The Law Commission

(LAW COM. NO. 132)

FAMILY LAW

DECLARATIONS IN FAMILY MATTERS

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

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THE LAW COMMISSION
FAMILY LAW

Item XIX of the Second Programme

DECLARATIONS IN FAMILY MATTERS

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

PART I

INTRODUCTION

Background

1.1 Over the past decade or so, the Law Commission has made proposals for reform of substantial areas of the law relating to the jurisdiction and powers of the courts in granting matrimonial relief and relating to the recognition of foreign divorces, legal separations and annulments. As part of this general review of family law, under Item XIX of our Second Programme of Law Reform,[1] we published a Working Paper in 1973 examining the present state of the law on declarations of status in family matters[2] and making provisional proposals for reform. We received a number of helpful comments in the course of consultation and we are grateful to those who gave us their views.[3]

1.2 A declaration affords a convenient method of seeking a judicial determination as to family status. A person's status may be in doubt and he may wish to know, for example, whether his foreign marriage or divorce will be recognised as valid in England; or the question may be whether he is legitimate or has become legitimated. The purpose of a declaration is to resolve such doubts once and for all by establishing a person's existing status, but without granting any further relief.[4] A person's status may, of course, be determined as an incidental or preliminary issue in the course of other proceedings, for instance, an inheritance case; and a finding made in those proceedings will be binding on the parties and those claiming under them. In this Report, however, our concern is with "bare" declarations as to status in proceedings which are brought for that purpose alone. Such declarations are at present obtainable under the court's inherent jurisdiction and under section 45 of the Matrimonial Causes Act 1973. This section gives the court power to make declarations as to the validity of a marriage and declarations concerning legitimacy or legitimation or that the

[1] This requires us to undertake a comprehensive examination of family law with a view to its systematic reform and eventual codification: Law Com. No. 14 (1968).
[2] Working Paper No. 48.
[3] A list of commentators is set out in Appendix C.
[4] The court cannot grant ancillary relief, e.g., orders for financial provision or for custody of children, on making a declaration: *Kassim* v. *Kassim* [1962] P. 224.

applicant is a "British subject".[5] However, notwithstanding its modern setting, section 45 does little more than re-enact the substance of statutory provisions dating back to 1858; and to put the matter in context, it might be convenient to refer briefly to the way the court's power to grant declaratory relief has developed.

1.3 The remedies of divorce, nullity and judicial separation are in an important respect declaratory in that each includes or implies a declaration as to the validity or invalidity of the marriage. But a need for additional declaratory relief has long been felt. The Legitimacy Declaration Act 1858[6] conferred upon the Court for Divorce and Matrimonial Causes[7] the power to make declarations of legitimacy and illegitimacy of certain persons, to make decrees declaratory of the validity or invalidity of certain marriages[8] and to make decrees declaratory of a person's right to be deemed a natural born British subject. The 1858 Act closely defined the persons to whom this relief was available and the marriages in respect of which it was possible to obtain such declarations. The Act also established a number of safeguards designed to ensure that the Attorney-General and persons who might be affected by such decrees should have an opportunity of being heard. The law, substantially as stated in the 1858 Act, has survived a number of statutory restatements[9] and is now to be found in section 45 of the Matrimonial Causes Act 1973.

1.4 Alongside the statute law, there has also developed a substantial body of case law in which without resort to the statute the courts have granted declarations of matrimonial status. The basis of this case law is to be found in R.S.C., Order 15, rule 16, which provides that the Supreme Court has a power to make "binding declarations of right whether or not any consequential relief is or could

[5] "British subject" means "Commonwealth citizen" (British Nationality Act 1981, s. 51(1)) and includes British citizens, British Dependent Territories citizens, British Overseas citizens and citizens of Commonwealth countries (Sched. 3 of the 1981 Act) as well as the residual group of those who are British subjects under the 1981 Act. A declaration as to the "right to be deemed a British subject" under the Matrimonial Causes Act 1973, s. 45(4), confers no rights of citizenship, such as the right of entry to, or abode in, this country.

[6] Sects. 1 and 2.

[7] The court, which replaced the ecclesiastical courts, was created by the Matrimonial Causes Act 1857.

[8] Prior to the enactment of the Legitimacy Declaration Act 1858, the courts did not have power to grant bare declarations as to the validity of a marriage or as to a person's legitimacy in proceedings brought for that purpose alone: see *Earl of Mansfield* v. *Stewart* (1846) 5 Bell 139, 160; the Attorney- General's speech on the first reading of the Legitimacy Declaration Bill: Hansard (H.C.) 15 June 1858, vol. 150, col. 2156; *De Gasquet James* v. *Mecklenburg-Schwerin* [1914] P. 53, 69–70. However, if, e.g., the validity of a marriage was in issue in certain actions, it was the practice of the temporal courts to send the question to be determined by the ecclesiastical courts, whose determination (called a Bishop's certificate) was binding on the parties and all others: see *Burn's Ecclesiastical Law* 9th ed., (1842), vol. II, pp. 485–486; *Har-Shefi* v. *Har-Shefi* [1953] P. 161, 168.

[9] The Legitimacy Declaration Act 1858, ss. 1 and 2, were repealed by the Supreme Court of Judicature (Consolidation) Act 1925, and s. 188 of the 1925 Act, while substantially re-enacting ss. 1 and 2, abolished the court's powers to make declarations of illegitimacy or invalidity of a marriage; s. 188 of the 1925 Act and s. 2 of the Legitimacy Act 1926, which empowered the court to make a declaration of legitimacy of legitimated persons, were repealed by the Matrimonial Causes Act 1950 and replaced, with verbal amendments, by s. 17 of that Act; s. 17 of the 1950 Act was repealed by the Matrimonial Causes Act 1965 and replaced by s. 39 of that Act; s. 39 in turn was repealed by the Matrimonial Causes Act 1973 and replaced without any change of substance by s. 45 of that Act.

be claimed".[10] The rule is, however, procedural and gives no indication as to the scope or extent of the power, which is part of the court's inherent jurisdiction. However, the main area of family law where this inherent power has been invoked is that of recognition of foreign divorces and annulments. In granting such declarations the courts have sought to meet a need unsatisfied by the statute.[11]

1.5 The courts have also entertained applications under Order 15, rule 16 for declarations that a marriage was initially valid or invalid.[12] However, more recently they have, in the exercise of their discretion, refused to grant declarations under the Order in situations where other appropriate relief is available. Thus, the court has declined to grant a declaration as to the initial invalidity of a marriage since the appropriate relief in such a case is a decree of nullity.[13] It has also been held[14] that declarations, such as a declaration as to the initial validity of a marriage, which are obtainable under section 45 of the Matrimonial Causes Act 1973, should be made under, and in accordance with, that section. The statute, unlike Order 15, rule 16, prescribes special procedural safeguards, and the courts have exercised their discretion against making a declaration under the Order so as to ensure compliance with those safeguards.

Scope of our proposals

1.6 Our examination of the present law has led us to conclude that it is in need of reform. The statute law is restricted in scope, is outdated and complex and has failed to provide a satisfactory code of relief.[15] In this Report we put forward legislative proposals for a modern code of declaratory relief in family matters to take the place of section 45 of the Matrimonial Causes Act 1973 which we recommend should be repealed. Our proposals are limited in scope and their only impact on the court's inherent jurisdiction to make binding declarations would be that, so far as concerns matrimonial status, legitimacy, legitimation

[10] The power of the Probate, Divorce and Admiralty Division (now the Family Division) of the High Court to grant "bare" declarations as to status without resort to the statute was first firmly established in *Har-Shefi* v. *Har-Shefi* [1953] P. 161. The Court of Appeal held that since 1924, when R.S.C., Ord. 25, r.5 (now R.S.C., Ord. 15, r.16) was made applicable to matrimonial causes, the Divorce Division could exercise their inherent power to grant declarations even if no other relief was sought.

[11] The Matrimonial Causes Act 1973, s. 45, although providing for declarations as to the initial validity of a marriage, does not provide for declarations as to the validity of a divorce or annulment. The need for the latter form of relief became apparent in the 1950s when increased facilities for travel and the upheavals occasioned by the war resulted in an influx into England of a number of foreign domiciliaries or nationals. Moreover, a large number of marriages had taken place between English women and foreign domiciliaries or nationals, who had subsequently taken divorce or nullity proceedings in their own country, and it became important for the English wife to know whether the foreign divorce or annulment would be recognised as valid here: see Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678, para. 909.

[12] See para. 2.8 below.

[13] *Kassim* v. *Kassim* [1962] P. 224. The practical importance of the distinction between the two forms of relief is that the court cannot make orders for financial relief and for custody of children on making a declaration.

[14] See, e.g., *Collett* v. *Collett* [1968] P. 482; *Vervaeke* v. *Smith* [1981] Fam. 77.

[15] See the observations of Sir James Hannen P., made in the context of an application for a declaration of legitimacy, in which he agreed with counsel for the Attorney-General that the Legitimacy Declaration Act 1858 "was defectively drawn, was difficult of construction and failed to afford a remedy in certain cases it was intended to meet.": *Dodds* v. *A.-G.* (1880) 42 L.T. 402.

and adoption, the declarations available would be limited to those which will be provided by statute.

1.7 The recommendations in this Report are based very substantially on the provisional proposals made in Working Paper No.48. Those proposals were generally supported and welcomed on consultation as providing a rationalisation and simplification of the law. However, one commentator expressed the view that the power to grant declarations in family matters should neither be limited nor defined. We agree with the view that there should be no undue limitation on the court's inherent jurisdiction. As will be apparent, our proposals would only have a limited impact on the court's inherent powers and would, in effect, confirm the approach recently adopted by the courts. If our proposals are implemented, applications for declarations under the new statutory regime will be subject to special procedural safeguards[16] designed to protect third parties and the public. It would be undesirable, as the courts have emphasised, to permit a litigant to petition by an alternative procedure and thus to circumvent the statutory safeguards.

1.8 Although we are primarily concerned in this Report with declarations in family matters, we have not excluded consideration of some aspects of the law as to nullity of a void marriage. A decree of nullity of a void marriage is in effect the converse of a declaration as to the initial validity of a marriage made under section 45 of the Matrimonial Causes Act 1973 and we think that they should both be governed by the same rules in certain matters, such as procedural safeguards and application by third parties.

1.9 There is a final preliminary matter to which we should refer. This is that in one respect (i.e., whether the court should be empowered to grant declarations of parentage) the provisional proposals made in Working Paper No.48 have been overtaken by the publication of our Report on Illegitimacy.[17] In that Report we considered at some length the anxiety which we felt about introducing such a declaration procedure,[18] but concluded that subject to certain jurisdictional and procedural safeguards the court should be able to make a bare declaration of the applicant's own parentage.[19] That proposal has consequences for the present Report. First, the question arises whether the court's existing power to make declarations of legitimacy need be preserved once the court has power to make declarations about the two elements usually implicit in the concept of legitimacy—that is, parentage and the validity of the parents' marriage. Secondly, it will be necessary to consider whether the jurisdictional and other safeguards which we proposed should apply to bare declarations of parentage, in order to meet fears about the possible potential for disruption and difficulties of proof, need to be applied in cases involving the two elements of parentage and marriage. We deal with these matters in Part III below.

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[16] These safeguards are similar to those imposed by the Matrimonial Causes Act 1973, s. 45, and the Matrimonial Causes Rules 1977 (S.I. 1977 No. 344), rr. 109 and 110; see paras. 3.57–3.63 below.

[17] Law Com. No. 118 (1982). We note that you welcomed the proposals contained in that Report, and indicated that you would wish to see those proposals implemented as soon as resources permit: *Hansard* (H.L.) 21 November 1983, vol. 445, col. 93.

[18] Law Com. No. 118 (1982) paras. 10.6–10.13.

[19] *Ibid.*, paras. 10.14–10.39.

Arrangement of the Report

1.10 The arrangement of this Report is as follows. Part II examines the present law relating to the two main sources of the court's declaratory power (section 45 of the Matrimonial Causes Act 1973 and the inherent jurisdiction) and the various defects in the law. Part III sets out our detailed recommendations for reform. In Part IV we propose that the remedy of jactitation of marriage should be abolished and that the Greek Marriages Act 1884 should be repealed. Our recommendations are summarised in Part V. The draft Bill to implement our recommendations appears in Appendix A. Appendix B reproduces section 45 of the Matrimonial Causes Act 1973, and Appendix C contains a list of those persons and organisations who sent us comments on Working Paper No.48.

PART II

THE PRESENT LAW AND ITS DEFECTS

A. The Present Law

2.1 Declarations in family matters are made at present:—

(a) under the Matrimonial Causes Act 1973, section 45;
(b) at the discretion of the court under R.S.C., Order 15, rule 16;
(c) in a jactitation suit;
(d) under the Greek Marriages Act 1884.

Our principal concern is with (a) and (b). Jactitation and the Greek Marriages Act are special cases and are considered in Part IV.

(a) Declarations under the Matrimonial Causes Act 1973, s.45

2.2 Under section 45 of the Matrimonial Causes Act 1973 the following applications for a declaration of status may be made:—

(1) Any person who
  (a) is a British subject or whose right to be deemed a British subject depends wholly or in part on his legitimacy or the validity of any marriage, and
  (b) is domiciled in England and Wales or Northern Ireland or claims any real or personal estate in England and Wales may apply in the High Court for a declaration that
    (i) he is the legitimate child of his parents;[20] or
    (ii) his marriage or that of his parents or that of his grandparents was a valid marriage[21] (section 45(1)).

(2) Any person may apply for a declaration that he or his parent or remoter ancestor[22] has been legitimated under the Legitimacy Act 1976[23] or recognised under section 3[24] of that Act as legitimated (section 45(2)).[25]

(3) Any person who is domiciled in England and Wales or Northern Ireland or claims real or personal estate in England and Wales may apply for a declaration that he is to be deemed a British subject (section 45(4)).

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[20] This declaration includes children of a putative marriage rendered legitimate by s.1 of the Legitimacy Act 1976: *F & F* v. *A.-G.* (1980) 10 Fam. Law 60. A putative marriage is a void marriage where at the time of the act of intercourse resulting in the birth of the children (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid; and the father of the child was domiciled in England and Wales at the time of the birth, or, if he died before the birth, was so domiciled immediately before his death.

[21] A declaration can be made as to the validity of a polygamous marriage under s. 45 or under the court's inherent jurisdiction: s. 47 (1) and (3).

[22] Ancestor means lineal progenitor (not, e.g., an uncle): *Knowles* v. *A.-G.* [1951] P.54.

[23] Formerly, the Legitimacy Act 1926; and see Legitimacy Act 1976, Sched., 1, para. 1(2).

[24] Or under s. 8 of the Legitimacy Act 1926.

[25] No rules as to the jurisdiction of the courts are prescribed for such declarations. The jurisdiction would appear to be unlimited and not dependent on the petitioner's domicile or nationality or his claim to property in England and Wales.

2.4 Leaving aside for the present the jurisdictional criteria,[26] it will be seen that the declarations available under section 45 are:—

(a) that the applicant is legitimate;
(b) that the applicant or any ancestor of his has been legitimated;
(c) that the applicant's marriage or that of his parents or of his grandparents was a valid marriage;
(d) that the applicant is a British subject.

2.4 Except in the case of (b) (legitimation), where the application can be made either to the High Court or to the county court,[27] all applications under section 45 must be made to the High Court. The Attorney-General[28] must be made a party in every case[29] and the applicant must apply for directions[30] as to what other persons must be given notice of the application so as to enable them to oppose it if they so wish. Care must be taken to have before the court everybody whose interests may be affected.[31] The hearing may take place *in camera* and the restrictions on reporting contained in the Judicial Proceedings (Regulation of Reports) Act 1926 apply.[32] It is provided that the court "shall make such decree as it thinks just" and it was decided in *Puttick* v. *A.-G.*[33] that the court had a discretion to refuse a declaration that a petitioner's marriage was valid, if it was of the opinion that it would not be just to do so. It is further provided that the decree shall be binding on the Crown and all other persons, but so that the decree is not to prejudice any person

(a) if obtained by fraud[34] or collusion; or
(b) unless that person had been given notice of, or was a party to, the proceedings or claimed through such a person.[35]

[26] These differ according to the type of declaration sought: see para. 2.12(d) below.
[27] The county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court must, transfer the application to the High Court: s. 45(3).
[28] It was said in *De Gasquet James* v. *Mecklenburg-Schwerin* [1914] P.53, 70, that the Attorney-General becomes a party to protect the interests of the Crown and the public.
[29] Sect. 45(6).
[30] Sect. 45(7); Matrimonial Causes Rules 1977 (S.I. 1977 No. 344), r. 110(4).
[31] *Re A.B.'s Petition* (1927) 96 L.J.P. 155. In the case of a legitimacy application the next-of-kin of the putative father may be persons whose interests may be affected: *ibid.* See also the Matrimonial Causes Rules 1977 (S.I. 1977 No. 344), rr. 110 and 111 and C.C.R., Order 46 (S.I. 1981 No. 1687) for the rules as to practice; the applicant must give particulars by affidavit of every person whose interests may be affected: *ibid.*
[32] Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s. 2(3) as amended.
[33] [1980] Fam. 1. The decision not to grant the declaration rested in this case on the applicant's lack of an English domicile. Sir George Baker P. found the applicant's marriage to be valid but stated that he would have refused a declaration to that effect, even if the applicant had been domiciled in England.
[34] *The Ampthill Peerage* [1977] A.C. 547 where fraud in this context was held to mean that the declaration has been obtained by dishonesty; "there must be conscious and deliberate dishonesty and the declaration must be obtained by it." *ibid.*, at p. 571 *per* Lord Wilberforce.
[35] Sect. 45(5).

2.5 The court's power under section 45 is limited to making declarations which fall squarely within the terms of the section.[36] Thus, it has been held that there is no power under this section to declare that a marriage still subsisted on a specified date[37] or to declare that any person other than the applicant is legitimate,[38] or that any person is illegitimate,[39] or that any person, other than the applicant or an ancestor of his, had been legitimated.[40]

(b) Declarations under the inherent jurisdiction of the court

2.6 In addition to its powers under section 45 of the Matrimonial Causes Act 1973, the High Court has power to make declarations as to matrimonial status, using the procedure of R.S.C., Order 15, rule 16, which provides that:—

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

The rule does no more than make clear that the rules of court do not prevent the exercise of a declaratory jurisdiction: it does not create any such jurisdiction or specify what declarations are available. One must look to the cases to discover the nature of the jurisdiction and the declarations that a court can make.

2.7 Declarations have been made:—

(a) that a foreign divorce has validly dissolved[41] a marriage;
(b) that a foreign decree of nullity has validly annulled[42] a marriage;
(c) that a foreign divorce[43] or foreign nullity[44] decree was not entitled to be recognised in England.

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[26] The only decision which would seem to run counter to this proposition is *Starkowski* v. *A.-G.* [1952] P. 135; [1952] P. 302 (C.A.); [1954] A.C. 155 (an application under what is now s. 45 in which the marriage of the petitioner's parents was declared invalid and the petitioner not to have been legitimated (this was the form of the declaration made: Case No. 4308 of 1951); but it is questionable whether this, though in the form of a declaration, was intended to be anything more than a statement of the consequences flowing from the dismissal of an application.

[37] *Aldrich* v. *A.-G.* [1968] P. 281.

[38] *Warter* v. *Warter* (1890) 15 P.D. 35 (no power to make legitimacy declaration otherwise than in accordance with the provisions of the Legitimacy Declaration Act 1858; application to declare applicant's father legitimate refused); *Aldrich* v. *A.-G.* [1968] P. 281 (application to declare applicant's daughter legitimate refused).

[39] *Mansel* v. *A.-G.* (1877) 2 P.D. 265; (1879) 4 P.D. 232 (application to declare brother illegitimate struck out); *B.* v. *A.-G.* [1967] 1 W.L.R. 776 (declaration that A was not the legitimate child of B refused).

[40] *Knowles* v. *A.-G.* [1951] P. 54 (application to declare applicant's uncles legitimated refused).

[41] *Har-Shefi* v. *Har-Shefi* [1953] P. 161 (C.A.); *Lee* v. *Lau* [1967] P. 14; *Cruse* v. *Chittum* [1974] 2 All E.R. 940; *Quazi* v. *Quazi* [1980] A.C. 744.

[42] *Abate* v. *Abate* [1961] P. 29; *Merker* v. *Merker* [1963] P. 283; *Law* v. *Gustin* [1976] Fam. 155; *Perrini* v. *Perrini* [1979] Fam. 84.

[43] *Macalpine* v. *Macalpine* [1958] P. 35; *Middleton* v. *Middleton* [1967] P. 62; *Re Meyer* [1971] P. 298; *Kendall* v. *Kendall* [1977] Fam. 208.

[44] *Lepre* v. *Lepre* [1965] P. 52, 57.

It has, however, been held[45] that the court has no jurisdiction either under Order 15, rule 16, or otherwise, to grant a bare declaration of paternity in wardship proceedings. Further, it has been held that there is no power under Order 15, rule 16, to make declarations of legitimacy[46] or as to the initial validity of a marriage.[47] These declarations must be made under section 45. However, it may be, as was tentatively suggested in two cases,[48] that there is a distinction between a declaration that a marriage is still subsisting and a declaration that it was valid *ab initio*. It was suggested in these cases that the court might under Order 15, rule 16 make the former but not the latter declaration. Finally, it has been held[49] that there is no power under Order 15, rule 16, to make declarations of invalidity of marriage and that such a declaration can be made only by means of a decree of nullity.

2.8 Nevertheless, the position is not entirely free from doubt as in a number of cases the court has entertained applications under Order 15, rule 16 to declare marriages valid or invalid. Thus, the court has entertained applications for declarations that "the marriage remains a valid and subsisting marriage",[50] that "her marriage to the respondent subsisted and that her status was that of a married woman"[51] and that "the marriage subsisted on" a specified date.[52] Moreover, in *Kunstler* v. *Kunstler*[53] the court entertained an application for a declaration that a marriage was initially valid and in *Woyno* v. *Woyno*[54] actually

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[45] *Re J.S. (a minor)* [1981] Fam. 22.

[46] *Knowles* v. *A.-G.* [1951] P. 54; *Aldrich* v. *A.-G.* [1968] P. 281. In the latter case, Ormrod J. relied on s. 21 of the Supreme Court of Judicature (Consolidation) Act 1925 in holding that the court had no power to grant declarations of legitimacy outside the scope of s. 39 of the Matrimonial Causes Act 1965 (now s. 45 of the Matrimonial Causes Act 1973). Sect. 21 of the 1925 Act conferred on the High Court jurisdiction "with respect to declarations of legitimacy and of validity of marriage, as is hereinafter in this Act provided". This is a reference to s. 188 of the 1925 Act which became, with minor amendments, s. 17 of the Matrimonial Causes Act 1950, s. 39 of the Matrimonial Causes Act 1965 and s. 45 of the Matrimonial Causes Act 1973. Sect. 21 of the 1925 Act has been repealed by the Supreme Court Act 1981. However the Court of Appeal has recently held that the existence of special safeguards imposed on applications for declarations by the 1973 Act and by the Matrimonial Causes Rules 1977 (S.I. 1977 No. 344) constitutes a valid ground for not allowing an application for a declaration under the court's inherent jurisdiction as regulated by R.S.C., Order 15, r. 16; *Vervaeke* v. *Smith* [1981] Fam. 77, 122; see also *Collett* v. *Collett* [1968] P.482.

[47] *De Gasquet James* v. *Mecklenburg-Schwerin* [1914] P. 53; *Collett* v. *Collett* [1968] P. 482; *Eneogwe* v. *Eneogwe* (1976) 120 S.J. 300 (C.A.) following the decision in *Aldrich* v. *A.-G.* (n. 46 above).

[48] *Collett* v. *Collett* [1968] P.482, 494; *Aldrich* v. *A.-G.* [1968] P.291, 293. In *Garthwaite v Garthwaite* [1964] P.356, 397 Diplock L.J. left open the question as to whether the court has power to make a bare declaration as to the validity or continued subsistence of a marriage between English domiciled spouses otherwise than in the circumstances provided for in s. 17 of the Matrimonial Causes Act 1950 (now s. 45 of the Matrimonial Causes Act 1973), though he was inclined to think that the court had such power.

[49] *Kassim* v. *Kassim* [1962] P. 224; *Corbett* v. *Corbett* [1971] P. 83.

[50] *Garthwaite* v. *Garthwaite* [1964] P. 356 (C.A.).

[51] *Qureshi* v. *Qureshi* [1972] Fam. 173.

[52] *Re Meyer* [1971] P. 298; but a similar declaration was refused in *Aldrich* v. *A.-G.* [1968] P. 281.

[53] [1969] 1 W.L.R. 1506; but the court refused to entertain an application for a similar declaration in *Eneogwe* v. *Eneogwe* (1976) 120 S.J. 300 (C.A.).

[54] [1960] 1 W.L.R. 986.

made such a declaration; in *Gray* v. *Formosa*[55] the court entertained an application "that the marriage should be declared a nullity" and in *Merker* v. *Merker*[56] "that it should declare her marriage not to have been validly celebrated according to English law".

2.9 The jurisdictional criteria for the grant of relief under R.S.C., Order 15, rule 16, are not entirely clear.[57] Courts have exercised the jurisdiction on the following grounds:—

(a) where, at the time the proceedings were commenced, the petitioner was domiciled in England;[58]
(b) where, at the time the proceedings were commenced, the respondent was resident in England;[59]
(c) where determination of the validity of a foreign decree was a necessary step in proceeding to adjudication on a matter within the jurisdiction of the court.[60]

In the case of a marriage void *ab initio* the ecclesiastical courts had jurisdiction to pronounce a decree of nullity if the marriage had taken place in England[61] and it may be that there is jurisdiction to make a declaration in respect of such a marriage if it had taken place here: this was submitted in *Abate* v. *Abate,*[62] but the ground on which jurisdiction was assumed is not stated. Finally, it was decided in *Vervaeke* v. *Smith*[63] that the jurisdiction of the court to grant declarations under

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[55] [1963] P. 259 (C.A.). The court was primarily concerned with whether it should recognise a foreign decree of nullity and it is questionable whether this declaration was intended to be anything more than a statement of the consequences following from the dismissal of an application. See also *Starkowski* v. *A.-G.* (referred to in n. 36 above) where a marriage was declared invalid.

[56] [1963] P. 283. In this case the court was again primarily concerned with whether it should recognise a foreign decree of nullity and therefore this decision is open to the same doubt as *Gray* v. *Formosa* [1963] P. 259.

[57] Historically, they seem to have developed by analogy with the jurisdiction of the ecclesiastical courts to grant matrimonial relief, which courts had exclusive jurisdiction to grant such relief before the Matrimonial Causes Act 1857.

[58] *Har-Shefi* v. *Har-Shefi* [1953] p.161; *Merker* v. *Merker* [1963] P. 283; *Garthwaite* v. *Garthwaite* [1964] P. 356; *Lee* v. *Lau* [1967] P. 14. There does not appear to be any direct English authority on whether the *respondent's* domicile suffices to found jurisdiction but, on principle, it ought to. If, as is the case, the respondent's residence suffices, it would be anomalous if his domicile did not.

[59] *Vervaeke* v. *Smith* [1981] Fam. 77, where the respondent was resident in England at the time of the commencement of the proceedings but died some years before judgment. This decision of Waterhouse J., affirmed by the Court of Appeal, appears to disapprove that part of the decision of Sir Jocelyn Simon P. in *Qureshi* v. *Qureshi* [1972] Fam. 173 which held that the jurisdiction was based on the residence of both the parties in England. The residence of the *petitioner* alone as a jurisdictional basis is supported by Australian authority (*Bishop* v. *Bishop* [1971] 1 N.S.W.L.R. 300, 304–305; *Casias* v. *Wallace* [1971] 1 N.S.W.L.R. 331, 333) and by *Lepre* v. *Lepre* [1965] P. 52, 57; but the weight of English authority is against such a jurisdictional basis: *Har-Shefi* v. *Har-Shefi* [1953] P. 161, 170, 172–173, 174; *Garthwaite* v. *Garthwaite* [1964] P. 356, 379, 390–391; *Vervaeke* v. *Smith* [1981] Fam. 77, 95.

[60] *Lepre* v. *Lepre* [1965] P. 52 (the petition was (i) for a declaration that a foreign nullity decree was invalid and (ii) for divorce). The judgment of Waterhouse J. in *Vervaeke* v. *Smith,* above, at p. 95, throws some doubt on this ground of jurisdiction.

[61] *Ross Smith* v. *Ross Smith* [1963] A.C. 280.

[62] [1961] P. 29; but see *Garthwaite* v. *Garthwaite* [1964] P. 356 where the Court of Appeal declined jurisdiction to make a declaration of status even though the marriage had been celebrated in England.

[63] [1981] Fam. 77.

R.S.C., Order 15, rule 16 is unaffected by the Domicile and Matrimonial Proceedings Act 1973[64] which laid down new jurisdictional rules for divorce and nullity proceedings.

2.10 An application under Order 15, rule 16, is by petition in the High Court[65] and the Matrimonial Causes Rules apply with the necessary modifications.[66] The person immediately affected by the proposed declaration is made respondent, and where there is no such person, as where he is dead, leave must be obtained to proceed without a respondent.[67] There is no provision, as there is in the case of an application under section 45,[68] for giving notice of the application to persons who might be affected by the proposed declaration; though the court may ask the Attorney-General to make arrangements for counsel to appear as *amicus curiae,* and direct that interested parties be served and given an opportunity to take part in the proceedings.[69] The hearing of the petition is in open court and the restrictions on publication applicable to proceedings under section 45 do not apply. It has not been finally determined[70] whether the declaration operates *in rem* and binds persons who were not parties to the proceedings nor aware of their existence or whether the declaration operates *in personam* and only binds the parties to the proceedings.

2.11 The power to make declarations under R.S.C., Order 15, rule 16 is discretionary[71] and the court will not decide hypothetical or academic questions.[72] Indeed, it has been emphasised in a number of decisions relating to declarations of status that, even where the court has jurisdiction to grant the declaration,[73] the exercise of that jurisdiction remains in the discretion of the court.[74] In *Vervaeke* v. *Smith*[75] such discretion was not exercised because the

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[64] Sect. 5.

[65] Only the High Court can make a bare declaration as to matrimonial status; a divorce county court may do so only where the petitioner seeks a declaration ancillary to the main relief claimed, as where it is necessary to adjudicate on the validity of a marriage or divorce or as a necessary preliminary to consideration of a petition for divorce or nullity: *Practice Direction* [1971] 1 W.L.R. 29.

[66] Matrimonial Causes Rule 1977 (S.I. 1977 No. 344) r. 111.

[67] *Re Meyer* [1971] P. 298 (wife's application after husband's death to have foreign divorce declared to be invalid).

[68] See para 2.4 above.

[69] This was done in *Kunstler* v. *Kunstler* [1969] 1 W.L.R. 1506. In that case the husband asked for a declaration that his marriage to his second wife was valid, the validity of the second marriage being dependent on whether the first marriage had been validly dissolved, and the court adjourned the petition for an application to be made for directions relating to the joinder of the first wife. See also R.S.C., Order 15, rule 6.

[70] *Kunstler* v. *Kunstler*, above, at p. 1508, but see also the apparently conflicting *dicta* of Baker J. at p. 1510.

[71] *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.* [1921] 2 A.C. 438; *Hanson* v. *Radcliffe U.D.C.* [1922] 2 Ch. 490, 507 *per* Sterndale M.R.; *Ibeneweka* v. *Egbuna* [1964] 1 W.L.R. 219, 225 (P.C.) *per* Viscount Radcliffe; *Varanand* v. *Varanand* (1964) 108 S.J. 693; and see Matrimonial Causes Rules 1977 (S.I. 1977 No. 344) r. 109 (3)(b).

[72] *Re Barnato* [1949] Ch. 258 (C.A.); *Har-Shefi* v. *Har-Shefi* [1953] P. 161, 166 *per* Singleton L.J.: "The court will not grant a declaration in the air."

[73] See para. 2.9 above.

[74] *Adlrich* v. *A.-G.* [1968] P. 281, 294–295; *Kunstler* v. *Kunstler* [1969] 1 W.L.R. 1506; *Re Meyer* [1971] P. 298, 305; *Vervaeke* v. *Smith* [1981] Fam. 77, 96–102. The latter decision was affirmed by the House of Lords on grounds of *res judicata* and public policy; the jurisdictional questions were not touched upon: [1983] 1 A.C. 145.

[75] [1981] Fam. 77 (Waterhouse J.).

purpose of the declaration sought—that a foreign nullity decree should be recognised in England—was to establish the validity of a subsequent marriage. Because a procedure for granting a declaration as to the validity of that later marriage was available under section 45, which, unlike Order 15, rule 16, lays down various procedural safeguards,[76] the court exercised its discretion to ensure that the petitioner would submit to those procedural safeguards.

B. Defects in the present law

2.12 The existing law contains, in our view, at least five unsatisfactory features:—

(a) There is uncertainty as to the *type* of declarations which can be made by reason of Order 15, rule 16 under the inherent jurisdiction.[77]

(b) Whereas declarations under section 45 have "built-in" safeguards,[78] such as giving notice to persons who might be affected by the declaration, declarations in matrimonial matters under Order 15, rule 16 have no safeguards other than the discretionary powers of the court.[79]

(c) The jurisdictional criteria enabling the court to make declarations under Order 15, rule 16 are unclear. These jurisdictional criteria, which would appear to be those of the old ecclesiastical court, remain unaffected by the changes in the jurisdiction of the court in matrimonial proceedings introduced by the Domicile and Matrimonial Proceedings Act 1973.[80]

(d) The jurisdictional criteria to make declarations under section 45 of the Matrimonial Causes Act 1973 are anomalous. To obtain a declaration as to legitimacy or initial validity of marriage the applicant must be domiciled in England and Wales (or Northern Ireland) or claim property in England and Wales; moreover he must be a "British subject".[81] By contrast, there is no jurisdictional requirement at all for applicants for a declaration of legitimation (although an element in that declaration is the validity of the applicant's parents' marriage: for a declaration as to that, the above jurisdictional requirement would have to be satisfied).

(e) The declaration as to the "right to be deemed a British subject",[82] under section 45(4) of the Matrimonial Causes Act 1973, appears (in its present terms) to be of uncertain value since it confers no rights of citizenship, such as the right of entry to or abode in this country; and in any event it relates not to matters of family status but exclusively to a matter of public law.

2.13 These unsatisfactory features are due in part to the outdated complexities of the statute (section 45 of the Matrimonial Causes Act 1973) and in part to uncertainty as to the true relationship between the statutory and discretionary powers to grant relief. We recommend, therefore, that a new legislative code,

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[76] See para. 2.4 above.
[77] Paras. 2.7–2.8 above.
[78] See para. 2.4 above for a description of these safeguards.
[79] See para. 2.10 above.
[80] Para. 2.9 above.
[81] Or a person whose "right to be deemed a British subject" depends on his legitimacy: Matrimonial Causes Act 1973, s. 45(1). The term "British subject" is synonymous with "Commonwealth citizen": see British Nationality Act 1981, s. 51(1) and s. 37(1) and Sched. 3; and n. 5 above.
[82] See n. 81 above.

based on consistent principles, should replace the existing hotchpotch of statutory and discretionary relief. In effect the new statute will determine the declaratory relief available in matters of matrimonial status, legitimacy, legitimation and adoption.

PART III

PROPOSALS FOR REFORM

3.1 We have recommended[83] that there should be new statutory provisions regulating the powers of the court to make declarations in matters of matrimonial status, legitimacy, legitimation and adoption. In this Part of our Report we shall examine in more detail such matters as the kinds of declaration which we think the courts should be able to make, their effect, the circumstances in which they can be made and the safeguards thought to be necessary.

A. What declarations should be available by statute

3.2 The declarations which appear to be available at present are:—

(a) that a marriage was initially valid;[84]
(b) that a marriage was initially void;[85]
(c) that a marriage subsists or has ceased to subsist;[86]
(d) that a foreign divorce or annulment is valid or invalid in English law;[87]
(e) that the applicant is legitimate or that he (or his parent or remoter ancestor) is legitimated;[88]
(f) that the applicant is a British subject;[89]
(g) that a foreign adoption is valid or invalid in English law;[90]

3.3 We proposed in the Working Paper that the following declarations should be available by statute:—

(i) that the applicant's marriage was, when celebrated, a valid marriage;[91]
(ii) that English law recognises, or as the case may be, does not recognise, a foreign divorce or annulment in respect of the applicant's marriage;[92]
(iii) that the applicant is legitimate or has been legitimated pursuant to statute or at common law.[93]

There was no disagreement on consultation from this proposal that such declarations should be available.[94]

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[83] Para. 2.13 above.
[84] Matrimonial Causes Act 1973, s. 45(1).
[85] In *Kassim* v. *Kassim*[1962] P. 224, it was held that the court has no power to make such a declaration but must, where it has found a marriage to be void, grant a decree of nullity; but there are authorities which suggest that applications under R.S.C., Ord. 15, r. 16 may also be entertained; see para. 2.8 above.
[86] R.S.C., Ord. 15, r. 16; see para. 2.8 above.
[87] *Ibid.*; see para. 2.7 above.
[88] Matrimonial Causes Act 1973, s. 45(1) and (2) respectively; see para. 2.2 above.
[89] *Ibid.*; s. 45(4).
[90] There is nothing to suggest that the court cannot grant such a declaration under its inherent jurisdiction as regulated by R.S.C., Ord. 15, r. 16. However, there does not appear to be any reported English decision where the court has granted such a declaration.
[91] Working Paper No. 48, paras. 22–23.
[92] *Ibid.*, paras. 30–31.
[93] *Ibid.*, paras. 32–33.
[94] Though, as we pointed out in para. 1.7 above, one commentator expressed the view that the power to grant declarations should not be limited or defined by statute.

(i) Declaration as to the initial validity of one's own marriage

3.4 This is already provided for by statute.[95] We have no doubt that it should continue to be available. The question whether a person should be able to obtain a declaration as to anyone else's marriage is considered below.[96]

(ii) Declaration as to the recognition or non-recognition in England of the validity of a foreign divorce, annulment or legal separation

3.5 The recognition of foreign divorces and legal separations is governed by the Recognition of Divorces and Legal Separations Act 1971. Recognition of foreign annulments is governed by common law rules of recognition.[97] Doubt can and does arise as to whether such foreign determinations of status are valid in the eyes of English law and it is appropriate and desirable that the court should have the power to pronounce on their validity. This power is also necessary in relation to nullity decrees obtained elsewhere in the British Isles.

3.6 In Working Paper No. 48 we doubted whether such power was necessary in the case of divorce decrees granted elsewhere in the British Isles because of the rules as to their recognition laid down in section 1 of the Recognition of Divorces and Legal Separations Act 1971. On further reflection, we have concluded that such a power is necessary since that section is not retrospective; it does not apply to decrees obtained before 1 January 1972 and the recognition of such decrees will continue to depend on the common law rules.[98] Moreover, even if the decree is granted after 1 January 1972, recognition in England will not be automatic since the English court has power to refuse recognition if it is of the opinion that there was no subsisting marriage between the parties.[99] In the Working Paper we did not make any proposals for the recognition of decrees of judicial separation,[100] whether obtained elsewhere in the British Isles or abroad, but, for the reasons given above, the courts should be able to grant declarations as to the validity or invalidity of judicial separation decrees as well as of divorces and annulments. We accordingly recommend that the court should have power under the proposed new statutory regime[101] to grant declarations that English law recognises or, as the case may be, does not recognise a divorce, annulment or legal separation, whether obtained elsewhere in the British Isles or overseas.

(iii) Declaration as to the subsistence of a marriage whose initial validity is not in question

3.7 Once it is conceded that a marriage is initially valid, the issue of granting a declaration as to its subsisting validity may arise in two types of case. The first, and most likely, case is where the marriage has been terminated by death, divorce

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[95] See para. 3.2(a) above.

[96] Paras. 3.29–3.33 below.

[97] These are currently under joint review by the Law Commission and the Scottish Law Commission.

[98] Consideration is being given in the review referred to in n. 97 above, to the question whether to recommend that the provisions of s.1 of the 1971 Act should apply to British divorces and judicial separations obtained before 1972.

[99] Sect. 8(1)(a).

[100] Although a decree of judicial separation does not change the partners' marital status, it declares their status with binding force and affects their mutual obligations.

[101] The effect of putting such declarations on a statutory footing would be that they would no longer be available under the inherent jurisdiction of the court as regulated by R.S.C., Ord. 15, r. 16: see para. 3.28 below.

or annulment. So far as concerns the death of the other spouse, we expressed the view in the Working Paper[102] that the granting of a declaration as to the subsistence of a marriage was inappropriate and unnecessary. If one spouse is thought to be dead, the other may petition under section 19 of the Matrimonial Causes Act 1973 for a decree of presumption of death and dissolution of marriage.[103] The decree has the effect of a decree of divorce and the court has power to make orders for custody and financial provision for the children of the family and, indeed, financial provision and property adjustment orders in favour of the petitioner if the other spouse turned out to be alive.[104] Thus a spouse who alleges that his marriage is no longer subsisting by reason of the death of his partner has an appropriate procedure available to him for determining the issue. The other circumstances where the termination of an initially valid marriage may be in issue are those which concern the validity of a foreign divorce or annulment. We have already recommended[105] that the court should be able to grant a declaration as to the validity of divorces and annulments, whether granted elsewhere in the British Isles or obtained overseas.

3.8 We now consider the second type of case where the issue of granting a declaration as to the subsistence of a marriage may arise, namely, where there is no issue as to whether the marriage has been terminated but where it may be desirable for the petitioner to obtain a declaration as to its subsistence on a particular date. *Re Meyer*[106] indicates that there is a need for a specific declaration as to the subsistence of a marriage. Such a declaration can prove useful to a person, such as Mrs Meyer, who is seeking to establish pension or succession rights in a foreign country and the foreign court indicates that it requires, or would be assisted by, a declaration from the English court. We therefore recommend that the court should have power to grant declarations as to the subsistence of a marriage[107] under the new statutory regime we propose.[108]

(iv) Declarations as to legitimacy and legitimation

3.9 Our Working Paper No. 48, published in 1973, proposed the retention of the existing statutory power of the court to grant a declaration as to the petitioner's legitimacy and as to legitimation. We also proposed a minor amendment to the present law to make clear that a declaration of legitimation may be granted in respect not only to legitimation by virtue of statute,[109] or recognition as a legitimated person under the statutory provisions, but also in the case of a

[102] Para. 29.

[103] The court may grant the decree if satisfied that reasonable grounds exist for supposing the other party to be dead.

[104] See *Manser* v. *Manser* [1940] P. 224; *Deacock* v. *Deacock* [1958] P. 230 (C.A.).

[105] See para. 3.6 above.

[106] [1971] P. 298 (the wife divorced the husband in 1939 in Nazi Germany under duress; both parties lived together in England for some years and, on the husband's death, his widow became entitled in Germany to a pension from a Compensation Fund for the benefit of victims of the Nazi regime. The German court ordered the wife to prove by production of a suitable English document that she was validly married according to English law on certain specified dates. The wife successfully sought from the English court a declaration that the 1939 German decree was invalid and that she was lawfully married to the husband on the relevant dates.)

[107] I.e., a declaration that a marriage subsists or has ceased to subsist on a particular date or dates.

[108] The effect of including such declarations in the proposed statutory scheme would be that they would no longer be available under the inherent jurisdiction of the court as regulated by R.S.C., Ord. 15, r. 16: see para. 3.28 below.

[109] I.e., under the Legitimacy Act 1926 or the consolidating Legitimacy Act 1976.

person recognised as legitimated at common law. There was no dissent on consultation from these provisional proposals.

3.10 Our Report on Illegitimacy[110] recommended extensive reforms of the law designed to remove all the legal disadvantages of illegitimacy so far as they discriminated against the illegitimate (or non-marital[111]) child; but that Report accepted[112] that there would continue to be legal differences between those children whose parents had married and those whose parents had not. These differences would survive in relation to parental authority,[113] and some other matters such as succession under an instrument—for example, the letters patent creating a hereditary peerage—which preserved the distinction.[114] To that extent we recognised[115] that it would be necessary to preserve the concepts of "legitimacy", "illegitimacy" and "legitimation", and accordingly the procedures available under section 45 of the Matrimonial Causes Act 1973 for obtaining declarations of legitimacy and legitimation.

3.11 It may, however, be argued, that when statutory provision is available (as proposed in our Report on Illegitimacy) for declarations of parentage, it would also be possible to dispense with declarations of legitimacy and legitimation on the ground that an applicant would in an appropriate case be able to obtain all that he required by seeking a declaration of parentage and a declaration as to the existence of his parents' marriage on the relevant date. To adopt this practice would be in accordance with the policy underlying the recommendations in the Report on Illegitimacy of removing all legal distinctions between the marital and the non-marital child so far as they affect the child.

3.12 There would, however, be certain difficulties in the way of adopting this solution. First, there may be cases in which the court would have no jurisdiction to make a declaration about the validity of the parents' marriage—for example, because they were neither domiciled nor habitually resident in England[116]—even though the applicant was born here and had lived here ever since. Secondly, there are cases in which the legitimate status of a child under a foreign system of law which, for example, permits legitimacy to be conferred by acknowledgement or by government decree is recognised in this country, even though his parents are not, and never have been, married;[117] yet such a child could not have his status conclusively determined under the two-stage procedure envisaged above. Thirdly, it needs to be remembered that our recommendations for a declaration of parentage included proposals for special safeguards designed to minimise the problems associated with proof of parentage and the potential for disruption inherent in such a procedure for a bare declaration of parentage;[118]

[110] Law Com. No. 118 (1982).
[111] *Ibid.*, para. 4.51.
[112] *Ibid.*, para. 4.51 and n. 125.
[113] *Ibid.*, Part VII.
[114] *Ibid.*, Part VIII.
[115] *Ibid.*, paras. 4.51 and 10.2.
[116] In para. 3.44 below we recommend that the jurisdictional test for declarations as to marital status should be based on the domicile or habitual residence of either of the parties to the marriage.
[117] *Re MacDonald* (1962) 34 D.L.R. (2d.) 14, affirmed on appeal (1964) 44 D.L.R. (2d.) 208; and see *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529, 543.
[118] Law Com. No. 118 (1982) Part X.

and some of those safeguards (such as the requirement that the child be born in this country[119]) would be unusual in proceedings long familiar in this and other countries in which what is in issue is the status of legitimacy.

3.13 Different views may be held on how much weight to give to these competing arguments. On the one hand, it may be said that where essentially similar issues have to be decided, similar jurisdictional and procedural safeguards should be applicable; and accordingly that which is necessary for determining parentage when a declaration of parentage is sought, should also be necessary for declarations of legitimacy and legitimation, which by definition involve a finding of parentage. On the other hand, it can be argued that the justification for introducing special (and in the context of status issues unusual) jurisdictional and other rules is an apprehension that failure to do so would leave the court at risk of being faced with applications which it would otherwise be unable satisfactorily to resolve.[120] Such apprehensions (it may be said) cannot be justified in the case of declarations of legitimacy since they have not arisen in the 125 years experience of the working of that jurisdiction. The same argument can be used against depriving an (admittedly small) number of people of a procedure, whereby they can have their legitimate status formally recognised once and for all in this country, merely because that status is not dependent on their parents' marriage.

3.14 We do not find it easy to evaluate these competing arguments; but the problem does not call for immediate decision. This is because our Report on Illegitimacy has not yet been implemented, nor have its proposals been considered by Parliament; and it is clear to us that declarations of legitimacy or legitimation could not be abolished before the recommendations in that Report for the provision by statute of declarations of parentage had been implemented. Accordingly, we propose in this Report that the right to apply for declarations of legitimacy and legitimation should be retained; and that the following declarations should be available under the statutory regime which we recommend:—

(a) a declaration that the applicant[121] is legitimate;[122]
(b) a declaration that the applicant[123] has or has not become legitimated[124] pursuant to statute or at common law.

If and when declarations of parentage are introduced, it may be thought appropriate to consider the respective merits of the arguments outlined above, and to decide, in the light of the terms of the new legislation and its underlying policy, whether or not it would be appropriate to dispense entirely with separate declarations of legitimacy and legitimation, leaving applicants wishing to assert their legitimacy to make a combined application for a declaration of parentage and a declaration as to the validity of the parents' marriage. If the latter course were

[119] *Ibid.*, paras. 10.21 and 10.34.
[120] *Ibid.*
[121] In paragraph 3.36 below we recommend that only the child himself should be able to apply for a declaration of legitimacy or for a declaration as to the validity of a legitimation.
[122] The court will not have power to make a declaration of illegitimacy: see para. 3.22 below.
[123] See n. 121 above.
[124] In recommending that the court should be able to grant a declaration that the applicant has not become legitimated, we have borne in mind that there may well be cases in which such a declaration could serve a useful purpose, particularly where the alleged legitimation has occurred as a result of formal acknowledgement, or governmental act, in a foreign country.

adopted, we assume that the recommendations made by us in our Report on Illegitimacy[125] in connection with blood testing and the extent to which third parties would be bound by the declaration of parentage would apply. If, on the other hand, it was considered preferable to preserve declarations of legitimacy and legitimation, a view would have to be taken as to whether the jurisdictional and other incidents of parentage declarations should be attached to them.

(v) Declaration as to foreign adoptions[126]

3.15 The Working Paper did not make any recommendation in relation to declarations as to the validity of foreign adoptions. It was suggested[127] that the question of recognition of foreign adoptions should be left to be governed by the Adoption Act 1968 (which was passed with a view to ratification of the Hague Convention of 1965 relating to Adoption of Children). An adoption order made in any other part of the British Isles is accorded automatic recognition in England and Wales.[128] An adoption made abroad which is specified as an overseas adoption[129] will be recognised in England,[130] but such recognition is not automatic.[131] The recognition of other adoptions[132] depends on the common law. Such an adoption will be recognised if it was made in the country in which the adopters were domiciled at the time of the adoption and was valid under the law of that country.[133] Such recognition will not, however, be automatic. Even if these conditions are satisfied, recognition may be refused if it would be contrary to public policy.[134]

3.16 The recognition in this country of the validity of a foreign adoption has arisen in a number of contexts, such as whether a foreign adopted child was entitled to take under a settlement,[135] a will[136] or an intestacy,[137] whether an adoptive parent was entitled to take on the child's intestacy,[138] or whether an English

[125] Law Com. No. 118, paras. 10.29–10.31 and 10.39.
[126] When the adoption takes place in England or Wales there is no need for a declaration as to its validity because the legal proceedings that are needed will judicially establish the fact of adoption.
[127] Working Paper No. 48, para. 33, n. 77.
[128] Children Act 1975, Sched. 1, paras. 1(2) (a)(b) and (c), 3.
[129] The Adoption Act 1968, s. 4(3), empowers the Secretary of State to specify as "overseas adoptions" any adoption effected under the law of any country outside Great Britain. The Adoption (Designation of Overseas Adoptions) Order 1973 (S.I. 1973 No. 19), which was made pursuant to the power conferred by the 1968 Act, specifies adoptions made in a large number of countries as "overseas adoptions". These countries include most of the Commonwealth, the dependent territories of the United Kingdom, all Western European countries, Yugoslavia, Greece, Turkey, Israel, South Africa and the United States of America.
[130] Children Act 1975, Sched. 1, paras. 1(2)(d), 3.
[131] The reservations are that the overseas adoption must have been effective under statutory law and not under common law; and it must relate to the adoption of a child who, at the time of the foreign adoption application, is under the age of 18 and has not married: see S.I. 1973, No. 19, para. 3(3). Recognition may also be refused if it would be contrary to public policy.
[132] I.e., adoptions other than those made in another part of the British Isles and other than "overseas adoptions".
[133] *Re Valentine's Settlement* [1965] Ch. 831 (C.A.). It may also be that the English courts would recognise a foreign adoption which, though not effected in the country of the adopters' domicile, would be recognised as valid by the law of their domicile: see Cheshire and North, *Private International Law,* 10th ed., (1979), p. 466.
[134] *Re Valentine's Settlement,* above.
[135] *Ibid.*
[136] *Re Marshall* [1957] Ch. 507.
[137] *Re Wilson* [1954] Ch. 733.
[138] *Re Wilby* [1956] P. 174.

adoption order might be made.[139] There is no reported case in which the court has had to consider an application for a declaration as to the validity of a foreign adoption, but a number of commentators suggested that, if there is, and is to remain, a statutory procedure for obtaining a declaration as to legitimation, the courts should be given power to declare whether a foreign adoption is to be recognised in English law. We think that the real question is not whether the courts should be given power to make declarations as to foreign adoptions. There is nothing to suggest that, in an appropriate case, they do not have such an inherent power under Order 15, rule 16. The real question, in our eyes, is whether a special statutory procedure with its own rules of jurisdiction should be created for such declarations or whether this is a matter which can safely be left to judicial development under Order 15, rule 16. We favour the former approach for two reasons. First, declarations as to foreign adoptions, like the other declarations recommended in this Report, determine a person's satus and we think it desirable, in the interests of certainty and convenience, that the legislation we propose should deal comprehensively with declarations as to family status, and at the same time provide clear and satisfactory jurisdictional rules for declarations as to the validity of foreign adoptions.[140] Secondly, under our proposals applications for declarations under the new statutory scheme will be subject to special procedural safeguards[141] designed to protect third parties and the public, and we think it important that these safeguards should apply to declarations as to foreign adoptions.[142] It would be anomalous if special procedural safeguards were to apply to some declarations as to status, such as declarations as to legitimacy and legitimation, but not to others. We recommend that the court should have power, under the proposed new statutory regime,[143] to grant a declaration that English law recognises or, as the case may be, does not recognise that the applicant[144] has been validly adopted abroad.

B. Declarations which should not be available

3.17 We listed in paragraph 3.2 above, those declarations in family law matters which would appear currently to be available whether by statute or under the

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[139] *Re H. (An Infant)* (1974) 4 Fam. Law 77.

[140] We recommend that the jurisdictional rules for such declarations should be the child's domicile in England and Wales at the date of the application or his habitual residence here throughout the period of one year ending with that date: see para. 3.50 below. This will ensure that a declaration will not be made unless the child has a sufficient connection with this country.

[141] See paras. 3.57–3.63 below.

[142] Cf. *In re H. (A Minor)* [1982] Fam. 121, 135 where Hollings J., in the context of an adoption application in England, stressed the importance, in cases where the child is a foreign national, of notice being given to the Secretary of State pursuant to r. 18 (j) of the Adoption (High Court) Rules 1976 and r. 4(3) of the Adoption (County Court) Rules 1976 so that in every such case the Secretary of State is given the opportunity of intervening if he wishes. Under our proposals for a declaration, notice may be given to the Attorney-General in appropriate cases and he would be empowered to intervene, either upon a reference from the court or of his own accord: see paras. 3.58 and 3.63 below. At present, declarations under R.S.C. Ord. 15, r. 16 have no specific safeguards other than the discretionary powers of the court and, even if those powers are exercised in a consistent manner, we think that safeguards are so important that specific provision should be made for them.

[143] The effect of including such declarations in the proposed statutory scheme would be that they would only be available under, and in accordance with, the statutory rules, and not under R.S.C. Ord. 15, r. 16: see para. 3.28 below.

[144] In para. 3.37 below we recommend that only the child himself should be able to apply for a declaration as to the validity of a foreign adoption.

inherent jurisdiction of the court. We have just discussed those for which we recommend that express statutory provision should be made. We must now go on to explain why we think that the others should be excluded from such a recommendation, and for which the law should make no provision.

(i) Declaration as to the initial invalidity of a marriage

3.18 The Working Paper[145] proposed that the only route for obtaining a declaration as to the initial invalidity of a marriage should be by a nullity decree. We also proposed that if there was no jurisdiction to entertain nullity proceedings (because neither party was domiciled in England and Wales nor had been habitually resident here for at least a year before the start of proceedings[146]) there should be no jurisdiction to apply for a declaration that the marriage was void, merely because the marriage had been celebrated in this country.[147] The main reason for this proposal was to prevent parties from avoiding the ancillary relief powers[148] of the court which arise in nullity, but not declaration,[149] proceedings. As regards the head of jurisdiction based on the celebration of the marriage here, this is not a sufficient ground for nullity proceedings and we see no reason why the jurisdictional rules for nullity should be capable of being evaded by recourse to the declaration procedure.

3.19 The provisional conclusion in the Working Paper was supported on consultation by almost all those who commented on this issue. However, one commentator suggested that the courts should have jurisdiction to decide the validity of a marriage celebrated in England. In our view, such a jurisdiction ought not, for reasons given in the previous paragraph, to be conferred by means of a declaration rather than jurisdiction to grant a nullity decree. It raises, therefore, the much broader question whether the jurisictional rules for nullity should be amended. The present rules are to be found in section 5(3) of the Domicile and Matrimonial Proceedings Act 1973 and were introduced as the result of proposals made by the Law Commission.[150] The nullity rules are, for all practical purposes, the same as for other matrimonial causes and are uniform throughout the United Kingdom. Furthermore, the question of conferring jurisdiction on the basis of celebration of the marriage within the jurisdiction was considered and rejected after consultation by both the Law Commission[151] and the Scottish Law Commission[152] and we have received no evidence of practical difficulties thereby

[145] Para. 24.
[146] See Domicile and Matrimonial Proceedings Act 1973, s. 5(3).
[147] Working Paper No. 48, paras. 26–27.
[148] I.e., the power to make orders for custody and financial relief for the children of the family and for financial relief for a spouse.
[149] See *Kassim* v. *Kassim* [1962] P. 224. We do not recommend that the court should be able to grant ancillary relief upon the making of a declaration: see para. 3.56 below. If, therefore, a spouse were able to obtain a declaration that his or her marriage was invalid as an alternative to a decree of nullity, he or she could thereby avoid being ordered to provide financially for the other spouse or the children, and the court would also not be under any duty to consider the arrangements proposed for the welfare of the children.
[150] Report on Jurisdiction in Matrimonial Causes, Law Com. No. 48 (1972). The similar Scottish provisions in the 1973 Act stem from the Scottish Law Commission's Report on Jurisdiction in Consistorial Causes affecting Matrimonial Status, Scot. Law Com. No. 25 (1972).
[151] Law Com. No. 48 (1972) para. 60.
[152] Scot. Law Com. No. 25 (1972), paras. 41–43.

created. We do not in this Report wish to recommend any change in the law in that respect. Our recommendation is, therefore, that the court should not be empowered to make a declaration as to the initial invalidity of a marriage, even in those cases where, because the parties do not satisfy the jurisdictional requirements, the court cannot entertain a petition for a decree of nullity of a void marriage.

(ii) Declaration under section 45 of the Matrimonial Causes Act 1973 that the applicant is a British subject

3.20 Section 45(4) of the Matrimonial Causes Act 1973 provides that any person who is domiciled in England and Wales or Northern Ireland or claims any real or personal estate situate in England and Wales may apply for a decree declaring his right to be deemed a British subject. Applications under section 45(4) are extremely rare[153] and there would seem to be only one[154] case reported this century involving such an application. This is not surprising, given the limited rights attached to being a "British subject" which, under the British Nationality Act 1981,[155] means a Commonwealth citizen and carries with it no right of entry to or abode in this country. Furthermore, it would seem to be possible to seek a declaration as to issues of British nationality under Order 15, rule 16.[156] We reached the conclusion in the Working Paper[157] that it was inappropriate to retain a provision as to declarations of citizenship in the Matrimonial Causes Act 1973. On consultation there was no dissent from our provisional proposal that what is now section 45(4) of the Matrimonial Causes Act 1973 should be repealed and not replaced and we so recommend. Any remaining need for declaratory relief in this sphere can adequately be accommodated by the inherent jurisdiction of the court under Order 15, rule 16 which we do not propose to affect in this respect.[158]

(iii) Declarations as to illegitimacy

3.21 While section 45 of the Matrimonial Causes Act 1973 empowers the court to make declarations of legitimacy[159] it makes no provision for granting a declaration that a person is illegitimate. In *B.* v. *A.-G.*[160] Ormrod J., in dismissing an application under (what is now) section 45 for a declaration that the applicant was legitimate, expressly refused to make a declaration (which the interveners'

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[153] See Working Paper No. 48, para. 35.

[154] *Abraham* v. *A.-G.* [1934] P. 17.

[155] Sect. 37 and 51. Under the British Nationality Act 1948, "British subject" was a similarly wide term.

[156] The leading case in the post-war years, *A.-G.* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436, was brought in the Chancery Division, as was *Bulmer* v. *A.-G.* [1955] Ch. 558. As we indicated in our Report on Illegitimacy, Law Com. No. 118 (1982), para. 11.19, the reports of these two cases do not make clear on what basis jurisdiction was assumed.

[157] Paras. 35–36.

[158] We discuss in our Report on Illegitimacy (Law Com. No. 118 (1982), paras. 11.18–11.19) the relationship between the inherent power to make declarations of citizenship and the declaration of parentage proposed in that Report.

[159] See para. 2.2 above. The Legitimacy Declaration Act 1858, s. 1, conferred on the court power to make declarations of illegitimacy or of invalidity of marriage. This Act was repealed by the Supreme Court of Judicature (Consolidation) Act 1925; and s. 188 of the 1925 Act, while substantially re-enacting s. 1 of the 1858 Act, did not re-enact the power to grant a declaration of illegitimacy or of invalidity of marriage.

[160] [1967] 1 W.L.R. 776; but see *Starkowski* v. *A.-G.* [1952] P. 135 and n. 36 above.

in the proceedings had asked for in their answer) that the applicant was illegitimate. It has also been held[161] that the court cannot grant a declaration of legitimacy otherwise than in accordance with the provisions of that section. Since section 45 does not provide for declarations of illegitimacy, it is clear that the court has no power to grant such a declaration under that section; and it would also appear that the court cannot grant a declaration of illegitimacy under R.S.C., Order 15, rule 16 because section 45 deals exhaustively with all matters relating to legitimacy declarations.[162]

3.22 In our Working Paper[163] we concluded that the court should not have power to grant a declaration that a person is illegitimate. On consultation there was no dissent from this conclusion, and we recommend accordingly. It is in fact extremely unlikely that an applicant[164] would wish to seek a declaration that he is illegitimate. We would emphasise that our recommendation is confined to declarations *in rem*; it would not prevent a finding that a person is illegitimate where such a finding is necessary in the course of litigation, for instance, in a succession case.

C. Other declarations

(i) Declaration as to parentage

3.23 We canvassed the question in the Working Paper[165] whether it should be possible to obtain a declaration establishing the existence of the parent–child relationship in cases where the applicant does not claim the status of legitimacy or legitimation. We came to no provisional conclusion on this matter but merely invited views. We re-examined the issue in our recent Report on Illegitimacy[166] where we recommended that the court should have power to make declarations of parentage and where we considered the detailed issues arising from that recommendation.[167] We do not, therefore, consider the matter further in this Report.

(ii) Negative declarations

3.24 We have recommended that the court should not have power to grant a declaration that a marriage was initially invalid[168] or that a person is illegitimate.[169] The court will therefore not be able to grant such declarations on dismissing an

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[161] *Aldrich* v. *A.-G.* [1968] P. 281. This decision was approved in *Eneogwe* v. *Eneogwe* (1976) 120 S.J. 300 (C.A.) where it was held that the statutory jurisdiction to grant declarations as to the initial validity of a marriage is exhaustive and that accordingly the court has no power to grant such a declaration under R.S.C., Ord. 15, r. 16.

[162] See the cases cited in n. 161 above and *Re J.S. (A Minor)* [1981] Fam. 22.

[163] See paras. 40 and 70(1).

[164] We have recommended that only the *propositus* should be able to apply for a declaration of legitimacy: para. 3.36 above; the same rule would have to apply to a declaration that a person is illegitimate, if such a declaration were to be made available.

[165] Para. 34.

[166] Law Com. No. 118 (1982).

[167] *Ibid.*, paras. 10.2–10.39 and clauses 27–30 of the draft Family Law Reform Bill appended to that Report.

[168] Para. 3.19 above.

[169] Para. 3.22 above.

application for a declaration of initial validity of marriage or of legitimacy, as the case may be. However, we have recommended that the following declarations should be made available by statute:—

(a) that English law recognises or, as the case may be, does not recognise a divorce, annulment or legal separation, whether obtained elsewhere in the British Isles or overseas;[170]

(b) that a marriage subsists, or has ceased to subsist, on a particular date;[171]

(c) that the applicant has, or has not, become legitimated.[172]

(d) that English law recognises or, as the case may be, does not recognise that the applicant has been validly adopted abroad.[173]

The question therefore arises whether the court should have power to make a converse declaration on the dismissal of an application for the declaration sought, for example, a declaration that the marriage has ceased to subsist on a particular date in the case of an unsuccessful application for a declaration that the marriage subsisted on that date.

3.25 Our provisional conclusion[174] in the Working Paper was that the court, on the dismissal of an application for a declaration, should not grant another declaration for which an application has not been made by a party. This conclusion was supported on consultation and we maintain it in this Report. However, this recommendation would not prevent the court from making one of two alternative declarations if both are applied for in the alternative; or from making the declaration which the respondent had applied for in answer to the petition.[175]

3.26 As we have already indicated,[176] under our proposals the court, on dismissing an application for a declaration of initial validity of marriage, would not be able to make a declaration that the marriage is void. The main reason underlying this proposal is that if a spouse could obtain a declaration that his marriage was invalid, he could avoid the ancillary powers of the court[177] which arise in nullity, but not declaration, proceedings. If an applicant seeks to question the validity of a marriage, his proper course will be to apply for a decree of nullity. It is, however, desirable that the court should be able to make, on the application of either party, a declaration of initial validity of marriage on dismissal of a petition for nullity of a void marriage or, conversely, a decree of nullity on dismissal of an application for a declaration as to the initial validity of

[170] Para. 3.6 above.
[171] Para. 3.8 above.
[172] Para. 3.14 above.
[173] Para. 3.16 above.
[174] Para. 40.
[175] E.g., the respondent may cross-pray for a declaration that a foreign divorce is invalid in answer to an application for a declaration that the divorce is valid if he has a sufficient interest in obtaining the declaration: see para. 3.33 below. However, if the petitioner applies for a declaration that he has (or has not) become legitimated, or that he has (or has not) been validly adopted abroad, the respondent will not be able to cross-pray for the converse declaration because, under our proposals, only the *propositus* himself will be able to apply for such a declaration: see paras. 3.36–3.37 below.
[176] Para. 3.24 above.
[177] I.e., the power to make orders for custody and financial relief for the children of the family, and for financial relief for a spouse.

a marriage, so that the result of the proceedings in either case would be to settle once and for all whether the marriage is valid or void.[178] However, at present a person cannot apply in the same petition for a declaration as to the initial validity of a marriage and, in the alternative, for a decree of nullity (or *vice versa*); nor can the respondent, in answer to a petition for nullity, cross-pray for a declaration as to the initial validity of the marriage (or *vice versa*). This is because nullity proceedings must be started in a divorce county court[179] and that court does not have jurisdiction to entertain an application for a declaration as to initial validity of a marriage.[180] However, if the nullity proceedings have been transferred to the High Court or, in the case of proceedings for a declaration of initial validity of marriage, it would appear that a party may, with the leave of the court, amend his petition or answer to include a prayer for a decree of nullity or a declaration as to initial validity of a marriage, as the case may be.

3.27 Later on in this Report[181] we recommend that both the High Court and the county court should have jurisdiction to entertain applications for the declarations which we have proposed and that the applicant should be able to commence proceedings for a declaration in either court, subject to the power of the court to transfer such proceedings pending before it to the other. This would remove the obstacle (referred to in the preceding paragraph) to combining a petition for nullity with an application for a declaration as to initial validity of marriage. Further, under our proposals applications for a declaration as to initial validity of a marriage and petitions for nullity of a void marriage would be subject to the same jurisdictional criteria,[182] and we have also suggested[183] that they should be subject to the same procedural safeguards so that all interested parties will be before the court or have notice of the proceedings. If these proposals are implemented, the court, if asked by either party, would be able to make a declaration of initial validity of marriage on dismissal of a petition for nullity of a void marriage, or a decree of nullity on dismissal of an application for a declaration as to the initial validity of a marriage.

(iii) Overlapping declarations

3.28 We have seen that the court will not grant a declaration as to the initial invalidity of a marriage—the appropriate relief is a nullity decree.[184] We have also seen that, if an appropriate procedure is available under section 45 of the Matrimonial Causes Act 1973, the courts already take the view that that procedure should be followed, rather than a declaration being sought under the inherent jurisdiction of the court, that is, under Order 15, rule 16.[185] We think that this is the right approach and that there is, in our view, no advantage in retaining an overlapping inherent jurisdiction. We recommend that it should not

[178] The objections which apply to the granting of a declaration of initial invalidity of marriage do not apply here, since there is no question of depriving the court of its powers in respect of any children or the parties of their right to apply for financial relief.
[179] Matrimonial Causes Act 1967, s.1(3). The proceedings must be transferred to the High Court if they are defended, but there will be no such requirement if the Matrimonial and Family Proceedings Bill (now before Parliament) becomes law: see para. 3.53 below.
[180] Para. 2.4 above. See also *Practice Direction* [1971], W.L.R. 29 (Direction No. 106).
[181] Para. 3.54 below.
[182] See para. 3.44 below.
[183] See paras. 3.63–3.64 below.
[184] See para. 2.7 above.
[185] See para. 2.11 above.

be possible to seek declaratory relief under the inherent jurisdiction of the court in those circumstances where we have recommended specific statutory provision for the granting of declarations in family matters. Furthermore, in those cases where we have specifically recommended that no declaratory relief should be available,[186] this recommendation ought not to be evaded by seeking declarations under Order 15, rule 16. We do not wish, however, to introduce any other restrictions on the availability of declarations under the inherent jurisdiction of the court.

D. Who should be able to apply for the various declarations?

(a) Declarations as to matrimonial status and decrees of nullity of a void marriage

3.29 As in the case of a decree of nullity of a void marriage, declarations as to the initial validity or continued subsistence of a marriage and declarations as to the validity of a foreign divorce, annulment or judicial separation determine a matrimonial status and, in principle, each should be governed by the same rules in the matter of applications by third parties.

3.30 Declarations as to the initial validity of marriage can now be obtained under section 45 of the Matrimonial Causes Act 1973 in respect of the applicant's own marriage and in respect of the marriage of his parents or grandparents So far as the other declarations as to matrimonial status are concerned, there is nothing to suggest that the court cannot in an appropriate case grant a declaration under Order 15, rule 16 on the application of someone who is not a party to the marriage. In the case of a petition for a decree of nullity of a void marriage, in addition to the spouses themselves, any person with a sufficient interest in obtaining a decree of nullity may petition. A slight pecuniary interest is sufficient[187] and anyone whose title to property would be affected or on whom a legal liability might be cast by the natural result of the marriage (i.e., the birth of issue) has a right to petition for a decree of nullity.[188]

3.31 In our Working Paper, we provisionally recommended[189] that only a party to the marriage should be entitled to apply for a declaration as to its initial validity, for a declaration as to the validity of a foreign divorce or annulment, or for a decree of nullity of a void marriage. We said that, although the court might well need to make a finding about the validity of a third party's marriage in the course of litigation, such a finding should be *in personam*, binding only the parties thereto. To go further and allow an applicant to obtain a declaration *in rem* in respect of a marriage other than his own would, we suggested, constitute an unnecessary interference with third parties' rights.

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[186] We have recommended that the court should not have power to grant a declaration as to the initial invalidity of a marriage or a declaration that a person is illegitimate: see paras. 3.19 and 3.22 above.

[187] *Faremouth* v. *Watson* (1811) 1 Phillim. 355 (a sister having an interest under a will contingent on her brother dying without issue was held to have a sufficient interest to petition for a decree). In 1837 the Privy Council finally decided that the interest had to be "pecuniary", overruling the view of the Court of Arches that a father's "moral" interest in the child's welfare was sufficient: *Sherwood* v. *Ray* (1837) 1 Moo. P.C. 353.

[188] *Sherwood* v. *Ray* (1837) 1 Moo. P.C. 353, 399, 400; see also *Bevan* v. *M'Mahon* (1859) 2 Sw. & Tr. 58.

[189] Paras. 23, 31, 42, 59–62.

3.32 On consultation, views were divided. We have, in the light of these views and of the recommendation made in relation to declarations of parentage in our recent Report on Illegitimacy,[190] given further considerations to this whole question. In that Report we referred to the dangers inherent in allowing a third party to apply for a declaration of parentage and we concluded that "the difficulties inherent in allowing others to apply, coupled with the distress and invasion of privacy which could result from such litigation being started, are not counterbalanced by any significant advantages".[191] We accordingly recommended that only the child himself should have a right to apply for a declaration of parentage. We do not think, however, that this recommendation provides an appropriate analogy in the present context and we have reached the conclusion that it would not be right to recommend the abolition of the existing power to grant declarations as to marital status or a decree of nullity of a void marriage on the application of a third party. Our reasons are as follows. First, the right of a person to apply for a declaration as to the initial validity of his parents' or grandparents' marriage has existed since the Legitimacy Declaration Act 1858; the like right of a third party, having a sufficient interest, to petition for a decree of nullity declaring someone else's marriage to be void existed for centuries. On consultation there was nothing to suggest that the exercise of these rights has caused mischief or been abused. Secondly, in the case of the declarations now under consideration the potential for disruptive litigation is likely to be less than in relation to declarations of parentage. Where the validity of a marriage is in issue there will always be an allegation of a legal relationship (in practice likely to be officially documented) between the parties to the marriage. In contrast, there need be no such relationship in cases where the parentage of a non-marital child is concerned.

3.33 We believe that the approach of the present law of nullity is the right one (and we recommend no change in it) namely that, in addition to the spouses themselves, anyone with a sufficient interest in obtaining a decree of nullity of a void marriage may petition. In our view, it would also be appropriate to adopt a similar test in relation to the declarations as to matrimonial status which we recommend.[192] We think that the courts will not have difficulty in determining whether such a test has been satisfied. Its adoption in the context of declarations as to the initital validity of marriage would mean that the same test would apply whether the issue was initial validity or invalidity. It would also mean that, as under the present law, a declaration could be granted as to the initial validity of the marriage of the applicant's parents or grandparents in those cases in which the applicant has a sufficient interest (such as the pursuit of a property or succession claim) to justify the grant of a declaration to him. Our recommendation is that, in addition to the spouses themselves, anyone with a sufficient interest in obtaining a declaration as to matrimonial status[193] should be able to apply.

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[190] Law Com. No. 118 (1982).

[191] *Ibid.*, para. 10.18.

[192] I.e., a declaration that a marriage was initially valid, that a divorce, annulment or judicial separation is valid or invalid in English law, or that a marriage subsists or has ceased to subsist: see paras. 3.4–3.8 above.

[193] See n. 192 above.

(b) Declarations as to legitimacy and legitimation

3.34 Whilst the existing law allows a person to apply for a declaration of his own legitimacy, it does not enable him to ask for a declaration that any other person is legitimate.[194] By way of contrast, legitimation declarations are not so limited: an applicant can obtain a declaration that "he or his parent or remoter ancestor" has become legitimated.[195] We have not been able to discover any convincing reason for this distinction, and we think that the rule should be the same in both cases.

3.35 In the Working Paper[196] views were invited, but no provisional conclusion reached, on the question whether the declarations should be limited to the applicant's own status. The argument in favour of allowing an applicant to seek a declaration in respect of someone else's legitimacy or legitimation is that, as the Working Paper indicated,[197] such a declaration could be useful to a person seeking to establish rights of succession in a foreign court if he had to prove that the deceased was legitimate or had been legitimated under English law and the foreign court decided that the applicant had no *locus standi* unless the English court made a declaration of legitimacy or legitimation, as the case may be. In support of the view that declarations of legitimacy and legitimation should be limited to the applicant's own status, the Working Paper put forward the argument that declarations *in rem* should be restricted to cases where they are really needed. It was suggested that foreign courts rarely require declarations as to status from English courts, and the possibility that they may do so was not thought to be an adequate justification for enabling third parties to apply for declarations *in rem*. The views we received on consultation were divided. Indeed some commentators argued that not only should declarations be available in respect of the applicant's ancestors, a view canvassed in the Working Paper, but also in relation to his descendants.

3.36 In relation to declarations of legitimacy and legitimation, we think that the real choice is between, on the one hand, following the approach we have recommended for declarations as to marital status, namely, that anyone with a sufficient interest should be able to apply for the declaration[198] and, on the other, allowing only the child himself to apply. As we have already indicated,[199] we have followed the latter approach in relation to declarations of parentage in our Report on Illegitimacy.[200] The case for adopting this solution is, in our view, stronger in relation to declarations of legitimacy and legitimation than in relation to declarations as to matrimonial status, bearing in mind that the former declarations may involve a finding of parentage.[201] If any third party could apply for a declaration of legitimacy, it would be possible to circumvent the rule we have thought it right to recommend for declarations of parentage. We therefore recommend that only the child himself should be able to apply for a declaration

[194] Matrimonial Causes Act 1973, s. 45(1).
[195] *Ibid.*, s.45(2).
[196] Para. 32.
[197] *Ibid.*
[198] Para. 3.33 above.
[199] Para. 3.32 above.
[200] Law Com. No. 118 (1982).
[201] See *The Ampthill Peerage* [1977] A.C. 547.

of legitimacy or a declaration as to the validity of a legitimation.[202]

(c) Declarations as to foreign adoptions[203]

3.37 We think that the rule we have recommended in the preceding paragraph in relation to declarations as to legitimacy and legitimation is also appropriate for declarations as to the validity of foreign adoptions. Accordingly our recommendation is that only the child himself should be able to apply for such a declaration.

E. Death of a party to a marriage

3.38 We provisionally proposed in the Working Paper[204] the retention of the existing rule that a declaration as to matrimonial status[205] may be granted notwithstanding the death of a spouse. This proposal was supported on consultation. A decree of nullity of a void marriage[206] may be granted after the death of one spouse or of both spouses;[207] and we think that the same rule should apply to the declarations as to the matrimonial status recommended in this Report. Accordingly our recommendation is that proceedings for declarations as to matrimonial status[208] should be available after the death of one party or of both parties to the marriage.

F. Should declarations be obtainable as of right or at the court's discretion?

3.39 Declarations under Order 15, rule 16 are discretionary, but in the Working Paper[209] the view was expressed that declarations under what is now section 45 of the Matrimonial Causes Act 1973 appear to be obtainable as of right. The Working Paper then proposed, and most commentators agreed, that the declarations provisionally recommended should be obtainable as of right because, it was said, the right to obtain a declaration as to status was a human right which should not be subject to the court's discretion. Since the publication of the Working Paper, it has been held, *obiter*, in *Puttick* v. *A.-G.*[210] that in exceptional circumstances the court has a power to refuse to grant a declaration under section 45. Sir George Baker P., having decided that the applicant's marriage was valid, then concluded that her application did not fall within section 45 because she was not domiciled in England. Had he found otherwise, he would have refused her the declaration sought. This was because, though there had been no fraud at the hearing, "the whole history is of fraud and perjury and the facts to found a decree have been brought about by criminal acts and offences and a fraudulent, deceitful course of conduct."[211]

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[202] See para. 3.14 above.
[203] See para. 3.16 above.
[204] Paras. 43–46.
[205] See *Aldrich* v. *A.-G.* [1968] P. 281; *Re Meyer* [1971] P. 298; *Vervaeke* v. *Smith* [1981] Fam. 77.
[206] A voidable marriage cannot be annulled after the death of one of the parties.
[207] In addition to the spouses themselves, any person having a sufficient interest in obtaining a decree of nullity of a void marriage may petition. We have recommended that this rule should also apply in relation to declarations as to matrimonial status: see para. 3.33 above.
[208] See n. 192 above.
[209] Para. 39.
[210] [1980] Fam. 1.
[211] *Ibid.*, p. 22; and see *R.* v. *Secretary of State for the Home Department, Ex p. Puttick* [1981] Q.B. 767, 775 *per* Donaldson L.J.

3.40 We have, in the light of this decision, given further consideration to the question whether declarations should be obtainable as of right. We considered in our Report on Illegitimacy[212] whether or not the declaration of parentage there recommended should be discretionary. We concluded that it should not.[213] The power of the court to grant a nullity decree is not discretionary[214] and we do not think that a declaration as to the initial validity of a marriage should be subject to different rules. We confirm our provisional recommendation that the declarations which we recommend should be available as of right. This will, however, be subject to the power of the court, in exceptional circumstances, to withhold relief as a matter of public policy.[215]

G. To what extent should declarations be binding?

3.41 Under the present law, as has been seen,[216] a declaration under section 45 binds the Crown and all other persons, but so as not to prejudice any person if obtained by fraud or collusion or unless that person has been given notice of, or was made a party to, the proceedings or claims through such a person.[217] The present law as to the effect of declarations under Order 15, rule 16 is less clear: the rule states that the court may make "binding declarations of right whether or not any consequential relief is or could be claimed" but the rule taken as a whole seems to operate merely so as not to prevent the exercise of a declaratory jurisdiction. Just as the rule does not specify what declarations are available, so (it may be argued)[218] it does not state the effect of a declaration except that it is "binding".[219]

3.42 In relation to the declarations as to status which we recommend[220] should be made available by statute the choice of policy seems to us to be between, on the one hand, making the declarations binding on everyone without exception (including the Crown) and, on the other hand, making them binding only on those who are parties to the proceedings (including the Crown).[221] The former solution was put forward in the Working Paper;[222] the latter has been recommended by us in relation to declarations of parentage in our Report on Illegitimacy.[223] The argument in favour of a binding effect *in rem* would seem to

[212] Law Com. No. 118 (1982).
[213] *Ibid.*, para. 10.36.
[214] *Bateman* v. *Bateman* (1898) 78 L.T. 42; *Kassim* v. *Kassim* [1962] P. 224, 234.
[215] See *Puttick* v. *A.-G.* [1980] Fam. 1.
[216] See para. 2.4 above.
[217] Apart from *The Ampthill Peerage* [1977] A.C. 547, there appears to be no reported case where this proviso has been invoked by anyone alleging to be "prejudiced" by the declaration.
[218] Cf. the New Zealand Declaratory Judgments Act 1908 which in s. 2 speaks of "binding declarations" in the same terms as in R.S.C., Ord. 15, r. 16 and in s. 4 states that the effect of a declaration is as in an action (i.e., *in personam*).
[219] It is not entirely clear whether a declaration of status under R.S.C., Ord. 15, r. 16 is binding *in rem*: see para. 2.10 above.
[220] I.e., declarations as to the initial validity or subsistence of a marriage, declarations as to the validity of a divorce, annulment or judicial separation, declarations of legitimacy, and declarations as to the validity of a legitimation or of a foreign adoption: see paras. 3.4–3.16 and 3.33–3.37 above.
[221] I.e., the model of s. 45 of the Matrimonial Causes Act 1973.
[222] Para. 37.
[223] Law Com. No. 118 (1982), paras. 10.37–10.39. The "halfway house" scheme in s. 45 seems an unattractive one to perpetuate. Although those not given notice are not bound, which makes the solution look like a binding effect *in personam* only, in practice it seems much more akin to a binding effect *in rem*: see particularly *The Ampthill Peerage* [1977] A.C. 547.

be stronger in relation to declarations of status[224] than in relation to declarations of fact, such as parentage. The purpose of a declaration regarding status is to still doubts once and for all;[225] and unless the declaration is *in rem* it will largely fail in achieving this purpose. Further, some declarations as to status, for example, those relating to the validity of a marriage, are closely analogous to decrees of nullity (and divorce) which undoubtedly operate *in rem*. We do not think that the binding effect of each should be different. If declarations as to the validity of a marriage are to operate *in rem*, so also should the declarations we recommend as to legitimacy, legitimation and foreign adoption. It would be anomalous and inconvenient if, in the present context, a distinction were drawn between two categories of declaratory relief both of which determine a person's status. The importance of finality in litigation is the same in each case. It follows that our recommendation is that the declarations recommended in this Report[226] should be fully binding *in rem*. Any concern, for example, that a person not given notice of the proceedings would be unable to re-open litigation would, in our view, adequately be met by the procedural safeguards which we recommend later in this Report.[227] Moreover, parties to the proceedings will have the usual remedy of appeal,[228] and a declaration, like any other judgment, can be rescinded if it is obtained by fraud.[229]

H. Rules of jurisdiction

3.43 Under the existing law, jurisdictional requirements for obtaining declarations vary according to the type of declaration claimed.[230] This variation is partly the result of statutory provisions going back to 1858[231] and partly due to judicial attempts to determine the proper jurisdictional rules for applications under Order 15, rule 16. We suggested in the Working Paper[232] that some uniform principle should be introduced so that there is a clear, logical and satisfactory basis for the exercise of jurisdiction. All commentators agreed.

(i) Validity of marriage or of foreign divorce, annulment or legal separation

3.44 There was general agreement that the jurisdictional rules in these two cases should be based on those for nullity, which are now to be found in section

[224] In principle, a determination as to status should be binding *in rem*: see *The Ampthill Peerage* [1977] A.C. 547, 576 *per* Lord Simon of Glaisdale ("...if the judgment is as to the status of a person, it is called a judgment in rem and everyone must accept it.").

[225] The importance of finality in litigation as to a person's status was emphasised by Lord Wilberforce in *The Ampthill Peerage* [1977] A.C. 547, 568: "It is vitally necessary that the law should provide a means for any doubts which may be raised to be resolved, and resolved at a time when witnesses and records are available. It is vitally necessary that any such doubts once disposed of should be resolved once for all and that they should not be capable of being re-opened whenever, allegedly, some new material is brought to light which might have borne upon the question. How otherwise could a man's life be planned?"

[226] See n. 220 above.

[227] See paras. 3.57–3.63 below.

[228] The court has a very wide discretion to enlarge the time limit for appealing in cases where it is just to do so: *Carson* v. *Carson* [1983] 1 W.L.R. 285, 294 (C.A.). See also *The Ampthill Peerage* [1977] A.C. 547, 569 and 576.

[229] As to the meaning of fraud, see n. 34 above: "...the fraud must be alleged with particularity and proved distinctly": *The Ampthill Peerage*, above, at p. 591 *per* Lord Simon of Glaisdale; *Jonesco* v. *Beard* [1930] A.C. 298.

[230] See para. 2.12(d) above.

[231] The Legitimacy Declaration Act 1858.

[232] Para. 47.

5(3) of the Domicile and Matrimonial Proceedings Act 1973. We recommend that the court should have jurisdiction to grant a declaration as to the validity of a marriage[233] or of a foreign divorce, annulment or legal separation if (and only if either of the parties to the marriage:—

(1) is domiciled in England and Wales at the date when the proceedings are begun; or

(2) was habitually resident in England and Wales throughout the period of one year ending with that date; or

(3) died before that date and either:—

  (i) was at death domiciled in England and Wales, or

  (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

3.45 The foregoing proposals would have the effect of abolishing the ground of jurisdiction laid down in *Lepre* v. *Lepre*,[234] namely that where the validity of a foreign decree is a necessary step in proceeding to adjudication on a matter within the jurisdiction of the court, that of itself gives the court jurisdiction to grant a declaration. In that case Sir Jocelyn Simon P. held that, as he had jurisdiction to entertain the divorce proceedings, he must have jurisdiction to make the declaration sought as to the validity of a foreign nullity decree for he could not grant the divorce without first ascertaining whether there was a subsisting marriage to dissolve. Under our proposals the jurisdictional grounds will be essentially the same as those for divorce so the question will no longer arise in that particular context. But the court may well have jurisdiction to determine, say, succession rights and the determination may depend on whether or not a marriage is valid.[235] In our view, although clearly the court should be entitled to determine the point, it should not make a declaration *in rem*. The finding which it makes as to the marital status of a party will bind only the parties to the litigation; and this is as it should be since all parties whose interests may be affected by a judgment *in rem* may not be before the court, or have received notice of the proceedings, as under our procedural proposals[236] they would on an application for a declaration.

(ii) Legitimacy and legitimation

3.46 As we have seen,[237] the jurisdictional criteria in respect of a declaration of legitimacy are very strict while those in respect of a declaration of legitimation are non-existent. We proposed in the Working Paper that the jurisdictional criteria should be the same in both cases.[238] This was agreed on consultation and we so recommend.

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[233] I.e., a declaration as to the initial or subsisting validity of a marriage.

[234] [1965] P. 52; see para. 2.9(c) above.

[235] E.g., the validity of a person's marriage may be relevant in deciding whether he or she is entitled to succeed to a deceased's estate. But the resolution of that question does not demand the granting of a declaration; it can be determined as between the parties concerned by an application for directions by the personal representatives or in an action against them.

[236] See para. 3.63 below.

[237] Para. 2.12(d) above.

[238] Para. 49.

3.47 In our Report on Illegitimacy[239] we have recommended that the court should have jurisdiction to entertain an application for a declaration of parentage only where the applicant was born in England or Wales. We do not think that the proposed rule provides an appropriate analogy for declarations as to legitimacy and legitimation; the connection is too slight in itself to provide an appropriate jurisdictional link in relation to matters of status. Moreover, such a jurisdictional requirement could operate unduly restrictively by excluding a number of people who by reason of their domiciliary or residential connections should be entitled to seek relief in our courts.

3.48 In our Working Paper, we provisionally recommended[240] that in relation to jurisdictional connections with the applicant, they should be the same in such matters of status as if he was seeking a declaration as to the validity of his marriage, i.e., based on his domicile or one year's habitual residence. On consultation there was no dissent from this proposal. We further proposed that jurisdiction should be found on no other basis and we rejected any requirement that the jurisdictional connection should be with the respondent. Most commentators agreed with this view, though two argued, on the analogy with the nullity jurisdictional rules we have recommended for declarations as to marital status,[241] that the domicile or habitual residence of the respondent, who might be a parent, should suffice. We are not persuaded that this analogy is appropriate for declarations as to legitimacy and legitimation. Such declarations differ from those in respect of marriage in that they do not relate directly to the marriage. Further, if our proposals are implemented, only the *propositus* himself will be able to apply for a declaration of legitimacy or a declaration as to the validity of a legitimation.[242] Since the result of the application is to determine the applicant's own status we think that the jurisdictional connection should be with him alone.

3.49 We recommend that the court should have jurisdiction to grant a declaration of legitimacy or a declaration as to the validity of a legitimation if (and only if) the applicant[243]:—

(1) is domiciled[244] in England and Wales at the date when the proceedings are begun; or

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[239] Law Com. No. 118 (1982), paras. 10.21 and 10.34.

[240] See para. 49.

[241] See para. 3.44 above.

[242] See para. 3.36 above. In relation to declarations as to matrimonial status, we have recommended that anyone with a sufficient interest in obtaining the declaration should be able to apply: see para. 3.33 above.

[243] The applicant and the *propositus* will be the same person.

[244] The domicile of origin of a legitimate child is that of his father. Until the child attains the age of 16 or marries under that age, his domicile will follow that of his father. If the father dies the child's domicile will thereafter usually follow that of his mother, and this principle has by statute been extended to cases where the parents are separated and the child has his home with the mother and has no home with his father: Domicile and Matrimonial Proceedings Act 1973, s. 4. A circular argument will therefore develop in considering whether the court has jurisdiction where the applicant for a declaration of legitimacy is an unmarried child under 16: the domicile of the child depends on whether he is legitimate, and jurisdiction to entertain the application depends on the child's domicile. We envisage that a court will resolve this problem, as has been done in other contexts (see, e.g., *Garthwaite* v. *Garthwaite* [1964] P. 356 (C.A.)), by not declining jurisdiction until it has ascertained whether or not the alleged fact upon which its jurisdiction is found is true. In practice this will mean that jurisdiction will depend on the domicile of the child's mother or father, as the case may be.

(2) was habitually resident in England and Wales throughout the period of one year ending with that date.

(iii) Foreign adoptions[245]

3.50 In determining what jurisdictional rules should apply to declarations as to the validity of a foreign adoption, essentially the same considerations are involved as those in relation to declarations of legitimacy and legitimation. We think that the jurisdictional rules should be the same in both cases, that is to say, the applicant's domicile[246] in England and Wales at the date of the application or his habitual residence here throughout the period of one year ending with that date;[247] and we recommend accordingly.

I. Which courts?

3.51 With one important exception the Family Division of the High Court[248] has exclusive jurisdiction to hear applications for declarations as to matrimonial status, both under section 45 of the Matrimonial Causes Act 1973 and under R.S.C., Order 15, rule 16. The exception is that an application for a declaration of legitimation under section 45(2) of the 1973 Act can be made either in the Family Division of the High Court or in the county court,[249] subject to a power of transfer to the High Court.[250]

3.52 In the Working Paper we provisionally proposed[251] that both the High Court and the county court should have jurisdiction to hear applications for the declarations proposed by us, and that, as with divorce and nullity and other matrimonial causes,[252] proceedings for a declaration should be commenced in a divorce county court and, if defended, should be transferred to the High Court. A majority of those who commented on this proposal agreed with it.

3.53 There are at present legislative proposals before Parliament which would affect the provisional proposal made in our Working Paper; and it is

[245] In the absence of any reported English decision, it is not possible to state with confidence what are the jurisdictional criteria enabling the court to make declarations as to the validity of foreign adoptions under R.S.C., Ord. 15, r. 16.

[246] An adopted child is now treated in law as if he had been born to the adopter or adopters in wedlock: Children Act 1975, Sched. 1, para. 3(1). Accordingly, the domicile of an adopted child will be determined as if he were the legitimate child of his adopted parent or parents, i.e., an adopted child will acquire the domicile of the adopter, or of his adoptive father in the case of a joint adoption, subject to the rules set out in the Domicile and Matrimonial Proceedings Act 1973, s. 4. We envisage that the court, in considering whether it has jurisdiction to entertain an application on behalf of an unmarried child under 16, will proceed on the same basis as in the case of an application for a declaration of legitimacy: see n. 244 above

[247] See para. 3.49 above.

[248] Supreme Court Act 1981, Sched. 1, para. 3.

[249] In the three years 1980–1982 the number of applications for declarations of legitimation under s. 45 made in the High Court were 1, 0 and 1 respectively and in the county court 12, 19 and 10 respectively.

[250] Sect. 45(3). The county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court must, transfer the application to the High Court.

[251] Para. 58.

[252] See Matrimonial Causes Act 1967, s. 1(3). An application for a declaration as to family status under section 45 of the Matrimonial Causes Act 1973 or under R.S.C., Ord. 15, r. 16 is not a matrimonial cause within the meaning of section 10(1) of the Matrimonial Causes Act 1967 (as amended by the Supreme Court Act 1981, s. 152(1) and Sched. 5).

convenient at this stage to summarise the proposals contained in Part V of the Matrimonial and Family Proceedings Bill. This Bill which received its second reading in the House of Lords on 21 November 1983, provides for the repeal of the Matrimonial Causes Act 1967 and also makes provision with respect to the family jurisdiction of the High Court and county courts and the transfer of family proceedings between those courts. Part V of the Bill will have the following effect if it becomes law in its present form:—

(a) Although divorce, nullity and other matrimonial causes[253] would, as at present, have to be started in a divorce county court, there would be no requirement that such proceedings must be transferred to the High Court if they cease to be undefended; instead the divorce county court would have power to transfer both defended and undefended proceedings to the High Court and the High Court would be able to transfer the proceedings back again.

(b) In relation to family proceedings[254] in the High Court or county court which could be commenced in either court, the court before which the proceedings are pending would be able to transfer (or re-transfer) the proceedings to the other.

In both cases, the power of transfer[255] would be exercised in accordance with any directions given (under a new power conferred for this purpose) by the President of the Family Division of the High Court, with the concurrence of the Lord Chancellor.[256]

3.54 An object of these legislative proposals, with their emphasis on flexibility, is to ensure so far as possible that cases are in fact dealt with at the level which is appropriate in the circumstances. We have therefore given further consideration to our provisional conclusion in the Working Paper in the light of these proposals and we no longer adhere to the view that all applications for declarations should be commenced in a divorce county court. Proceedings for declarations are often of some complexity, involving protracted investigations of fact or difficult questions of law, including the law of a foreign country. Such cases are clearly more suitable for determination by the High Court and we think there is little justification for requiring the applicant to commence proceedings in the county court in all cases. Conversely, some cases will be suitable for trial in the county courts, as is evidenced by the fact that applications for declarations of legitimation are already heard there. In our view, both the High Court and the county court should have concurrent jurisdiction under the legislation proposed by us, and the applicant should be able to commence proceedings for the

[253] An application for a declaration is not a matrimonial cause for the purposes of the Bill.

[254] This expression is broadly defined to mean proceedings relating to business of any description which in the High Court is exclusively assigned to the Family Division by or under s. 61 of (and Sched. 1 to) the Supreme Court Act 1981.

[255] The power of transfer would be in addition to the power of the High Court to transfer proceedings to itself: County Courts Act 1959, s. 75B added by Supreme Court Act 1981, Sched. 3, para. 8.

[256] Further, section 50 of the Matrimonial Causes Act 1973 would be repealed and the power to makes rules of court for the purposes of family proceedings (including matrimonial causes) would be vested in a new rule-making authority constituted by the Bill.

declarations we have recommended[257] in either court, subject to the power of the court to transfer such proceedings pending before it to the other; and we recommended accordingly. This proposal would be convenient for the litigants; it has the merit of flexibility and would enable cases to be redistributed between the two courts according to weight; and it accords with the general scheme of the legislative proposals, to which we have already referred, for the transfer of family business between the High Court and county courts.

3.55 In order to make it clear that the jurisdiction of the High Court under the legislation we recommend should be exclusively assigned to the Family Division, clause 7(1) of the draft Bill appended to this Report amends the Supreme Court Act 1981 by including applications for declarations under our statutory scheme within paragraph 3 of Schedule 1[258] of that Act. The effect of this provision would also be to bring proceedings for the declarations recommended in this Report[259] within the definition of "family proceedings" for the purposes of the Matrimonial and Family Proceedings Bill and therefore within the scope of the transfer provisions contained in it. However, until that Bill becomes law it is necessary to confer power to enable rules of court to be made for the transfer of proceedings under the legislation we recommend, and accordingly clause 7(2) of the draft Bill appended to this Report amends section 45 of the Courts Act 1971.[260]

J. Ancillary relief

3.56 If there is a petition for a decree of nullity, the court has full powers to make orders for financial relief for the spouse and children. No change in that position is recommended in this Report. Are similar powers required in relation to other declarations as to matrimonial status, there being no such powers at the moment? We do not think that it is necessary or desirable to make any such recommendations in this Report. If a declaration of validity of marriage is made, the applicant has all the rights of a spouse under the general law. If the matter in issue is the validity of a foreign divorce, legal separation or annulment, we have recommended recently that the courts should have power in certain circumstances to grant financial relief notwithstanding that the foreign decree is recognised in this country.[261]

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[257] I.e., declarations as to the initial validity or subsistence of a marriage, declarations as to the validity of a divorce, annulment or legal separation, declaration of legitimacy, and declarations as to the validity of a legitimation or of a foreign adoption: see paras. 3.4–3.16 and 3.33–3.37 above.

[258] This specifies the business which is exclusively assigned to the Family Division of the High Court; and see n. 254 above.

[259] See n. 257 above.

[260] This section confers power for rules of court to provide for the transfer of proceedings (under certain specified legislation) from a county court to the High Court and from the High Court to a divorce county court. The Matrimonial and Family Proceedings Bill provides for the repeal of this section. If that Bill becomes law, clause 7(2) of the draft Bill appended to this Report will need to be deleted.

[261] Report on Financial Relief after Foreign Divorce, Law Com. No. 117 (1982). The Matrimonial and Family Proceedings Bill, which received a second reading on 21 November 1983, seeks to implement the recommendations made in that Report.

K. Standard of proof and procedural safeguards

Proceedings for declarations

3.57 Since we are proposing that the declarations under the new statutory regime should be obtainable as of right and be fully binding *in rem*, it is clearly desirable that there should be safeguards to protect the interests of third parties and the public and that the court should only grant a declaration on clear and convincing evidence. The procedural safeguards which we propose at paragraphs 3.58 and 3.63 below are designed to ensure that all interested parties should have the opportunity of being heard and that there will, so far as is practicable, be "a proper contradictor"[262] to test the applicant's evidence. So far as the standard of proof is concerned, the courts have indicated that the standard is a high one and that accordingly a declaration ought not to be granted if the evidence in support of it cannot be properly investigated and verified.[263] The draft legislation[264] annexed to this Report reproduces the effect of the present law by requiring the facts alleged in support of a declaration to be proved "to the satisfaction of the court".[265]

3.58 At present where declarations are sought under section 45 of the Matrimonial Causes Act 1973 the Attorney-General has an important role to play in protecting the public interest and in assisting the court. He must automatically be made a respondent to the proceedings in every case.[266] In our Working Paper we suggested that it is not necessary for the Attorney-General automatically to be made a party to the proceedings because in most cases his preliminary investigations satisfy him that the declaration in question is properly sought and that there is no real need for him to take further part in the proceedings.[267] Our provisional proposal[268] was that the Attorney-General, instead of being made a party to each application, should be empowered to intervene, either upon a reference from the court or of his own accord. This was agreed on consultation. We recommend a provision to the effect that the court may, at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings, direct that all necessary papers be sent to the Attorney-General. The Attorney-General may, whether or not he has been sent the papers pursuant to a direction of the court, argue before the court any question in relation to the application which the court considers it necessary

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[262] "... that is to say, someone presently existing who has a true interest to oppose the declaration sought": *Russian Commercial and Industrial Bank* v. *British Bank of Foreign Trade* [1921] 2 A.C. 438, 448 *per* Lord Dunedin; see also *Aldrich* v. *A.–G.* [1968] p. 281, 285 *per* Ormrod J.

[263] See *Aldrich* v. *A.–G.* [1968] P. 281, 295.

[264] See clause 4(1). In relation to declarations of parentage, we have also recommended that parentage should be proved "to the satisfaction of the court": see our Report on Illegitimacy, Law Com. No. 118 (1982) para. 10.22 and clause 27(6) of the draft Family Law Reform Bill attached to that Report.

[265] This formulation is intended to make it clear that the standard of proof is high and that the court should only grant a declaration when the evidence in support of it is clear and convincing. As in other civil proceedings, the burden of proof will be on the applicant.

[266] Sect. 45(6); a copy of any application for a declaration and supporting affidavit must be delivered to the Attorney-General at least one month before the application is made.

[267] The number of petitions for declarations of legitimation in the three years 1980–1982 were 13, 19 and 11 respectively. There are no petitions recorded (in the *Judicial Statistics* for those years) for any other declaration available under the Matrimonial Causes Act 1973, s. 45.

[268] Working Paper No. 48, Appendix, para. 1. This proposal was made in consultation with the Treasury Solicitor, who in practice acts on behalf of the Attorney-General in cases under s. 45.

to have fully argued or take such other steps as he thinks necessary or expedient.[269]

3.59 We also recommend that the existing provisions as to the court being able to hear a case *in camera* and as to restrictions on publicity, which apply to applications under section 45 of the Matrimonial Causes Act 1973,[270] should apply to applications for declarations under the proposed new statutory regime.

Proposed rules of court

3.60 So far we have considered the safeguards which we think ought to be embodied in the statute. We now make proposals for procedural provisions, such as the giving of notice to interested persons and in proper cases to the Attorney-General, which can more appropriately be implemented by rules of court. These proposals are in substance those set out in the Appendix to our Working Paper. Consultation revealed a general consensus in favour of the safeguards we proposed, and we have taken into account the suggestions made by some commentators on points of detail.

3.61 The procedural requirements for applications under section 45 of the Matrimonial Causes Act 1973 for a declaration as to the initial validity of a marriage or for a declaration of legitimacy or legitimation are set out in the Matrimonial Causes Rules.[271] A petition for a declaration as to the initial validity of a marriage must state the matters set out in rule 109(2)[272] and also whether there are any proceedings continuing in any country outside England and Wales which relate to the marriage or are capable of affecting its validity.[273] A petition for a declaration of legitimacy or legitimation is required to state the matters referred to in rule 110(1).[274] In addition, the petition under section 45 of the 1973 Act for a declaration as to the initial validity of a marriage or for a declaration of legitimacy or legitimation must be supported by an affidavit by the petitioner verifying the petition and giving particulars of every person whose interest may be affected by the proceedings and his relationship to the petitioner;[275] and the petitioner must on filing the petition issue a summons for directions as to the persons who must be made respondents.[276]

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[269] In our Report on Illegitimacy we have made similar proposals in relation to declarations of parentage: Law Com. No. 118 (1982), paras. 10.24 and clause 27 of the draft Family Law Reform Bill appended to that Report.

[270] See para. 2.4 above.

[271] S.I. 1977 No. 344, rr. 109–111.

[272] I.e., *inter alia*, the place and date of any ceremony of marriage to which the application relates; whether there have been any previous proceedings between the parties with reference to the marriage or ceremony of marriage or with respect to the matrimonial status of either of them, and, if so, the nature of the proceedings; all other material facts alleged by the petitioner to justify the making of the declaration and the grounds on which he alleges that the court has jurisdiction to make it.

[273] Rule 111(2) and Appendix 2, para. 1(j).

[274] I.e., *inter alia*, the grounds on which the petitioner relies, the date and place of birth of the petitioner and, if the petitioner is known by a name other than that which appears in his birth certificate, the petition must state that fact.

[275] Rule 110(2). If the petitioner is under 16, the affidavit must, unless otherwise directed, be made by his next friend.

[276] Rule 110(4).

3.62 Since, as we have already indicated,[277] the declarations we have recommended will be binding *in rem* and be obtainable as of right, it is important that they should not be made without ensuring so far as practicable that all those who have an interest in the matter are notified and are given an opportunity of appearing and being heard. The precise details of the rules of court will be a matter for the rule-making authority,[278] but we envisage that the procedure for the declarations proposed in this Report would be substantially similar to that applicable in cases under section 45 of the Matrimonial Causes Act 1973.

3.63 Our recommendation is that the rule-making authority should consider introducing a scheme which would have the following features:—

(a) Every applicant for a declaration as to matrimonial status[279] should in the first instance make the other spouse[280] to the marriage in respect of which the declaration is sought a respondent to his application; in the case of an application for a declaration of legitimacy or legitimation, the applicant should make both parents (if alive) respondents; and in the case of an application for a declaration as to the validity of a foreign adoption, the applicant should make the adopter or adopters (if alive) respondents.

(b) The applicant should then issue a summons for directions supported by an affidavit verifying the application and giving particulars of every person whose interest may be affected by the proceedings and his relationship to the applicant.[281]

(c) The Registrar should at the hearing of the summons for directions give directions as to the persons who should be added as respondents or given notice of the proceedings to enable them to apply to be so added.[282]

(d) The Registrar should either be required or have a discretion to direct that notice of the application be given to the Attorney-General in the following cases:—

  (i) where the result of the application may affect British nationality or a British title of honour;

  (ii) where there is involved a point of law which the court deems it necessary or expedient to have fully argued;

  (iii) where there is no respondent;

  (iv) where a respondent or an interested person cannot be served, or if served cannot reasonably be expected to take part in the proceedings even if desirous of doing so (e.g., where he is in a country where for political reasons he is deprived of normal opportunities to take part);

  (v) where a party is a minor and is not represented by a guardian *ad litem*;

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[277] Para. 3.57 above.

[278] I.e., the authority constituted by the Matrimonial Causes Act 1973, s. 50; or, if the Matrimonial and Family Proceedings Bill (now before Parliament) becomes law, the rule-making body constituted by Part V of that Bill: see Appendix A to this Report, draft clause 8(3) and the explanatory notes thereto.

[279] I.e., a declaration that a marriage was initially valid, that a divorce, annulment or judicial separation is valid or invalid in English law, or that a marriage subsists or has ceased to subsist.

[280] Or spouses, in the case of a polygamous marriage. At present a declaration can be made as to the validity of a polygamous marriage under s. 45 of the Matrimonial Causes Act 1973 or under the court's inherent jurisdiction: Matrimonial Causes Act 1973, s. 47(1) and (3).

[281] See para. 3.61 above.

[282] If an interested person has not been notified, he may nevertheless apply to the court at any stage of the proceedings to be added as a party: see R.S.C. Ord. 15, r. 6(2)(b); Matrimonial Causes Rules 1977, r. 3(1).

(vi) where it is advisable in all the circumstances, particularly in cases in which a matter of public policy may arise.

The Registrar's power to direct that notice of the application be given to the Attorney-General should be exercisable not only at the hearing of the summons for direction but at any time during the progress of the suit before trial.

Proceedings for annulment of a void marriage

3.64 A decree of nullity of a void marriage is in effect the converse of a declaration of the initial validity of a marriage. Both are concerned with the same problem, namely, whether a marriage was or was not valid; and a decree of nullity of a void marriage is obtainable as of right and fully binding *in rem*. In our Working Paper we suggested that it would be anomalous to have a provision requiring certain safeguards to be observed where it is sought to declare that the marriage was valid but not requiring any such safeguards where it is sought to declare that the marriage was void. Our provisional conclusion,[283] which was supported on consultation, was that the proposed safeguards should apply not only to petitions for declarations but also to petitions for nullity of a void marriage.[284] We recommend that the rule-making body should consider adapting the provisions recommended at paragraph 3.63 above to petitions for nullity of a void marriage.

[283] Para. 53.

[284] The number of petitions for nullity of a void marriage in the three years 1980–1982 were 86, 115 and 95 respectively. The Treasury Solicitor has indicated that he would be able to act in these cases on the same basis as in the case of applications for a declaration. We do not propose however that the Attorney-General should be involved beyond the substantial relief claimed, e.g., he would not be concerned with questions of ancillary relief such as orders for financial provision or for custody of the children. The proposed procedure is not intended to affect the existing procedure under which the court can invite the Queen's Proctor to appear as *amicus curiae* or the Queen's Proctor can intervene to show cause why a decree nisi of nullity should not be made absolute: see Matrimonial Causes Act 1973, ss. 8 and 9.

PART IV

JACTITATION OF MARRIAGE AND THE GREEK MARRIAGES ACT 1884

A. Jactitation of Marriage

(a) The nature of the remedy and historical background

4.1 The purpose of a petition for jactitation of marriage[285] is to prevent unjustifiable assertions that a marriage exists. The nature of the remedy is a declaration by the court that the parties are not married, coupled with an injunction forbidding the respondent from claiming that he or she is married to the petitioner. Only the person claiming to be misrepresented can bring the suit[286] which only lies against the person claiming to be married to the petitioner. The declaration that the parties are not married does not bind third parties,[287] and the suit cannot therefore be used to forbid third parties from alleging the existence of a marriage. The defences to the suit are three in number: first, a denial that the assertion was made;[288] second, an admission that it was made but that it is true;[289] third, that the misrepresentation was acquiesced[290] in by the petitioner.[291]

4.2 If the respondent in answer to the jactitation suit claims that there is a valid marriage between him and the petitioner, the court can, if it so finds, make a declaration as to the validity of the marriage which, apparently, is binding *in rem*.[292] Consequently, a suit for jactitation of marriage could be used by parties desiring to obtain a declaration that their marriage was valid; indeed, prior to the enactment of the Legitimacy Declaration Act 1858[293] this was the only means of obtaining a bare declaration as to the validity of a marriage.[294]

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[285] The remedy, which is inherited from the ecclesiastical courts, rests on a non-statutory basis, except in that section 26 of the Supreme Court Act 1981 (replacing s. 21 of the Supreme Court of Judicature (Consolidation) Act 1925 gives the High Court jurisdiction in relation to jactitation of marriage, and s. 1 of the Matrimonial Causes Act 1967 gives divorce county courts jurisdiction to hear undefended jactitation petitions.

[286] *Re Campbell* v. *Corley, ex parte Campbell* (1862) 31 L.J. (P.M. & A.) 60. The jurisdictional requirements for jactitation proceedings are far from clear. There is, however, some support for the view that the jurisdictional rules are the same as the common law rules in suits to annul a marriage alleged to be void, that is to say, the court has jurisdiction if, at the commencement of the proceedings, either party is domiciled in England or the respondent is resident in England, or if the marriage was celebrated in England. *Halsbury's Laws of England,* 4th ed., (1974), vol. 8, para. 504; see also *Rayden on Divorce,* 14th ed., (1983), vol. 1, p. 81.

[287] *Duchess of Kingston's Case* (1776) 20 State Tr. 355; it seems that it is not even conclusive as between the parties, but that the case can be re-opened on the respondent showing, on new evidence, that the parties were married: *ibid.*, at pp.534, 544, 545.

[288] *Hawke* v. *Corri* (1820) 2 Hag. Con. 280.

[289] *Lindo* v. *Belisario* (1795) 1 Hag. Con. 216; (1796) 1 Hag. Con. App. 7; *Hawke* v. *Corri, supra*; *Thompson* v. *Rourke* [1893] P. 70 (C.A.); *Goldstone* v. *Smith* (1922) 38 T.L.R. 1179; *Schuck* v. *Schuck* (1950) 66 (pt. 1) T.L.R. 1179; *Igra* v. *Igra* [1951] P. 404.

[290] *Thompson* v. *Rourke* [1893] P. 11, 14 ("In other words has [the petitioner] allowed herself to be respresented as his wife?").

[291] See the cases referred to in n. 289 above.

[292] Poynter, *Ecclesiastical Court* (1824) p. 271; *Goldstone* v. *Smith* (1922) 38 T.L.R. 403.

[293] The 1858 Act enabled the court to grant declarations of validity of marriage, legitimacy and British nationality; see para. 1.3 above.

[294] Ecclesiastical courts made such declarations only in suits for restitution of conjugal rights or for a divorce a *mensa et thoro* (i.e. a judicial separation), or if the issue as to whether a marriage was valid was referred to it by the temporal courts (the ecclesiastical court being the only court which had jurisdiction to pronounce on that issue) or in suits for jactitation of marriage where the respondent's defence that there was a valid marriage between him and the petitioner was upheld. Only the last method resulted in a bare declaration.

4.3 Prior to Lord Hardwicke's Marriage Act 1753, which first made a formal ceremony of marriage compulsory in England and Wales, marriage was constituted either *de praesenti* by an exchange of vows with the intention that a marriage should come into effect then and there,[295] or *de futuro* by an exchange of promises to be married at a future date followed by cohabitation. Such informality, not unnaturally, frequently gave rise to doubt or dispute as to whether a marriage had taken place and until the Act of 1753 a suit for jactitation was the usual mode by which questions as to the validity of a marriage was determined.[296] With the requirement of a formal ceremony in order to constitute a marriage, proof of such ceremony was all that was needed to establish a marriage and the necessity for frequent resort to the court for this purpose disappeared.[297] The need for jactitation of marriage as a method of resolving genuine doubts as to matrimonial status declined further with the enactment of the Legitimacy Declaration Act in 1858.

4.4 In addition to its use in cases of doubt as to the validity of a marriage, a jactitation suit was at one time extensively used to obtain collusively,[298] and even fraudulently,[299] a declaration that a first marriage was invalid, so that a second marriage would be recognised as being valid, and not bigamous. A decree[300] of jactitation of marriage was conclusive evidence that the petitioner and the respondent were not married[301] and appears to have been sought where a decree of nullity could not be obtained.[302] But this procedure suffered a set-back in 1776 in the *Duchess of Kingston's Case.*[303] In that case the Duchess, in a prosecution for bigamously marrying the Duke of Kingston, relied by way of defence on a decree of jactitation in respect of her first marriage to another man, but it was held that the decree could be binding only on the parties to the suit and, therefore, was not binding on the Crown.[304]

4.5 The suit thereafter fell into "disrepute",[305] so much so that in 1820[306] Lord Stowell described it as "a proceeding not now very familiar to this court" and added "but it has nevertheless, I presume, a legal existence"; in 1892[307] the court found it necessary to adjourn a case because "suits for jactitation of marriage

[295] In *R.* v. *Millis* (1844) 10 Cl. & F. 544 the House of Lords added the further requirement that the marriage must be celebrated in the presence of an episcopally ordained clergyman. However, no other formalities, e.g., the publishing of banns and the presence of any other witnesses were required and the ceremony could take place at any time or in any place.

[296] Rogers, *Ecclesiastical Law* (1840), p. 484; Poynter, *op. cit.*, p. 266 says this was the only mode available.

[297] The Divorce and Matrimonial Causes Bill, which was introduced in 1857, contained a provision abolishing jactitation of marriage. This provision was opposed and it was omitted from the Bill: Hansard (H.C.), 4th August 1857, vol. 147, cols. 1057–1060.

[298] Rogers, *op cit.*, p. 482.

[299] Poynter, *op. cit.*, p. 265.

[300] The decree recited that "the party had failed in his proof and that the libellant is free from all matrimonial contract as far as yet appears": *Duchess of Kingston's Case* (1776) 20 State Tr. 355.

[301] *Hatfield* v. *Hatfield* (1725) Str. 960; Burn, *Ecclesiastical Law,* 2nd. ed. (1767), pp. 427–428.

[302] Rogers *op. cit.*, p. 482.

[303] (1776) 20 State Tr. 355.

[304] *Ibid.*, at 534, 544, 545; and see n. 287 above.

[305] *Burn's Ecclesiastical Law,* 9th ed. (1842), vol. II, p. 500; Shelford *Marriage and Divorce* (1841), pp. 583–584.

[306] *Hawke* v. *Corri* (1820) 2 Hag. Con. 280, 281, 284.

[307] *Thompson* v. *Rourke* [1892] P. 244, 245, (C.A.); further proceedings [1893] P. 11, 70, 72 (C.A.): "A suit of jactitation is a rare proceeding..." *per* Bowen L.J.

are so rare in modern times that we desire to inquire into the practice"; in 1900[308] the court remarked that the suit has "fallen into disuse". Thereafter there were cases reported in 1906,[309] 1922,[310] 1950,[311] 1951[312] and 1968.[313]

(b) Our provisional proposals

4.6 We have twice before examined this topic. In Working Paper No. 34 we reached the provisional conclusion that this little used remedy is "today inappropriate and should be abolished". Whilst a majority of commentators[314] supported this conclusion, there were a number who were anxious to see the remedy retained or, at all events, not abolished unless an alternative remedy were provided to take its place. The substance of their arguments was that there were, albeit rarely, cases in which a person found himself or herself in an intolerable situation because someone falsely claimed to be married to him or her and was giving publicity to the false claim, but since the claim did not of itself necessarily amount to defamation, it could not be silenced except through the medium of a jactitation suit. It was also pointed out that the threat of instituting jactitation proceedings was in the commentators' actual experience, at times sufficient to put an end to the false allegations.

4.7 In these circumstances, in Working Paper No. 48 we did not recommend that the remedy be abolished. We said that if the suit is to be abolished it should only be done after a general review of civil remedies in respect of injurious statements.[315] On consultation there was no dissent from this conclusion.

(c) Our recommendation

4.8 We have given further consideration to this whole question, in the light of the comments received on the two Working Papers and the views expressed in more recent and limited consultations which we have undertaken,[316] and our final conclusion is that the suit for jactitation of marriage should be abolished.

4.9 Although in the past a jactitation suit may have been of use in obtaining a declaration as to the validity of marriage, it is no longer needed for that purpose today, more appropriate means being available for that purpose. Declarations as

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[308] *Cowley* v. *Cowley* [1900] P. 305, 313 (C.A.).
[309] *Ascroft* v. *Trevor*, The Times, 13 to 23 March 1906.
[310] *Goldstone* v. *Smith* (1922) 38 T.L.R. 403.
[311] *Schuck* v. *Schuck* (1950) 66 (pt. 1) T.L.R. 1179.
[312] *Igra* v. *Igra* [1951] P. 404. It would appear that in this case, and in *Schuck* v. *Schuck* (n. 311 above), the petitioner's real purpose in bringing jactitation proceedings was to obtain a declaration as to the validity of a foreign divorce.
[313] *Malhotra* v. *Pinfield-Welles*, The Times, 12 November 1968; for earlier proceedings, see The Times, 28 March 1968. In Working Paper No. 34 (1971) we said that this was the last case on record. Since then there has been another case: *Davids-Morelle* v. *Davids-Morelle* (1977; unreported).
[314] Including the President and an overwhelming majority of the judges of the Probate, Divorce and Admiralty Division.
[315] Para. 63.
[316] We consulted a number of interested persons and professional organisations on the question whether the suit for jactitation serves any useful purpose and ought to be retained. The balance of opinion was more or less on the same lines as on Working Paper No. 34.

to the initial validity of a marriage are obtainable under section 45 of the Matrimonial Causes Act 1973[317] and the court also has power, under its inherent jurisdiction as regulated by R.S.C., Order 15, rules 16 to grant declarations as to the validity of a foreign divorce or annulment, or as to the subsistence of a marriage whose initial validity is not in question.[318] These declarations will continue to be available under the new statutory regime which we have recommended.[319] If the false allegation of marriage is defamatory, as it may well be, if, for instance, the petitioner is married to someone else, a remedy is already available. That leaves one with the case where the false claim alleging the existence of a marriage is not in itself defamatory, but merely embarrassing to the party aggrieved. Thus the only remaining purpose of a jactitation suit is to restrain a party from repeating an embarassing falsehood about the existence of a marriage, and we do not think that it should continue to be available for this purpose. We have already referred[320] to the limitations of the remedy: it can be used only by one party to the alleged marriage against the other; it cannot be used to restrain a third party, for instance, a newspaper, from repeating the false allegation. For this and other reasons,[321] proceedings for jactitation of marriage are extremely rare,[322] and the action has been abolished in other common law jurisdictions.[323]

4.10 It could be argued that what is needed is not the abolition of the remedy but the creation of a more effective one. In our view, however, there is no valid reason why a false claim as to marriage should be treated differently from any other false claim. If a person makes a false claim, for instance, that he is someone's son or brother, or that the parties are engaged, such a claim does not of itself enable the person aggrieved to obtain in injunction,[324] even though the allegation may be just as embarrassing as an allegation that the parties are married.

4.11 Our recommendation is that the remedy of jactitation of marriage should be abolished.[325] The draft legislation appended to this Report so provides.

B. The Greek Marriages Act 1884

4.12 Between 1836 and 1837 marriages between members of the Greek Orthodox Church were celebrated in England in religious form in the belief by all concerned that they were valid in English law. In fact they were not valid as they failed to comply with legal requirements or, at best, there was doubt as to their validity. Consequently the Greek Marriages Act 1884 was passed, its object being "to remove doubts as to the validity of certain marriages of members of

[317] Para. 2.2 above.
[318] Paras. 2.7–2.8 above.
[319] See paras. 3.4–3.8 above.
[320] Para. 4.1 above.
[321] E.g., the availability of declaratory relief under s. 45 of the Matrimonial Causes Act 1973 and under the court's inherent jurisdiction.
[322] See para. 4.5 above. "These suits, already very rare, are likely to die out altogether in view of the right to apply to the court in an appropriate case for a declaration as to matrimonial status.": *Halsbury's Laws of England,* 4th ed., (1974) vol. 8, para. 504.
[323] Australia and New Zealand.
[324] He may, however, be able to obtain a declaration, under R.S.C., Ord. 15, r. 16, as to the absence of such a relationship.
[325] The abolition of this remedy will be without prejudice to the right of a person to seek a declaration, under R.S.C., Ord. 15, r. 16, that the parties are not married.

the Greek Church in England." Unfortunately, the Act as drafted was ineffective to remove those doubts, for instead of validating the doubtful marriages in question (as was done in numerous other Acts which validated doubtful or invalid marriages), the Act left the marriages invalid unless an interested party applied for a declaration of validity with regard to any particular marriage.

4.13 Two such applications are reported,[326] but, as we stated in the Working Paper, neither the Greek Orthodox authorities in England nor the Principal Registry[327] has any record to show whether any other applications have or have not been made. The total number of marriages to which the Act applies is 36, so that it is the fate of 34 marriages which is unknown. In theory the 1884 Act can be invoked at any time in the future, since the application for a declaration can be made by one of the parties to the marriage, by their children or grandchildren or by "any persons interested in the validity of any such marriage."[328] Grandchildren of persons married between 1836 and 1857 may well be alive today and a person may be "interested", e.g., for succession purposes, in obtaining a declaration of validity of marriage at any time within the reasonably foreseeable future. Though this is the theoretical position, it is doubtful whether in practice any further applications for a declaration are to be expected and the Act can probably be regarded as being, in practice, of no further utility.

4.14 We reached the provisional conclusion in the Working Paper[329] that there was little point and, indeed, a positive disadvantage in keeping on the statute book an Act which is, for practical purposes, spent and we proposed that the Act should be repealed and that, in order not to prejudice any person interested, the remaining 34 marriages (or so many of them as have not already been validated under the Act) should, subject to the limitations set out in the proviso to section 1 and in section 2 of the 1884 Act,[330] be now declared by statute to have been valid. We communicated this proposal to the Greek Orthodox Archbishop of Thyateira and Great Britain, as Head of the Greek Orthodox community here, and he approved of it. It was agreed on consultation and we so recommend.

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[326] *Zarafi* v. *A.-G.* (1885) 1 T.L.R. 683; *Scaramanga* v. *A.-G.* (1889) 14 P.D. 83.

[327] We are informed by the Principal Registry that none of their officials can recollect any application under the Act being made in the last 35 years.

[328] Sect. 1.

[329] Para. 69.

[330] Section 1: "Provided always, that this Act shall not extend to render valid any marriage which before the passing thereof has been declared invalid by any court of competent jurisdiction in any proceedings touching such marriage, or any right dependent on the validity or invalidity thereof, or any marriage where either of the parties thereto has afterwards during the life of the other intermarried with any other person."

Section 2: "Provided always, and be it further enacted, that the status of any person or any right of any person to any real or personal property or any estate or interest of any such person in any real or personal property which may be dependent on the invalidity of any such marriage shall not be altered, taken away, or injuriously affected by any decree made under the provisions of this Act; but shall be and remain as valid and effectual in law to all intents and purposes as if this Act had not been passed.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 We summarise here the conclusions and recommendations for reform set out in the earlier Parts of this Report and, where appropriate, we identify the relevant clauses in the Draft Declarations of Status Bill[331] to give effect to the recommendations.

The new statutory regime

(1) Section 45 of the Matrimonial Causes Act 1973 should be repealed, and replaced by new statutory provisions regulating the powers of the court to make declarations in matters of matrimonial status, legitimacy, legitimation and adoption.

(Paragraph 2.13; clause 8(1))

Proposed declarations in family matters under the new statutory regime

(2) The following declarations should be available by statute:—

(i) that a marriage was, when celebrated, a valid marriage;

(Paragraphs 3.4 and 3.33; clause 1(1)(a))

(ii) that English law recognises or, as the case may be, does not recognise a divorce, annulment or legal separation, whether obtained elsewhere in the British Isles or overseas;

(Paragraph 3.6; clause 1(1)(d) and (e))

(iii) that a marriage subsists or has ceased to subsist on a particular date.

(Paragraph 3.8; clause 1(1)(b) and (c))

(iv) that the applicant is legitimate, or that he has (or has not) become legitimated pursuant to statute or at common law.

(Paragraph 3.14; clause 2)

(v) that English law recognises or, as the case may be, does not recognise that the applicant has been validly adopted abroad.

(Paragraph 3.16; clause 3)

(3) The court should not have power[332] to grant a declaration as to the initial invalidity of a marriage, even in those cases where it cannot entertain a petition for a decree of nullity of a void marriage because the parties do not satisfy the jurisdictional requirements for the grant of such relief.

(Paragraph 3.19; clause 4(5)(a))

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[331] See Appendix A.

[332] I.e., either under the new statutory regime or under its inherent jurisdiction: see recommendation (7) below.

(4) The existing statutory right to apply in the Family Division for a declaration of British nationality should be abolished.[333]

(Paragraph 3.20)

(5) The court should not have power to make a declaration that a person is illegitimate.

(Paragraph 3.22; clause 4(5)(b))

(6) The court, on dismissing an application for a declaration, should not have power to make another declaration for which an application has not been made by a party.

(Paragraph 3.25; clause 4(3))

Relationship between the statutory regime and the court's inherent jurisdiction

(7) The declarations referred to at (2) above should only be available under, and in accordance with, the statutory regime. Such declarations, a declaration as to the initial invalidity of a marriage (referred to at (3) above) and a declaration that a person is illegitimate (referred to at (5) above) should not be available under the court's inherent jurisdiction.

(Paragraph 3.28; clause 4(4))

Scope

(8) In addition to the spouses themselves, anyone with a sufficient interest in obtaining a declaration as to marital status[334] should be able to apply. We do not propose any change in the existing rule that anyone with a sufficient interest may petition for a nullity decree in relation to a void marriage.

(Paragraph 3.33; clause 1(1) and (3))

(9) Only the child himself should be able to apply for a declaration of legitimacy or for a declaration as to the validity of a legitimation or of a foreign adoption.

(Paragraphs 3.36 and 3.37; clauses 2(1), (2) and 3(1))

(10) Proceedings for a declaration as to matrimonial status should be available after the death of one party or of both parties to the marriage. We do not propose any change in the existing rule that a decree of nullity of a void marriage may be granted after the death of one or of both parties to the marriage.

(Paragraph 3.28; clause 1(2)(c))

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[333] This would not affect the existing power of other Divisions of the High Court to make a declaration of British nationality under the inherent jurisdiction.

[334] I.e., a declaration that a marriage was initially valid, that a divorce, annulment or legal separation is valid or invalid in English law, or that a marriage subsists or has ceased to subsist.

(11) The declarations under the new statutory regime should:—

(a) be available as of right, subject to the power of the court to withhold relief as a matter of public policy;

(Paragraph 3.40; clause 4(1))

(b) be fully binding *in rem*.

(Paragraph 3.42; clause 4(2))

Jurisdictional rules

(12) The court should have jurisdiction to grant a declaration as to the validity of a marriage or of a foreign divorce, legal separation or annulment if (and only if) either of the parties to the marriage:—

(a) is domiciled in England and Wales at the date when the proceedings are begun; or

(b) was habitually resident in England and Wales throughout the period of one year ending with that date; or

(c) died before that date and either:—

(i) was at death domiciled in England and Wales, or

(ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

(Paragraph 3.44; clause 1(2))

(13) The court should have jurisdiction to grant a declaration of legitimacy or a declaration as to the validity of a legitimation or of a foreign adoption if (and only if) the applicant:—

(a) is domiciled in England and Wales at the date when the proceedings are begun; or

(b) was habitually resident in England and Wales throughout the period of one year ending with that date.

(Paragraphs 3.49 and 3.50; clauses 2(3) and 3(2))

Courts

(14) The Family Division of the High Court and the county court should have jurisdiction to entertain applications for declarations under the proposed statutory regime. The applicant should be able to commence proceedings in either court, subject to the power of the court to transfer proceedings pending before it to the other.

(Paragraphs 3.54 and 3.55; clauses 7(1) and 12(2))

Ancillary relief

(15) Ancillary relief should not be available on the making of a declaration.

(Paragraph 3.56)

Standard of proof

(16) The court should only grant a declaration if the facts alleged in support of the declaration are proved to its satisfaction.

(Paragraph 3.57; clause 4(1))

Procedural safeguards

(17) In proceedings for a declaration under the proposed statutory regime the court should be empowered to direct, at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings, that all necessary papers be sent to the Attorney-General. The Attorney-General may, whether or not he has been sent the papers pursuant to a direction of the court, argue before the court any question in relation to the application which the court considers it necessary to have fully argued or to take such other steps as he thinks necessary or expedient.

(Paragraph 3.58; clause 5(1) and (2))

(18) The existing provisions as to hearing *in camera* and restrictions on publicity in the case of applications under section 45 of the Matrimonial Causes Act 1973 should apply to declarations under the new statutory regime.

(Paragraph 3.58; clause 6(5))

(19) Provision should be made by rules of court for protecting the interests of third parties and the public, such as the giving of notice to interested persons and in proper cases to the Attorney-General, in proceedings for a declaration. Consideration should also be given to introducing similar provisions in relation to proceedings for nullity of a void marriage.

(Paragraphs 3.63 and 3.64)

Jactitation of marriage

(20) The suit for jactitation of marriage should be abolished.

(Paragraph 4.11; clause 9)

The Greek Marriages Act 1884

(21) The Greek Marriages Act 1884 should be repealed and such marriages as might have been validated under the Act if application were made in respect of them should, subject to the limitations set out in the Act, be declared to have been valid.

(Paragraph 4.14; clause 10)

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

J.G.H. GASSON, *Secretary*
29 *December* 1983

APPENDIX A

DRAFT

DECLARATIONS OF STATUS BILL

Arrangement of Clauses

Clause

DRAFT
OF A
BILL
TO

Make fresh provision as to the powers of courts to make declarations relating to the status of a person; to abolish the right to petition for jactitation of marriage; to repeal the Greek Marriages Act 1884; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Declarations as to marital status.

1.—(1) Subject to the provisions of this section, any person may apply to the court for one or more of the following declarations in relation to a marriage specified in the application, that is to say—

(*a*) a declaration that that marriage was at its inception a valid marriage;

(*b*) a declaration that that marriage subsisted on a date specified in the application;

(*c*) a declaration that that marriage did not subsist on a date so specified;

(*d*) a declaration that the validity of a divorce, annulment or legal separation obtained in any country outside England and Wales in respect of that marriage is entitled to recognition in England and Wales;

(*e*) a declaration that the validity of a divorce, annulment or legal separation so obtained in respect of that marriage is not entitled to recognition in England and Wales.

EXPLANATORY NOTES

Clause 1

Subsection (1)

1. This subsection sets out the declarations as to marital status which the court (defined in clause 12(2)) will have power to make. In addition to the parties to the marriage, any person with a sufficient interest in obtaining a declaration as to marital status will be able to apply: clause 1(3). The applicant will be able to apply for more than one declaration, e.g., he may ask for a declaration that the marriage in question was initially valid and, in addition, that it subsisted on a particular date (or dates), or that the marriage subsisted on certain dates and, in the alternative (in case he fails), that it did not subsist on those dates.

2. Paragraph (a) of this subsection implements the recommendations in paragraphs 3.4 and 3.33 of the Report. The court will not have power to make a declaration that a marriage was initially invalid: see clause 4(5)(a).

3. Paragraphs (b) and (c) of this subsection give effect to the recommendations in paragraphs 3.8 and 3.33 of the Report.

4. Paragraphs (d) and (e) of this subsection give effect to the recommendations in paragraphs 3.6 and 3.33 of the Report that the court should be able to grant declarations as to the validity of a divorce, annulment or legal separation, whether obtained elsewhere in the British Islands or overseas. In relation to a divorce obtained elsewhere in the British Islands (i.e., in Scotland, Northern Ireland, the Channel Islands and the Isle of Man), paragraphs (d) and (e) do not use the term "decree of divorce" (which is the expression used in section 1 of the Recognition of Divorces and Legal Separations Act 1971) so as to allow for the possibility that a person may wish to seek a declaration as to the validity of an extra-judicial divorce obtained before section 16(1) of the Domicile and Matrimonial Proceedings Act 1973 came into force. Section 16(1) provides, in effect, that no extra-judicial divorce obtained in the British Islands can be recognised as validly dissolving a marriage, but this provision is not retrospective and does not affect the validity of an extra-judicial divorce obtained before 1974 which would be recognised as valid by the old recognition rules, i.e., under the common law rules.

(2) A court shall have jurisdiction to entertain an application under subsection (1) above if (and only if) either of the parties to the marriage to which the application relates—

(*a*) is domiciled in England and Wales on the date of the application, or

(*b*) has been habitually resident in England and Wales throughout the period of one year ending with that date, or

(*c*) died before that date and either—

(i) was at death domiciled in England and Wales, or

(ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

(3) Where an application under subsection (1) above is made by any person other than a party to the marriage to which the application relates, the court shall refuse to hear the application if it considers that the applicant does not have a sufficient interest in the determination of that application.

Clause 1 (continued)

Subsection (2)

5. Subsection (2) gives effect to the recommendation in paragraph 3.44 of the Report. It applies to proceedings for declarations as to marital status the same bases of jurisdiction as those applied by section 5(3) of the Domicile and Matrimonial Proceedings Act 1973 to nullity proceedings. The jurisdictional links laid down in the subsection are with the parties to the marrige and not, where an application is brought by a third person with a sufficient interest, with the applicant or respondent. An application for a declaration as to marital status may be brought after the death of one party or of both parties to the marriage (paragraph 3.38 of the Report) and accordingly paragraph (c) of this subsection makes provision for such a case.

Subsection (3)

6. This subsection gives effect to the recommendation in paragraph 3.33 of the Report that, in addition to the spouses, anyone with a sufficient interest in obtaining a declaration as to marital status should be able to apply. The subsection does not define what constitutes a "sufficient interest". It will be for the court to decide, in the light of all the circumstances of the case, whether the applicant has a sufficient interest.

Declarations of Status

Declarations as to legitimacy or legitimation.

2.—(1) Any person may apply to the court for a declaration that he is the legitimate child of his parents.

(2) Any person may apply to the court for one (or for one or, in the alternative, the other) of the following declarations, that is to say—

(*a*) a declaration that he has become a legitimated person;

(*b*) a declaration that he has not become a legitimated person.

(3) A court shall have jurisdiction to entertain an application under subsection (1) or (2) above if (and only if) the applicant—

(*a*) is domiciled in England and Wales on the date of the application, or

(*b*) has been habitually resident in England and Wales throughout the period of one year ending with that date.

(4) In this section "legitimated person" means a person legitimated or recognised as legitimated—

1976 c.31
1926 c.60

(*a*) under section 2 or 3 of the Legitimacy Act 1976; or

(*b*) under section 1 or 8 of the Legitimacy Act 1926; or

(*c*) by a legitimation (whether or not by virtue of the subsequent marriage of his parents) recognised by the law of England and Wales and effected under the law of any other country.

Clause 2

Subsection (1)

1. This subsection implements the recommendation in paragraphs 3.14 and 3.36 of the Report that the court (defined in clause 12(2)) should have power to grant a declaration that the applicant is legitimate. The court will not be able to make a declaration as to the legitimacy of any person other than the applicant; or to make a declaration that the applicant is illegitimate: see clause 4(5)(b).

Subsection (2)

2. This subsection implements the recommendation in paragraphs 3.14 and 3.36 of the Report that the court (defined in clause 12(2)) should be able to grant a declaration that the applicant has, or has not, become a legitimated person, as the case may be.

Subsection (3)

3. This subsection sets out the jurisdictional rules for declarations of legitimacy and for declarations as to legitimation and gives effect to the recommendation in paragraph 3.49 of the Report.

Subsection (4)

4. This subsection defines "legitimated person" for the purposes of this clause. The definition corresponds to that in section 10(1) of the Legitimacy Act 1976. The effect of paragraphs (a) and (b) of this subsection is that a declaration of legitimation may be granted in respect of legitimation by virtue of the Legitimacy Act 1926 or the Legitimacy Act 1976, or recognition under either of those Acts; and paragraph (c) makes it clear that a declaration may also be granted that the applicant is recognised as legitimated at common law.

Declarations of Status

Declarations as to adoptions effected overseas.

3.—(1) Any person whose status as an adopted child of any person depends on whether he has been adopted by that person by either—

(*a*) an overseas adoption as defined by section 72(2) of the Adoption Act 1976, or

1976 c.36

(*b*) an adoption recognised by the law of England and Wales and effected under the law of any country outside the British Islands,

may apply to the court for one (or for one or, in the alternative, the other) of the following declarations, that is to say—

(i) a declaration that the applicant is for the purposes of section 39 of the Adoption Act 1976 the adopted child of that person;

(ii) a declaration that the applicant is not for the purposes of that section the adopted child of that person.

(2) A court shall have jurisdiction to entertain an application under subsection (1) above if (and only if) the applicant—

(*a*) is domiciled in England and Wales on the date of the application, or

(*b*) has been habitually resident in England and Wales throughout the period of one year ending with that date.

(3) Until the Adoption Act 1976 comes into force subsection (1) above shall have effect—

(*a*) as if for the reference to section 72(2) of that Act there were substituted a reference to section 4(3) of the Adoption Act 1968; or

1968 c.53

(*b*) as if for the reference to section 39 of that Act there were substituted a reference to Part II of Schedule 1 to the Children Act 1975.

1975 c.72

Clause 3

Subsection (1)

1. This subsection implements the recommendations in paragraphs 3.16 and 3.37 of the Report that the court should be empowered by statute to grant a declaration that English law recognises or (as the case may be) does not recognise that the applicant has been validly adopted abroad. Only the child himself will be able to apply for such a declaration, and he may apply for both in the alternative. As to the meaning of "the court", see clause 12(2).

2. Adoption orders made in another part of the British Islands are accorded automatic recognition in England. There is therefore no need for a declaration as to the validity of such adoptions. The recognition in England of other adoptions depends on whether it is an "overseas adoption" or recognised at common law. Recognition is not automatic in either case; and therefore the subsection, in paragraphs (a) and (b), makes provision for the granting of a declaration as to the validity of such foreign adoptions.

3. References in paragraphs (a) and (i) of the subsection are to the consolidating Adoption Act 1976 which is not yet in force; the corresponding provisions in force at the moment are referred to in subsection (3) of this clause. Section 72(2) of the Adoption Act 1976 (section 4(3) of the Adoption Act 1968) empowers the Secretary of State to specify as "overseas adoptions" any adoption effected under the law of any country outside Great Britain; and section 39 of the Adoption Act 1976 (Part II of Schedule 1 to the Children Act 1975) deals with the status conferred by adoption and provides, in effect, that an adopted child shall be treated as the legitimate child of his adoptive parents.

4. The term "British Islands" used in paragraph (b) of this subsection is defined in the Interpretation Act 1978 as meaning the United Kingdom, the Channel Islands and the Isle of Man.

Subsection (2)

5. This subsection sets out the jurisdictional rules for declarations as to foreign adoptions. It implements the recommendation in paragraph 3.50 of the Report.

Subsection (3)

6. This transitional provision has been included because the Adoption Act 1976 is not yet in force.

General provisions as to the making and effect of declarations.

4.—(1) Where on an application for a declaration under this Act the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.

(2) Any declaration made under this Act shall be binding on Her Majesty and all other persons.

(3) The court, on the dismissal of an application for a declaration under this Act, shall not have power to make any declaration for which an application has not been made.

(4) No declaration which may be applied for under this Act may be made otherwise than under this Act by any court.

(5) No declaration may be made by any court, whether under this Act or otherwise—

(*a*) that a marriage was at its inception void;

(*b*) that any person is or was illegitimate.

(6) Nothing in this section shall affect the powers of any court to grant a decree of nullity of marriage.

Clause 4

Subsection (1)

1. The first part of this subsection provides that the matter in question in respect of which a declaration is sought must be proved to the satisfaction of the court. It indicates that the standard of proof is high and that the court should only grant a declaration when the evidence in support of it is clear and convincing: see paragraph 3.57 of the Report.

2. The second part of subsection (1) gives effect to the recommendation in paragraph 3.40 of the Report that declarations under the Bill should be available as of right, subject to the power of the court, to withhold relief as a matter of public policy. The phrase "manifestly... contrary to public policy" (which also appears in section 8(2)(b) of the Recognition of Divorces and Legal Separations Act 1971) makes it clear that the public policy safeguard should only be invoked in exceptional circumstances.

Subsection (2)

3. This subsection gives effect to the recommendation in paragraph 3.42 of the Report that a declaration made under this Bill should operate *in rem*, binding everyone without exception (including the Crown).

Subsection (3)

4. This subsection gives effect to the recommendation in paragraph 3.25 of the Report that the court, on dismissing an application for a declaration, should not be able to make another declaration for which an application has not been made by a party.

Subsection (4)

5. This subsection gives effect to the recommendation in paragraph 3.28 of the Report that the declarations for which provision has been made in this Bill should only be available under, and in accordance with the provisions of, this Bill. The effect of this subsection is that such declarations would not be available under R.S.C., Ord. 15, rule 16.

Subsection (5)

6. Paragraph (a) of this subsection gives effect to the recommendations in paragraphs 3.19 and 3.28 of the Report that the court should not be able to grant a declaration that a marriage was initially invalid, whether under this Bill or under R.S.C., Order 15, rule 16. The effect of this subsection is that an applicant who wishes to have it declared that his marriage was intially invalid will have to apply for a decree of nullity. This will prevent the parties from avoiding the ancillary powers of the court which arise in nullity, but not declaration, proceedings.

7. The effect of paragraph (b) of this subsection is that the court would not be able to grant a declaration of illegitimacy, whether under this Bill or under R.S.C., Order 15, rule 16. Paragraph (b) thus implements the recommendations at paragraphs 3.22 and 3.28 of the Report.

Clause 4 (continued)

Subsection (6)

8. This is a saving provision, consequential on subsection (5). Since a decree of nullity in relation to a marriage void *ab initio* is essentially a declaration that the marriage is void, it is necessary to make it clear that paragraph (a) of subsection (5) does not prevent the court from making a decree of nullity in respect of a void marriage.

Provisions relating to the Attorney-General

5.—(1) On an application for a declaration under this Act the court may at any stage of the proceedings, of its own motion or on the application of any party to the proceedings, direct that all necessary papers in the matter be sent to the Attorney-General.

(2) The Attorney-General, whether or not he is sent papers in relation to an application for a declaration under this Act, may—

(*a*) intervene in the proceedings on that application in such manner as he thinks necessary or expedient, and

(*b*) argue before the court any question in relation to the application which the court considers it necessary to have fully argued.

(3) Where any costs are incurred by the Attorney-General in connection with any application for a declaration under this Act, the court may make such order as it considers just as to the payment of those costs by parties to the proceedings.

Clause 5
Subsection (1)

1. Subsection (1), which implements the recommendations in paragraph 3.58 of the Report, provides that the court may direct all necessary papers to be sent to the Attorney-General; it may act of its own motion or on the application of any party to the proceedings including the applicant.

Subsection (2)

2. Subsection (2) provides for the Attorney-General's role in declaration proceedings. Whether or not the court directs that papers be sent to him, the Attorney-General may argue any question which the court wishes to have argued or he may take any other appropriate steps. This subsection implements the recommendation in paragraph 3.58 of the Report.

Subsection (3)

3. Subsection (3) provides for the reimbursement of the Attorney-General's costs by the parties to the proceedings in any case where the Attorney-General has played a part in the proceedings. There is a similar provision in divorce and nullity proceedings in relation to costs incurred by the Queen's Proctor: Matrimonial Causes Act 1973, ss. 8(2) and 15.

Supplementary provisions as to declarations.

6.—(1) Any declaration made under this Act, and any application for such a declaration, shall be in the form prescribed by rules of court.

(2) Rules of court may make provision—

(*a*) as to the information required to be given by any applicant for a declaration under this Act;

(*b*) as to the persons who are to be parties to proceedings on an application under this Act.

(3) No proceedings under this Act shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.

(4) The court hearing an application under this Act may direct that the whole or any part of the proceedings shall be heard in camera, and an application for a direction under this subsection shall be heard in camera unless the court otherwise directs.

1968 c.63.

(5) In section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 (restriction of publicity for certain proceedings)—

(*a*) in subsection (1) there shall be inserted at the end the following paragraph—

"(e) proceedings under the Declarations of Status Act 1983";

(*b*) in subsection (3) for the words "subsection (1)(a) or (d)" there shall be substituted the words "subsection 1(a), (d) or (e)".

Clause 6

Subsections (1) and (2)

1. These subsections provide for making of rules of court for the purposes of this Bill: see paragraphs 3.60 to 3.63 of the Report.

Subsection (3)

2. This subsection corresponds to section 45(8) of the Matrimonial Causes Act 1973.

Subsection (4)

3. This subsection corresponds to section 45(9) of the Matrimonial Causes Act 1973 and makes provision for hearing *in camera*.

Subsection (5)

4. Subsection (5) gives effect to the recommendations in paragraph 3.59 of the Report. Paragraph (a) of this subsection applies to proceedings under this Bill section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, which restricts publicity in relation to proceedings for declarations under section 45 of the Matrimonial Causes Act 1973. Paragraph (b) applies to proceedings under this Bill the provisions of section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 to the effect that publicity will be limited to giving particulars of the declaration sought.

5. Clause 28(5) of the draft Family Law Reform Bill appended to the Law Commission's Report on Illegitimacy (Law Com. No. 118; 1982) also amends section 2 of the 1968 Act by including a new paragraph (d) to cover proceedings for declarations of parentage under that Bill. If the present draft Bill is implemented before the draft Family Law Reform Bill, the references in subsection (5) will need to be amended.

Declarations to be family matters for jurisdiction purposes. 1981 c. 54.

7.—(1) In paragraph 3 of Schedule 1 to the Supreme Court Act 1981 (business assigned to Family Division of the High Court) there shall be added at the end the following sub-paragraph—

"(e) applications under the Declarations of Status Act 1983."

1971 c. 23

(2) In section 45 of the Courts Act 1971 (transfer of matrimonial proceedings between county court and High Court)—

(*a*) in subsection (1) there shall be inserted at the end the following paragraph—

"(d) the Declarations of Status Act 1983"; and

(*b*) in subsection (5) for "and (c)" there shall be substituted "(c) and (d)".

Clause 7

Subsection (1)

1. This subsection assigns the jurisdiction of the High Court under the Bill to the Family Division: see paragraphs 3.54 and 3.55 of the Report.

Subsection (2)

2. Section 45 of the Courts Act 1971 confers power for rules of court to provide for the transfer of proceedings under certain specified legislation from a county court to the High Court or from the High Court to a divorce county court. This subsection amends section 45 of the 1971 Act so as to enable rules of court to be made for the transfer of proceedings under this Bill.

3. Subsection (2) will need to be deleted if the Matrimonial and Family Proceedings Bill (now before Parliament) becomes law. That Bill provides for the repeal of section 45 of the Courts Act 1971 and makes provision for the transfer of family proceedings between the High Court and the county courts. The effect of clause 7(1) of the present Bill would be to bring proceedings for declarations within the scope of the transfer provisions contained in the new Matrimonial and Family Proceedings Act: see paragraph 3.55 of the Report.

Repeal of s. 45 of Matrimonial Causes Act 1973 and amendments of that Act. 1973 c. 18.

8.—(1) Section 45 of the Matrimonial Causes Act 1973 (declarations as to validity of marriage, legitimacy, legitimation and right to be deemed a British subject), is hereby repealed; except that the repeal of that section (and the amendment of that Act made by subsection (2) below) shall not affect any proceedings under that section begun before the commencement of this Act.

(2) In section 47 of that Act (declarations in respect of polygamous marriages) for subsection (3) there shall be substituted the following subsection—

"(3) In this section 'a declaration concerning the validity of a marriage' means any declaration under the Declarations of Status Act 1983 involving a determination as to the validity of a marriage."

(3) In section 50 of that Act (matrimonial causes rules)—

(*a*) in subsection (1) at the end of paragraph (a) there shall be inserted the words "and the Declarations of Status Act 1983";

(*b*) in subsection (2) in paragraph (a) for the words "38 or 45 above" there shall be inserted the words "or 38", in paragraph (b) the words "proceedings in a county court under section 45 above or to" shall be omitted and in paragraph (c) the words "or to any aspect of section 47 above which is excepted by paragraph (b) above" shall be omitted.

Clause 8

Subsection (1)

1. This subsection gives effect to the recommendation in paragraph 2.13 of the Report that section 45 of the Matrimonial Causes Act 1973 should be repealed. It also contains a transitional provision for proceedings under section 45 of the 1973 Act begun before the commencement of the new Act. In such cases the proceedings will be allowed to continue under the old section 45.

Subsection (2)

2. The amendments to section 47 of the Matrimonial Causes Act 1973 made by this subsection are consequential on the repeal of section 45 of that Act effected by clause 8(1) and on clause 4(4). The effect of the amendment is that the court will be able to make a declaration involving the validity of a polygamous marriage under the Bill, i.e., a declaration as to marital status under clause 1 or a declaration as to legitimacy or legitimation (by subsequent marriage) under clause 2; and that the applicant will not be able to apply for such a declaration under R.S.C., Order 15, rule 16.

Subsection (3)

3. Paragraph (a) of this subsection amends section 50(1) of the Matrimonial Causes Act 1973 so as to enable the rule-making authority constituted by that section to make rules of court for purposes of the new Act.

4. The amendments effected by paragraph (b) of this subsection are, in part, consequential on the repeal of section 45 of the Matrimonial Causes Act 1973. The amendments made by paragraphs (a) and (b) of this subsection will also enable the rule-making authority constituted by section 50(1) of the 1973 Act to make rules of court for the purposes of proceedings in a county court under the new Act.

5. Subsection (3) will need to be deleted if the Matrimonial and Family Proceedings Bill becomes law. That Bill provides for the repeal of section 50 of the Matrimonial Causes Act 1973 and constitutes a new rule-making authority to make rules of court for the purposes of "family proceedings" in the High Court or county courts. The effect of clause 7(1) of the Declarations of Status Bill would be to bring proceedings for declarations within the definition of "family proceedings" in the Matrimonial and Family Proceedings Bill and thus within the reach of the new rule-making body.

Abolition of right to petition for jactitation of marriage.

9.—(1) No person shall after the commencement of this Act be entitled to petition the High Court or a county court for jactitation of marriage.

1967 c. 56.

(2) In section 10 of the Matrimonial Causes Act 1967 in the definition of "matrimonial cause" for the words "judicial separation, or jactitation of marriage" there shall be substituted the words "or judicial separation".

1981 c. 54.

(3) In section 26(b) of the Supreme Court Act 1981 the words "or jactitation of marriage" shall be omitted.

(4) Nothing in this section shall affect any proceedings for jactitation of marriage begun before the commencement of this Act.

Clause 9

Subsection (1)

1. This subsection gives effect to the recommendation in paragraph 4.11 of the Report that the remedy of jactitation of marriage should be abolished.

Subsections (2) and (3)

2. The amendments made by these subsections to section 10 of the Matrimonial Causes Act 1967 and section 26(b) of the Supreme Court Act 1981 are consequential on clause 9(1). The Matrimonial and Family Proceedings Bill, which is now before Parliament, provides for the repeal of the 1967 Act and contains a definition of matrimonial causes corresponding to that in section 10(1) of the 1967 Act. If that Bill becomes law, subsection (2) of this Bill will need to be amended.

Subsection (4)

3. Subsection (4) is a transitional provision for proceedings for jactitation of marriage begun before the Bill comes into force. Such proceedings will be allowed to continue. This operates to preserve the rights of persons who have initiated proceedings for jactitation of marriage in accordance with the old law.

Repeal of Greek Marriages Act 1884.

10.—(1) The Greek Marriages Act 1884 is hereby repealed.

(2) Any marriage in respect of which a declaration that it was a valid marriage could before the commencement of this Act have been made under the Greek Marriages Act 1884 is hereby declared to have been a valid marriage; but nothing in this section shall affect any status or right which would not have been affected by a declaration under that Act.

1884 c.68.

Clause 10

1. This clause gives effect to the recommendation in paragraph 4.14 of the Report.

Subsection (1)

2. This subsection is self-explanatory.

Subsection (2)

3. This subsection provides for the validation of such marriages as might have been validated by application under the Greek Marriages Act 1884, but subject to the limitations contained in that Act: see paragraph 4.14 of the Report.

Commencement and savings.

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

(2) Nothing in this Act shall affect any proceedings for a declaration begun in the High Court before the commencement of this Act by virtue of rules of court relating to declaratory judgments.

Clause 11

Subsection (1)

1. This provision is in accordance with the current practice of providing a readily ascertainable commencement date where possible.

Subsection (2)

2. This subsection makes transitional provision for proceedings for declarations as to family status under R.S.C., Order 15, rule 16 pending in the High Court when the Bill comes into force. Such proceedings will be determined in accordance with the present law.

Short title, interpretation and extent.

12.—(1) This Act may be cited as the Declarations of Status Act 1983.

(2) In this Act "the court" means the High Court or a county court.

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

Clause 12

This clause provides for the short title and territorial extent of the Bill. It also defines "the court" for the purposes of the Bill as the High Court and a county court: see paragraph 3.54 of the Report.

APPENDIX B

SECTION 45 OF THE MATRIMONIAL CAUSES ACT 1973

45.—(1) Any person who is a British subject, or whose right to be deemed a British subject depends wholly or in part on his legitimacy or on the validity of any marriage, may, if he is domiciled in England and Wales or in Northern Ireland or claims any real or personal estate situate in England and Wales, apply by petition to the High Court for a decree declaring that he is the legitimate child of his parents, or that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage or that his own marriage was a valid marriage.

(2) Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply by petition to the High Court, or may apply to a county court in the manner prescribed by county court rules, for a decree declaring that he or his parent or remote ancestor, as the case may be, became or has become a legitimated person.

In this subsection "legitimated person" means a person legitimated by the Legitimacy Act 1926, and includes a person recognised under section 8 of that Act as legitimated.[1]

(3) Where an application under subsection (2) above is made to a county court, the county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court shall, transfer the matter to the High Court; and on such a transfer the proceeding shall be continued in the High Court as if it had been originally commenced by petition to the court.

(4) Any person who is domiciled in England and Wales or in Northern Ireland or claims any real or personal estate situate in England and Wales may apply to the High Court for a decree declaring his right to be deemed a British subject.

(5) Applications to the High Court under the preceding provisions of this section may be included in the same petition, and on any application under the preceding provisions of this section the High Court or, as the case may be, the county court shall make such decree as it thinks just, and the decree shall be binding on Her Majesty and all other persons whatsoever, so however that the decree shall not prejudice any person:—

[1] See the Legitimacy Act 1976, Sched. 1, para. 1(2): "In any enactment whether passed before or after this Act references to persons legitimated or recognised as legitimated under section 1 or section 8 of the Legitimacy Act 1926 or under section 2 or section 3 of this Act shall be construed as including references to persons legitmated or recognised as legitimated under section 2 or section 3 of this Act or under section 1 or section 8 of the said Act of 1926 respectively."

(a) if it is subsequently proved to have been obtained by fraud or collusion; or

(b) unless that person has been given notice of the application in the manner prescribed by rules of court or made a party to the proceedings or claims through a person so given notice or made a party.

(6) A copy of every application under this section and of any affidavit accompanying it shall be delivered to the Attorney-General at least one month before the application is made, and the Attorney-General shall be a respondent on the hearing of the application and on any subsequent proceedings relating thereto.

(7) Where any application is made under this section, such persons as the court hearing the application thinks fit shall, subject to rules of court, be given notice of the application in the manner prescribed by rules of court, and any such persons may be permitted to become parties to the proceedings and to oppose the application.

(8) No proceedings under this section shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.

(9) The court hearing an application under this section may direct that the whole or any part of the proceedings shall be heard in camera, and an application for a direction under this subsection shall be heard in camera unless the court otherwise directs.

APPENDIX C

Individuals and organisations who commented on Working Paper No. 48

The General Council of the Bar
The Hon. Mr. Justice Hollings, M.C.
The Rt. Hon. Sir Seymour Karminski
The Hon. Mrs. Justice Lane
The Law Society
Dr. J. H. C. Morris
National Council of Women
Mr. P. M. North
The Hon. Mr. Justice Reeve
The Society of Public Teachers of Law
(Family Law Reform Sub-Committee)
Mr. A. Wharam
Women's National Commission

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