B The law of Scotland

(6) A person domiciled in Scotland should not be regarded as lacking legal capacity to enter into a marriage outside the United Kingdom by reason only of the fact that the marriage is, or is to be, celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy, provided that the marriage is not actually polygamous.

(paragraphs 6.1-6.4, 7.4)

(7) The fact that a marriage was entered into outside the United Kingdom under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy should not preclude the marriage being regarded in Scots law as having the incidents of a monogamous marriage if it is not and does not become actually polygamous.

(paragraphs 6.5, 7.8-7.9)

(8) We raise the question of the effect upon a first marriage (which is either monogamous or only potentially polygamous) of a later valid marriage contracted by the husband. As to this issue:

(i) we do not favour the adoption of a principle whereby the first wife should in every case have the rights of a wife under a monogamous marriage, irrespective of the nature of the ceremony and the domicile of the parties;

(ii) we are undecided whether any change in the present law is desirable in this respect and whether it is desirable to regulate this matter by legislation.

but if such a change is thought to be desirable

(iii) we tentatively propose a limited rule whereby a marriage contracted by a person having a Scottish domicile should be regarded as having a legally monogamous character, until that person should acquire a domicile in a country whose law permits polygamy. We should particularly welcome evidence as to whether this issue is, or is likely to be, significant in practice.

(paragraphs 6.6, 7.9)

C General matters

(9) Further consideration of the choice of law rules relating to the capacity of parties to contract a polygamous marriage should be carried out in the context of a general review of the choice of law rules relating to marriage.

(paragraphs 5.27-5.31, 6.8, 7.10)

(10) A review of the law of domicile in general would now be opportune; and any practical problems relating to domicile to which section 11(d) of the Matrimonial Causes Act 1973 gives rise should be examined in that context.

(paragraphs 5.34-5.35, 6.8)

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