Scottish Law Commission

DISCUSSION PAPER No. 88

PARENTAL RESPONSIBILITIES AND RIGHTS, GUARDIANSHIP AND THE ADMINISTRATION OF CHILDREN'S PROPERTY

OCTOBER 1990

This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 28 February 1991. All correspondence should be addressed to:-

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NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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PARENTAL RESPONSIBILITIES AND RIGHTS, GUARDIANSHIP AND THE ADMINISTRATION OF CHILDREN'S PROPERTY

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PART I -INTRODUCTION

Purpose of discussion paper

1.1 In this discussion paper we seek comments on proposals for, and questions relating to, reform of the law of Scotland on parental responsibilities and rights, guardianship and the administration of children's property. These areas still depend largely on the common law much of which, particularly in relation to guardianship, has become outmoded. Accordingly, the purpose of this discussion paper is to identify, in the light of comments received, the best means of bringing the law into line with current social thinking.

Scope of discussion paper

1.2 In this discussion paper we are concerned with the private (as contrasted with the public) law affecting children. A review body[1] set up by the Secretary of State for Scotland to identify options for change in child care law has already considered several public law aspects of child care law reform. The body is due to report this year and it is hoped that the report which will follow this discussion paper together with the Child Care Law Review Report will constitute a significant contribution to the modernisation and

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[1]The Child Care Law Review.

improvement of Scottish child law. It is also hoped that any amendments made in the private law will in due course be incorporated into a family law code.[1]

1.3 The guardianship with which we are concerned in this paper is the guardianship of children. The concept of guardianship is also used in relation to mentally incapable adults. This aspect of guardianship is currently being looked at by the Commission and will be the subject of a future discussion paper.

1.4 In framing this discussion paper we have given careful consideration to the Children Act 1989 which has radically reformed the law of England and Wales relating to children. The discussion paper seeks views on whether certain provisions of the Children Act should be adopted in Scotland.

Arrangement of discussion paper

1.5 The discussion paper is arranged in the following manner. In Part II we discuss proposals and options for reform in relation to parental responsibilities and rights, including custody and access. In Part III we set out proposals and options for reform in relation to guardianship. Part IV examines the subject of the administration of a child's property. Part V deals with court orders. In Part VI we discuss relevant aspects of private international law and, finally, Part VII contains a summary of the propositions and questions on which we invite comment.

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[1]See Scot Law Com Discussion Paper No 85, para 1.4.

PART II - PARENTAL RESPONSIBILITIES AND RIGHTS

Introduction

2.1 The existing law refers expressly to parental rights but does not contain any general reference to parental responsibilities. The term parental rights means

> "tutory, curatory, custody or access, as the case may require, and any right or authority relating to the welfare or upbringing of a child conferred on a parent by a rule of law."[1]

If our report on The Legal Capacity and Responsibility of Minors and Pupils[2] were implemented, the reference to tutory and curatory (terms which have little meaning for non-lawyers) would be replaced by a reference to guardianship.

2.2 We discuss the question of parental rights later. First it must be asked whether the law could or should contain a general reference to parental responsibilities. If there were such a statement it should, we suggest, come before any statement of parental rights in order to stress that parenthood involves responsibilities and that parental rights are conferred in order to enable those responsibilities to be met.[3]

Parental responsibilities

2.3 One specific duty which is referred to in the

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[1]Law Reform (Parent and Child) (Scotland) Act 1986, s8.

[2]Scot Law Com No 110 (1987), paras 4.15-4.22.

[3]Cf Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.

existing law is the duty to aliment the child - which is a duty to provide such support as is reasonable in the circumstances.[1] Another is the duty to provide a suitable education.[2] Any further statement of parental responsibilities would, of necessity, have to be very general but should, we think, contain some reference to caring for the child and safeguarding and promoting the child's welfare and administering the child's property. We wonder whether it would be generally agreed that, in addition to the obligations and duties relating to aliment and education already mentioned, a parent has responsibilities (a) to care for his or her child throughout childhood (b) to safeguard and promote the child's welfare throughout childhood and (c) to administer, during the child's childhood, for the benefit of the child, any property belonging to the child. We think that the word "responsibilities" is better than "duties" or "obligations" in this context because it is not suggested that the statutory statement of responsibilities should give a child any new rights to sue his or her parent for failing to meet these responsibilities. In certain cases failure to meet parental responsibilities could lead, under the existing law, to a criminal prosecution[3] or to a civil action for damages,[4] or for an accounting,[5] or to state intervention to impose compulsory measures of care or

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[1]Family Law (Scotland) Act 1985, s1.

[2]Education (Scotland) Act 1980, s30.

[3]Children and Young Persons (Scotland) Act 1937,s12.

[4]Eg if the parent's negligence injured the child in a car crash.

[5]Eg in relation to maladministration of the child's property.

deprive a parent of parental rights.[1] The advantages of a general statutory statement of parental responsibilities are

(a) that it would make explicit what is already implicit in the law.[2]

(b) that it would counteract any impression that a parent has rights but no responsibilities and

(c) that it would enable the law to make it clear that parental rights are not absolute or unqualified,[3] but are conferred in order to enable parents to meet their responsibilities.[4]

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[1]Provided the statutory requirements for these steps were met. See Social Work (Scotland) Act 1968, ss16 and 32. Note, in particular, that s16(2)(e) refers to the case where the parent "has so persistently failed without reasonable cause to discharge the obligations of a parent ... as to be unfit to have the care of a child.".

[2]Stair recognised that parents had an obligation to care for their children and prepare them "for some calling and employment according to their capacity and condition". Institutions 1.5.6. For more recent recognitions of implicit duties of care and promotion of welfare, see eg Social Work (Scotland) Act 1968 s16(2); Law Reform (Parent and Child) (Scotland) Act 1986, s3. Cf Gillick v West Norfolk & Wisbech Area Health Authority [1986] AC 112 where, in relation to English law, the House of Lords clearly accepted that there were parental duties, including a duty of "protection". The responsibility to administer the child's property is clearly recognised in the existing law of Scotland. See Scott v Occidental Petroleum (Caledonia) Ltd 1990 SCLR 278.

[3]Cf Porchetta v Porchetta 1986 SLT 105 (re access). For a discussion of the qualified nature of parental powers in English law, see Bainham, Children, Parents and the State (1988) 47-57.

[4]See the speeches of Lord Fraser of Tullybelton and Lord Scarman in the Gillick case [1986] AC 112 at pp170 and 185.

2.4 If there were to be a statutory statement of parental responsibilities we would suggest for consideration that childhood for this purpose should be regarded as continuing until the child attains the age of 16. We recognise that many parents will be anxious to fulfil certain parental responsibilities long after that age, and that the obligation of aliment can continue until the child is 25 if the child is undergoing further education or training.[1] Nonetheless a young person above the age of 16 may well be living away from home or married and it would, we think, often be unrealistic to state that a parent had a responsibility for care and protection in such cases. The responsibility of administering the child's property should clearly come to an end when the child attains the legal capacity to do so on his or her own account.

2.5 We would welcome views on the following questions.

1(a) Should there be a statutory statement of parental responsibilities?

(b) If so, should it be provided that a parent has a responsibility

(i) to care for his or her child throughout childhood,

(ii) to safeguard and promote the child's welfare throughout childhood, and

(iii) to administer, during the child's childhood, for the benefit of the child, any property belonging to the child.

(c) Should "childhood" for this purpose last until the child attains the age of 16?

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[1]Family Law (Scotland) Act 1985, s1.

These general parental responsibilities would be without prejudice to any other obligations or duties imposed by any enactment, such as the obligation of aliment[1] or the duty to provide a suitable education.[2]

Parental rights

2.6 Under the existing law the most important parental rights[3] are tutory, curatory, custody and access.[4] A parent's tutory is his or her right to manage the child's property, enter into contracts on the child's behalf, litigate on the child's behalf, and generally to act on the child's behalf in any legally relevant matter where the child is incapable of acting on his or her own behalf. The parent as tutor is the child's administrator-in-law or legal representative. Tutory applies only to a pupil child - that is a girl under 12 years of age or a boy under 14 years of age. Curatory is the right to consent, or withhold consent, to contracts or other legal steps entered into or taken by a child who is of or above the age of 12 or 14, as the case may be, but is not yet 18. The parent as curator is not the child's legal representative. He or she does not act for the child, but rather acts along with the child. In our report on The Legal Capacity and Responsibility of

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[1]Family Law (Scotland) Act 1985, s1.

[2]Education (Scotland) Act, 1980 s30.

[3]It has frequently been pointed out that "rights" is here used in a loose sense. The right of guardianship, for example, is really a power to take legally effective action on behalf of a child. See Dickens "The Modern Function and Limits of Parental Rights" (1981) 97 LQR 462; Bainham, Children, Parents and the State 48.

[4]These are the rights referred to specifically in the Law Reform (Parent and Child) (Scotland) Act 1986, s8.

Minors and Pupils[1] we took the view that there was no longer any significance in the ages of 12 and 14 (which derive from Roman law) and that, subject to important qualifications and exceptions, 16 was a more appropriate age for conferring capacity on a young person to act on his or her own behalf in legal matters. We recommended that curatory should be abolished and that tutory should last until the child was 16, whether the child was a boy or a girl. Between the ages of 16 and 18 a young person would be able to act on his or her own behalf, but would have the right to have certain prejudicial transactions set aside. We also thought that the word tutory was one which had little meaning for non-lawyers and suggested that tutors should be known as guardians.[2] The government has accepted the recommendations in our report.[3] In the rest of this discussion paper we assume that there will be only one type of guardian and that guardianship will last until the child is 16.

2.7 There is a question, however, as to whether the parent's right to act on behalf of his child in legal matters should be called "guardianship". There are two disadvantages in using this terminology. First, it defines the parent's role in terms of the guardian's role, which seems peculiar as parenthood is the primary relationship. Guardians are substitute parents, not the other way about. Secondly, the parent's right of

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[1]Scot Law Com No 110, 1987.

[2]The term "guardian" is already used in some modern Scottish statutes. See eg Education (Scotland) Act 1980, s135(1); the School Boards (Scotland) Act 1988, s22(2).

[3]On 4 Nov 1988. See Parl Deb 6th ser Vol 139 (HC) col 795. A Private Member's Bill to implement the report was introduced by Sir Nicholas Fairbairn MP in 1988-89 but did not proceed.

guardianship may well differ from the rights conferred on non-parental guardians. The parent's guardianship, for example, does not need to include rights in relation to the person of the child, because those rights are comprehended in custody. A non-parental guardian may need to have certain rights in relation to the child's person.[1] We think therefore that it would be an aid to clarity if the parent's right to act as the child's legal representative in all matters of legal significance where the child is incapable of acting for himself or herself were no longer described as guardianship, but were seen as a distinct parental right attaching to the parent as parent. The English Law Commission came to a similar conclusion, after full consultation, in their report on Guardianship and Custody.[2] They said that

> "parenthood should become the primary concept. Any necessary distinctions between parents and guardians who act in loco parentis could then clearly be drawn ...."[3]

Their recommendation on this point has been implemented in the Children Act 1989. We suggest that the same approach should be adopted in Scotland. We suggest further that the parental right to act on behalf of the child in all legal matters where the child is not capable of acting on his or her own behalf should be described simply as the right of legal representation. This would be more informative and more accurate than describing it as guardianship. It would not be very far

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[1]At present a child's (non-parental) tutor does have control of his or her person, but the exact nature of this in modern times is not clear. We discuss this question at para 3.13 below.

[2]Law Com No 172 (1988) para 2.3.

[3]Ibid.

removed from the old idea of the parent as administrator-in-law.[1]

2.8 Custody has never been precisely defined in Scots law but is generally taken to be the right of a person to have the child living with him or her (or otherwise to regulate the child's residence[2]) and to control the child's day to day upbringing.[3] "Child" in relation to custody means a child under the age of 16 years.[4]

2.9 Access is the right to have reasonable contact with the child, either by visiting the child or by being allowed to take out the child or by being allowed to have the child to stay ("residential access"). Conceivably, reasonable contact might in some cases be by telephone (for example, where the parent is in another country) but we know of no case where that has been an element in an award of access under the existing law. Access operates as a modification of the rights of the person who has custody or care of the child.[5] Some people like to think of access as a right of the child rather than the parent but this does not correspond to what actually happens: it is the parent who seeks an award of access. However, the idea that access is intended to be for the benefit of the child is certainly

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[1]See Robertson (1865) 3 M 1077 at p1079.

[2]See eg Pagan v Pagan (1883) 10 R 1072.

[3]See eg Zamorski v Zamorska 1960 SLT (Notes) 26 (control of religious upbringing). See also Thomson, Family Law in Scotland (1987) 160.

[4]Law Reform (Parent and Child) (Scotland) Act 1986, s8.

[5]Cf D v Strathclyde Regional Council 1985 SLT 114 at p116.

valid[1] and would be given a more direct expression in the law if it were made clear that any parental rights were conferred to enable parents to fulfil their parental responsibilities.

2.10 We suggest that these three key concepts of legal representation, custody and access might be defined by statute on the above lines. This would not mean any essential change in the law but it would help to stabilise and clarify it. The definition of "parental rights" in the Law Reform (Parent and Child) (Scotland) Act 1986 mentions tutory, curatory, custody and access but also refers to

> "any right or authority relating to the welfare or upbringing of a child conferred on a parent by any rule of law."[2]

This is not a particularly helpful addition. It was included in the 1986 Act as a holding measure. The principal purpose of the Act was to remove legal discrimination against children born out of marriage. In our report on Illegitimacy, which was implemented by the 1986 Act, we referred to concern about the vagueness of the term "parental rights".[3] We had not consulted on this question, however, and were obliged to conclude that our Illegitimacy report was not the place

> "to analyse these so-called rights in depth or to ask to what extent they actually exist as separate rights independent of, say, tutory or custody".[4]

Our concern in the Illegitimacy report was not with the content of parental rights but rather with the question

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[1]Law Reform (Parent and Child) (Scotland) Act 1986, s3(2). Cf Porchetta v Porchetta 1986 SLT 105.

[2]S8.

[3]Scot Law Com No 82 (1984), para 4.1.

[4]Ibid para 4.2

whether any parental rights which did exist should be recognised in relation to children born out of marriage and, if so, when.[1] In this discussion paper we are concerned with the content of parental rights and we are anxious to meet the criticism of vagueness, if this is possible. Child law is of concern to a great many people who are not lawyers and who do not have access to complete sets of law reports. It is, we think, unsatisfactory and unfair to expect people to work with a definition of parental rights which says, in effect, that parental rights are what the common law says they are, without providing further assistance. We are working towards a codification of family law and a definition of a key concept which takes this form is particularly unsatisfactory in this context.

2.11 It should be noted that the residual category of parental rights in the 1986 Act is not concerned with rights under specific enactments. It applies only to any right or authority conferred on a parent by "any rule of law". That expression is normally used in statutes in relation to common law rules: if statutory rules are to be included the term normally used is "any enactment or rule of law". This in itself may be a source of confusion to non-lawyers. Specific statutory rights do not need to be included in a general definition of parental rights. They stand on their own. For example, a parent's agreement to adoption is required by an express statutory provision.[2] That applies, and will continue to apply, no matter what a general definition of parental rights may provide. Similarly, a parent's right to appoint a guardian to act after his or her death depends

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[1] Ibid para 4.2.

[2] Adoption (Scotland) Act 1978, s16.

on a specific statutory provision which applies regardless of any general definition of parental rights.[1] There are other examples of statutory parental rights.[2] All could be covered by making it clear that any general statement of parental rights was without prejudice to any right conferred by an enactment.

2.12 The residual common law parental rights which are commonly mentioned are: control of education and religious upbringing; choice of, or consent to, medical treatment; discipline; choice of name; and choice of nationality and domicile.[3] The question is whether any of these rights would not be covered by the rights of legal representation, custody and access, if clarified as suggested above.

2.13 A parent's rights in relation to the child's education and religious upbringing are recognised by the European Convention on Human Rights[4] and by Scottish

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[1]Law Reform (Parent and Child) (Scotland) Act 1986, s4.

[2]See eg Registration of Births, Deaths and Marriages (Scotland) Act 1965, s14 (registration of birth - also a duty) Social Work (Scotland) Act 1968, s41 (presence at children's hearing - also a duty).

[3]See eg Eekelaar, "What are Parental Rights?" 1973 89 LQR 210; Thomson, Family Law in Scotland (1987) 158-172; Hoggett, Parents and Children: The Law of Parental Responsibility (3rd edn 1987) 7-17.

[4]Protocol No 1 Art 2 - "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions". Cf Campbell and Cosans v United Kingdom (1982) 4 EHRR 293.

legislation.[1] However, control of these matters would fall clearly within the concept of custody, if it were defined so as to include control of the child's day to day upbringing.[2] There would seem to be no need for a separate residual right. The statutory position under the enactments relating to education would be unaffected.

2.14 Choice of medical treatment would fall within the definition of custody in so far as no question of giving a legally effective consent arose. Deciding, for example, whether a child should take certain pills, or should be taken to a doctor, would fall within control of day to day upbringing. The giving of a legally effective consent to medical treatment in any case which involved invasion of the child's bodily integrity and in which the child was incapable of consenting on his or her own behalf would fall within the right of legal representation, if that were defined as we suggest. Again there seems to be no need for special residual rights.

2.15 The discipline of a child would also fall within the concept of custody, as part of the child's day to day upbringing. The question of reasonable chastisement as a defence to a charge of assault is a separate question, which we consider later.[3] Recognising that a parent has a right to control the day to day upbringing of the child in order to fulfil his or her parental

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[1]Education (Scotland) Act 1980, ss28 and 28A.

[2]See Zamorski v Zamorska 1960 SLT (Notes) 26.

[3]Paras 2.44-2.49 below. See also Education (No 2) Act 1986, s48 (abolishing corporal punishment of pupils, as defined, in Scotland).

responsibilities does not imply any recognition that corporal punishment is lawful or unlawful. That is a different question, relating not to the right to control but to the means used.

2.16 Choice of name, apart from the statutory rules on registration of birth or change of name or surname[1] is a matter of usage rather than law. In so far as there is a parental right it would fall within the concept of custody, if that includes control of day to day upbringing. By virtue of the right to control the child's day to day upbringing a parent can control, at least in the case of a young child, the name by which the child is known.

2.17 Nationality is governed by specific statutory provisions,[2] which would be unaffected by a general definition of parental rights. It is misleading to talk of a parent's right to choose the domicile of his or her child. The child's domicile often follows that of the parent but that is a result of a legal rule, not of the exercise of a parental right.[3]

2.18 Another way of approaching the question of parental rights is to ask what rights a parent needs to enable him or her to discharge parental responsibilities. Clearly the parent needs to have the right to control

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[1]Registration of Births, Deaths and Marriages (Scotland) Act 1965, ss14, 43.

[2]British Nationality Act 1981.

[3]The two Law Commissions have recommended reforms in this area but they would not affect this point. See the Law Commission and the Scottish Law Commission Report on The Law of Domicile (Law Com No 168; Scot Law Com No 107, 1987) paras 4.1-4.33.

the child's physical whereabouts, day to day activities and general upbringing, although the control which is required and possible will obviously diminish as the child grows older. This can be comprised in the concept of custody. The parent also needs to be able to act on behalf of the child in the legal sphere (in relation, for example, to the administration of the child's property, to contracts, litigation, receipts or discharges) or in any area (for example, surgery) where legally effective consent might be required on behalf of the child. This can be comprised in the concept of legal representation. If the parent, for some reason, does not have the child living with him or her then to play any role in the child's upbringing the parent needs a right to have some contact with the child. This is covered by access. The three rights of custody, legal representation and access seem, however, to be enough, when taken along with rights under specific enactments, to give the parent all the rights he or she is likely to need. To confine parental rights to these three rights would remove a large element of uncertainty from the existing law.

2.19 We have been interested to note that in their report on Guardianship and Custody the English Law Commission reached the conclusion, after wide consultation, that it would not be possible to produce a satisfactory statutory list of parental rights, claims, duties, powers, responsibilities or authority.[1]

> "It would be superficially attractive to provide a list of these but those who responded to our Working Paper on Guardianship recognised the practical impossibility of doing so. The list must change from time to time to meet differing needs and circumstances. As the Gillick case itself

[1]Law Com No 172 (1988) para 2.6, footnotes omitted.

demonstrated, it must also vary with the age and maturity of the child and the circumstances of each individual case."

In England and Wales the Children Act 1989 now defines "parental responsibility" as

> "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property".[1]

If we are right in thinking that all the rights which a parent needs can be covered by legal representation, custody and access (when taken along with rights conferred by specific enactments) then the difficulty of a long specific list disappears. For the rest, we think that there would be advantages in dealing separately with responsibilities and rights. It seems somewhat unusual to define responsibility in terms of rights. It is more usual to give people certain responsibilities and then give them rights to enable them to fulfil those responsibilities. We also think that a less vague and open-ended definition would be more helpful, if it could be achieved.

2.20 We would welcome views on the following.

2 Should it be made clear in any new legislation on this topic that parental rights are conferred on a parent in order to enable him or her to fulfil his or her parental responsibilities?

3(a) It is suggested that parental rights should include legal representation, custody and access.

(b) The right of legal representation (which would replace the parent's rights as tutor and administrator-at-law) should be defined as the

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[1] S3(1). The definition is expanded by subsection (2) which brings in a guardian's rights.

right to administer the child's property and to act, or give consent, on behalf of the child in any legally significant matter where the child is incapable of acting or consenting on his or her own behalf.

(c) The right of custody should be defined as the right of the person concerned to have the child living with him or her, or otherwise to regulate the child's residence, and to control the child's day to day upbringing.

(d) The right of access should be defined as the right to have reasonable contact with the child, either by visiting the child, or by being allowed to take out the child, or by being allowed to have the child to stay ("residential access") or by other appropriate means.

(e) If legal representation, custody and access were defined on the above lines, and if any rights conferred on parents by any other enactments were expressly preserved, would it be necessary to confer any other parental rights and, if so, which?

Who has parental responsibilities and rights?

2.21 We are concerned here with the question of who has parental responsibilities and rights in the absence of a court order. If the policy of the existing law were to be continued, the mother of a child would always have parental responsibilities and rights but the father would have them only if he was married to the child's mother or had been married to her at the time of the

child's conception or subsequently.[1] It follows that a man who abandoned his wife when she was pregnant, and never saw his child, would have full parental responsibilities and rights, whereas a man who was cohabiting with the mother of his child and playing a full paternal role would have none. We would question whether this is in line with current social thinking.

2.22 The current law suggests that, in the case of a child born outside marriage, the mother alone has parental responsibilities and corresponding rights. This may be seen as encouraging irresponsibility in some men. The existing rule also seems to ignore the fact that an unmarried father[2] may be just as motivated to care for and protect his child as a married father, or indeed as the mother of the child. We wonder therefore whether the law ought not to be based on the general proposition that a person who brings a child into the world has certain responsibilities towards that child, and certain related rights.[3] This would mean conferring

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[1]Law Reform (Parent and Child) (Scotland) Act 1986, s2(1). The existing law, as we have noted, refers to parental rights and has no express provision on parental responsibilities. The father can, of course, apply to the court for custody or access, but the onus is on him to satisfy the court that an order would be in the child's interests. See McEachan v Young 1988 SCLR 98; Sloss v Taylor 1989 SCLR 407; Whyte v Hardie 1990 SCLR 23; Nolan v Lindsay 1990 SCLR 56; Crowley v Armstrong 1990 SCLR 361.

[2]We use this term, slightly loosely, to mean a father who is not married to the mother of the child and who has not been married to her since the child's conception.

[3]It is interesting to note that Stair considered that paternal authority "reacheth all children, whether procreated of lawful marriage or not, so they be truly known to be children; because the same foundation and

parental responsibilities and rights on the basis of parentage alone, subject to any court decree to the contrary. The answer to the question "Who has parental responsibilities and rights in the absence of a court decree?" would be, quite simply, "A parent".

2.23 We considered this question in our report on Illegitimacy.[1] Our conclusion at that time was that it would not be desirable to give the father of a child parental rights automatically unless he was married to the child's mother at, or after, the time of the child's conception. We mentioned the following arguments.[2]

1 It would be inappropriate to give parental rights to fathers where the child had resulted from a casual liaison or even from rape.

2 Automatic parental rights for unmarried fathers would cause offence to mothers who had struggled alone to bring up their children with no support from the fathers.

3 Mothers of children born outside marriage might feel at risk from interference and harassment by unmeritorious fathers in matters connected with the upbringing of the children.

4 The unmarried father would have to be involved more often in care or adoption proceedings even in cases where it would be inappropriate to give any weight to his views.

These arguments, or very similar arguments, were made by consultees to us and to the English Law Commission who were dealing with reform of the law on illegitimacy at

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common principles and duties are in both.". Institutions 1.5.6.

[1]Scot Law Com No 82 (1984).

[2]Ibid para 2.5.

about the same time.[1] They were sufficient to carry the day, particularly as the main concern of both Commissions at that time was to remove the legal disadvantages of the child born outside marriage. It is clear, however, that these arguments have not been found persuasive by everybody. We have received representations urging us to reconsider the position of the unmarried father. In the context of an examination of parental responsibilities and rights the arguments for excluding a large category of fathers from the responsibilities and rights normally flowing from parenthood must, we think, be re-examined. Before locking at each argument in turn, we should point out that where two people have parental rights by operation of law each of them may exercise those rights without the consent of the other person.[2] It follows that the completely uninterested absent parent is not a problem. Where a mother is bringing up her child alone and the father has abandoned the family and never taken any interest in the child then, even if the father has parental rights, the mother can exercise all the parental rights on her own without requiring to obtain the father's consent. In this type of situation the rights of the absent parent are of a purely theoretical nature. This is an important point which may not always have been fully appreciated by those who have in the past opposed parental rights for unmarried fathers.

2.24 The argument that it would be inappropriate to give parental responsibilities and rights to a father where

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[1]Report on Illegitimacy (Law Com No 118, 1982) paras 4.24-4.30.

[2]Law Reform (Parent and Child) (Scotland) Act 1986, s2(4).

the child had resulted from a casual liaison is not self-evidently true. Parental responsibilities and rights are conferred not for the benefit of fathers, or at least not primarily so, but for the benefit of the child. The mother's parental responsibilities and rights are recognised even if the child resulted from a casual liaison, and there is no self-evident reason why the father's should not be also. Of course, some fathers will be uninterested but that is no reason for the law to encourage and reinforce an irresponsible attitude.

2.25 The question of the rapist is much more difficult. Some writers have suggested a special rule excluding convicted rapists from parental rights.[1] This may not be strictly necessary but would probably be expedient. There would be difficulties in this approach if the rape were of the man's wife, or cohabitee, or even if it were of a woman with whom he had a continuing sexual relationship. How would it be known whether the child was the result of the rape or of some other act of intercourse? Why should it matter? Perhaps, therefore, any exclusion should be confined to cases where the child was the result of the rape of a woman with whom the rapist did not have a continuing sexual relationship.

2.26 The argument that conferring parental responsibilities and rights on unmarried fathers would cause offence to mothers who were struggling to bring up their children without support from the fathers is not a weighty argument for denying parental responsibilities and rights to all unmarried fathers, even if they are

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[1]See Eekelaar, "Second Thoughts on Illegitimacy Reform" 15 Fam L 261 (1985); Bainham, Children, Parents and the State (1988) p43.

providing support and fulfilling a parental role. A similar argument could be made in relation to divorced fathers. Indeed lone fathers (whether married, formerly married or never married) who are bringing up children without help from the mothers might feel the same way in relation to the mother's parental responsibilities and rights. The important point in all these cases is that it is not the feelings of one parent in a certain type of situation that should determine the content of the law but the general interests of children and responsible parents.

2.27 The same point can be made about the feelings of certain mothers that they might be at risk of interference and harassment by the father of their child if he had automatic parental responsibilities and rights. There is also the point that what is perceived as "interference" by one parent might be perceived as a manifestation of affection, concern and responsibility by the other, or even by a court or impartial observer. The interests of the child are not necessarily identical to the interests of the parent who has custody. Again, the same dislike of interference is often present after a marriage has broken down but the policy of the law is to encourage involvement by both parents in the child's life, where this is likely to be in the child's interest. The answer to parental involvement which is against the child's welfare is for a court to remove or regulate parental rights. It seems unjustifiable, however, to have what is in effect a presumption that any involvement by an unmarried father is going to be contrary to the child's best interests. Moreover it is by no means clear that there is a real risk of

harassment by unmeritorious fathers.[1] A father who has never taken any interest in his child is unlikely to assert parental rights. The less meritorious the father, the less likely is he to trouble himself about his child.

2.28 The argument about the involvement of the unmarried father in care or adoption proceedings cuts both ways. It could be said to be a grave defect in the existing law that a man who has been a social father to a child should have no legal position in such matters merely because he and the child's mother have not married each other.[2] The uninterested father who has abandoned his child (whether or not he has ever been married to the mother) can be dealt with under the existing law.[3]

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[1]See Eekelaar, loc cit.

[2]See Bainham, "When is a Parent not a Parent? Reflections on the Unmarried Father and His Child in English Law" 3 Int'l Journal of Law and the Family (1989) 208 at pp220 to 225. Under the existing law in Scotland the unmarried father, even if not regarded as a parent, may qualify as the child's "guardian" in certain situations. Under the Social Work (Scotland) Act 1968, for example, "guardian" includes any person who "has for the time being the custody or charge of or control over the child". (s94(1)). Under the Adoption (Scotland) Act 1978 the unmarried father is "guardian" if he has tutory, curatory, custody or access or any other parental right by virtue of a court order. The difficulty is that the father may not have charge of, or control over, the child at the relevant time and may be too late in applying for custody or any other parental right. See eg W v R 1987 SLT 369.

[3]See eg Social Work (Scotland) Act 1968, s15(1), s16(1), s41(2); Adoption (Scotland) Act 1978, s16(2).

2.29 The existing law discriminates against unmarried fathers in two ways.[1] It treats them less favourably than fathers who are or have been married to the child's mother: and it treats them less favourably than unmarried mothers. The increase in the number of cohabiting couples in recent years means that it is no longer possible, if it ever was, to assume that almost all unmarried fathers are irresponsible, uninterested in their children, or undeserving of a legal role as parent. By discriminating against unmarried fathers the law may foster irresponsible parental attitudes which it ought to be doing everything possible to discourage.

2.30 It can also be argued that the law discriminates against children born out of marriage by denying them a father with the normal legal responsibilities and rights.[2] If, for example, a child is being brought up by his parents, who are cohabiting but unmarried, and the mother is killed in a train crash it seems unfortunate that the child has no-one who is automatically qualified to act as his legal representative in relation, for example, to any claims for compensation. Many people would expect that the father would be able to act as the child's legal representative, but that is not the case, unless he obtains a court decree appointing him tutor.

2.31 We would welcome views in response to the following questions.

4(a) Should the law confer parental

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[1]For an example see In re J (A Minor) (Abduction: Custody Rights) [1990] 3 WLR 492.

[2]See Bainham, Children, Parents and the State (1988) pp41 and 44.

responsibilities and rights on the father of a child even if he is not, and has not been, married to the mother of the child?

(b) Should there be an exception for the case where the child is the result of rape and the father did not have a continuing relationship with the mother?

(c) Should there be any other exceptions?

2.32 An alternative to automatic parental responsibilities and rights for unmarried fathers would be to allow the parents of a child, where they are not married to each other at the time of the child's birth, to confer parental responsibilities and rights on the father by agreement. This is the approach which has been adopted in England and Wales by the Children Act 1989. Section 4 of the Act provides as follows.

> "(1) Where a child's father and mother were not married to each other at the time of his birth--
>
> ...
>
> (b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.
>
> (2) No parental responsibility agreement shall have effect for the purposes of this Act unless--
>
> (a) it is made in the form prescribed by regulations made by the Lord Chancellor; and
>
> (b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner."

The requirements of form and registration would probably mean that a couple would have to take legal advice

before obtaining an effective parental responsibility agreement. It seems likely that many couples would not bother with such an agreement so long as their relationship was good. If their relationship deteriorated the mother might then not agree to sign an agreement. Moreover there will be cases where an agreement is not an available option. If, for example, a couple are cohabiting and have a child and the mother dies in childbirth, the father will have no parental rights unless he takes court proceedings to obtain them. These are practical objections. A more fundamental objection is that it seems wrong that one parent should have a right to deny the other parental responsibility and parental rights unless the other resorts to court proceedings. In spite of these objections, the idea of a parental responsibility agreement has certain attractions as a modest advance on the present position and we invite views on it. Our preliminary view, however, is that it is a second best solution which would bring parental responsibilities and rights to only a small proportion of unmarried fathers.

5 **If parental responsibilities and rights are not conferred automatically on the father of a child where he is not, and has not been, married to the mother of the child, should the law enable the father and mother to confer parental responsibilities and rights on the father by agreement?**

Operation of parental responsibilities and rights

2.33 **Introduction.** The Children Act 1989 in England and Wales contains a number of provisions on the operation of parental responsibility - a term which, as we have seen, includes parental rights. As the Act was very carefully considered at all stages and has been very

well received, it seems right that we should consider these provisions with a view to seeing whether they, or something like them, should be included in any new Scottish legislation on this topic. The provisions are in section 2 of the 1989 Act. The first three subsections of that section deal with the question of who has parental responsibility. They adopt the same rule as that currently in operation in Scotland - namely that, in the absence of a court order, the mother has parental responsibility in all cases but the father has parental responsibility only by virtue of marriage to the mother. We have already discussed this question and have asked for views as to whether the law could not be advanced by giving parental responsibilities and rights to all parents, with one limited exception.[1] We discuss the remaining provisions of section 2 of the 1989 Act below.

2.34 **Father's position.** Section 2(4) of the 1989 Act abolishes the rule of law that a father is the natural guardian of his legitimate child. This has already been achieved in Scotland by giving both parents of a child, where they are married to each other or have been married to each other since the child's conception, equal parental rights.[2] Accordingly, we do not think that it would be necessary to reproduce this provision, or any equivalent of it, in new Scottish legislation.

2.35 **More than one person.** Section 2(5) of the 1989 Act provides that

"More than one person may have parental

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[1]See paras 2.21-2.31 above.

[2]Law Reform (Parent and Child) (Scotland) Act 1986, s2.

responsibility for the same child at the same time."

Again this seems unnecessary in the Scottish context where the 1986 Act already makes it clear that more than one person may have parental rights in relation to a child,[1] and where any new statement of parental responsibilities would make it clear that the normal situation was for both parents to have such responsibilities.

2.36 **Parental responsibilities endure.** Section 2(6) of the 1989 Act provides that

> "A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child."

The idea behind this provision is to preserve a parent's position as parent to the maximum extent and to emphasise the continued responsibility of both parents.[2] If new legislation in Scotland were to confer parental responsibilities separately from parental rights there might be something to be said for making it clear that the parental responsibilities continued notwithstanding the acquisition of any parental right by any other person. Of course, as the English Law Commission point out,[3] the scope for carrying out a parent's responsibilities might be greatly reduced if, for example, sole custody were awarded to someone else or the child were taken into local authority care under a supervision requirement, but the parent would still be a

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[1] S2(4).

[2] Law Commission Report on Guardianship and Custody (Law Com No 172, 1988) para 2.11.

[3] Ibid.

parent and would still have an important position in the child's life. It may be, however, that this would be sufficiently clear without a specific provision on it. We would welcome views.

6 **If new legislation were to include a statement of parental responsibilities should it be made clear that these responsibilities do not cease solely because some other person subsequently acquires any parental right?**

2.37 **Either parent can act alone.** Section 2(7) of the 1989 Act provides that

> "Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child."

There is already a provision to very similar effect in the Law Reform (Parent and Child) (Scotland) Act 1986.[1] We do not think that any new provision is required here.

2.38 **Court orders prevail.** Section 2(8) of the 1989 Act provides that

> "The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act."

There is no equivalent of this provision in the existing Scottish legislation, although we have no doubt that parents would, rightly, regard their parental rights as being subject to any court orders. We are not convinced

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[1] S2(4). This provides that "Where two or more persons have any parental right, each of them may exercise that right without the consent of the other person or, as the case may be, any of the other persons unless any decree or deed conferring the right otherwise provides."

that an equivalent provision would be necessary in any new Scottish legislation on this topic but it might be useful for the avoidance of doubt. We would welcome views. In a Scottish provision it would be useful to include a reference to any decree relating to the child's property, and to any supervision requirement made by a children's hearing. This would merely restate the existing law.[1]

7 Should it be provided that the fact that a person has parental responsibilities or rights in relation to a child does not entitle him or her to act in any way which would be incompatible with any court decree relating to the child, or the child's property, or any supervision requirement relating to the child made by a children's hearing?

2.39 **Delegation but no surrender or transfer.** Subsections (9), (10) and (11) of section 2 of the 1989 Act provide that

> "(9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.
>
> (10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.
>
> (11) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part

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[1] Aitken v Aitken 1978 SC 297; D v Strathclyde Regional Council 1985 SLT 114. In relation to the child's property it ought to be clear that the parent's responsibilities and rights would not entitle him or her to act in a way incompatible with the appointment of a judicial factor to administer the property, or with any other court order relating to the child's property.

of his parental responsibility for the child concerned."

Provisions on these lines would be a useful restatement of the existing law of Scotland.[1] The English Law Commission argued in their report on Guardianship and Custody that an express provision would be helpful for two reasons.[2]

> "First, parents are now encouraged to agree between themselves the arrangements which they believe best for their children, whether or not they are separated. It is important, therefore, that they should feel free to do so. Secondly, ... it is helpful if, for example, a school can feel confident in accepting the decision of a person nominated by the parents as a temporary "guardian" for the child while they are away."

We would add that in relation to the administration of a child's property it is particularly important to make it clear that the parent cannot transfer his or her rights and responsibilities to others but can appoint a factor or other agent to act on his or her behalf. These principles have recently been re-affirmed by the Court of Session[3] and ought to appear in any codification of this branch of the law. We suggest that

8 It should be provided that

(a) a person who has parental responsibilities or rights in relation to a child may not surrender or transfer any

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[1]See, in relation to the administration of the child's property, Scott v Occidental Petroleum (Caledonia) Ltd 1990 SCLR 278 per L P Hope at p281.

[2]Law Com No 172 (1988) para 2.13.

[3]Scott v Occidental Petroleum (Caledonia) Ltd, supra. In this case it was further held that for a mother to hand over the child's funds to trustees for the child went beyond the mere appointment of a factor and amounted to an attempt to transfer her rights and duties in relation to the child's property. It was not therefore permissible.

part of these responsibilities or rights to another but may arrange for some or all of them to be met by one or more persons acting on his behalf;

(b) the person with whom any such arrangement is made may himself be a person who already has parental responsibilities or rights in relation to the child concerned;

(c) the making of any such arrangement does not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibilities for the child concerned.

Position of carers without parental responsibilities or rights

2.40 Section 3(5) of the Children Act 1989 contains a provision which supplements the provisions just considered. It provides that

> "A person who --
>
> (a) does not have parental responsibility for a particular child; but
>
> (b) has care of the child,
>
> may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare."

One situation where this provision would be useful is where a young child is sent to stay with relatives or friends for a holiday. The provision would make it clear that the adult or adults with care of the child for the time being could, for example, arrange for any necessary medical treatment if the child became ill or had an

accident.[1] We think that a provision on these lines would be useful in Scotland too, although in this instance it is the absence of relevant rights rather than responsibilities which is important. We suggest that:

9 **It should be provided that a person who does not have the relevant parental rights in relation to a child but who has care of the child may do what is reasonable in all the circumstances for the purpose of safeguarding or promoting the child's welfare.**

Wishes of child

2.41 Where a child is in the care of a local authority or voluntary organisation the authority or organisation must, in reaching any decision relating to the child,

> "so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding."[2]

The Scottish Child Law Centre has suggested that a young person between the ages of 12 and 16 years should be entitled to be consulted by a parent or guardian before any major decision is taken relating to the young person. The obligation to consult would be qualified by a reference to the young person's age and understanding and the parent or guardian would be obliged to give due weight to the young person's views, taking into account his or her age and understanding.

2.42 Although the suggestion was limited to children above the age of 12 we consider that the reference to age and understanding makes any lower age limit

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[1]See Law Com No 172 (1988) para 2.16.

[2]Social Work (Scotland) Act 1968, s20.

unnecessary. The question, as we see it, is whether a parent or other person exercising parental rights should be under a similar obligation to ascertain and have regard to the child's wishes and feelings as a local authority is under in relation to a child in its care.

2.43 We can see great attractions in such an approach. It emphasises that the child is a person in his or her own right and that his or her views are entitled to respect and consideration. In relation to children above the ages of 12 (girls) or 14 (boys) it preserves a valuable feature of the Scottish common law. Yet it would be more flexible in recognising that arbitrary age limits are unsatisfactory in this respect. There are, however, some difficulties. First, the decisions which a local authority takes, as such, will be major decisions affecting the child. In the case of a parent, or other individual with parental rights, it would be unrealistic to require consultation on all decisions, however minor, relating to the child. This is recognised in the suggestion made by the Scottish Child Law Centre, which was limited to major decisions. However, it would be difficult to define major decisions with any precision. Secondly, it is not easy to see what the sanction would be for non-compliance. Again the parent's position is different from that of a local authority, which is accountable to the public and subject to judicial review. Neither of these objections is necessarily conclusive. There could be value in a provision which established a duty to consult the child, even if it was vague and unenforceable. It could have an influence on behaviour. We have reached no concluded view on this question but would welcome comments on it.

10 Should it be provided that a person with parental rights, in reaching any major

decision relating to the child in the exercise of those rights, must so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to the child's age and understanding?

We would suggest that if any such rule were introduced it should be made clear that third parties would not be prejudiced by any failure of the parent or other person (for example, when dealing with the child's property, or contracting or exercising an option as the child's legal representative) to consult the child.

Corporal punishment

2.44 A parent's right to inflict reasonable corporal punishment on his or her child[1] is an extremely controversial issue. Regardless of how one views such a right it is clear that many parents do in fact hit their children. One major research study[2] found that 62% of parents hit their one year old child, that 93% of parents hit their four year olds and that, by the age of seven, 8% of children were being hit by a parent at

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[1]For recent case law, see Guest v Annan 1988 SCCR 275; B v Harris 1990 SLT 208; Peebles v MacPhail 1990 SLT 245. The last case illustrates the limited nature of the right. Lord Justice-General Emslie said that "to slap a child of two years old on the face, knocking him over, is an act as remote from reasonable chastisement as one could possibly imagine." In England the High Court upheld a decision by East Sussex County Council to put a six year old boy on their child abuse "at risk" register after his mother had smacked him with a wooden spoon, causing bruising to his thigh, for "being too lippy". See The Times, 27 Feb 1990. The recent Scottish cases are discussed in Shiels, "Reasonable chatisement by parents" Scolag 1990, p115.

[2]John and Elizabeth Newson, Four Year Olds in the Urban Community, (1970); John and Elizabeth Newson Seven Year Olds in the Home Environment, (1976).

least once a day and a further third not less than once a week. 22% of the seven year olds were hit with some implement. The percentages of children hit by their parents were found to be consistently high in all social classes. In further research, conducted in 1985, two-thirds of the mothers interviewed admitted hitting their babies before they reached the age of one. However, there is a body of opinion that the physical punishment of children should no longer be tolerated.[1]

2.45 The question of corporal punishment of children by parents, foster parents and others was debated in Parliament in 1989 during the proceedings on the Children Bill. In the House of Commons an attempt was made to introduce a new clause which, in civil proceedings, would have removed the defence of "reasonable chastisement" from parents, guardians and others having custody or control of a child or young person. The motion to add the new clause attracted some support and some opposition but was eventually withdrawn.[2] An interesting feature of the proposed new clause was that, for its purposes, a person was not to be taken as giving corporal punishment

> "by virtue of anything done for reasons that include averting an immediate danger of personal injury to, or an immediate danger to the property of, any person (including the child or young person concerned)".[3]

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[1]There is, for example, a campaigning organisation called EPOCH (End Physical Punishment Of Children) based at 77 Holloway Road, London N7 8JZ.

[2]Parl Debs (HC) Standing Committee B, 13 June 1989, cols 549-567.

[3]This provision, like other provisions in the new clause, was derived from the provisions in the Education (No 2) Act 1986, ss47 and 48, abolishing corporal

In the House of Lords an amendment was moved to repeal section 1(7) of the Children and Young Persons Act 1933.[1] Section 1 of that Act deals with cruelty to children and, among other things, makes it an offence for any person who has the custody, charge, or care of a child or young person under the age of 16 to assault or ill-treat the child or young person in a manner likely to cause him unnecessary suffering or injury to health. Section 1(7) provides that

> "Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him.".

There are equivalent provisions for Scotland in section 12 of the Children and Young Persons (Scotland) Act 1937. The amendment was opposed by the Government on the ground that, as it did not abolish the common law defence, it would "create complete obscurity" as to the position of a parent administering reasonable corporal punishment.[2] After a short debate the amendment was withdrawn. Similar amendments at later stages in the House of Lords met with the same objection and were also withdrawn.[3] At the Report stage in the House of Lords an amendment was moved with the objective of preventing corporal punishment of children in foster care. This amendment was the subject of a vigorous debate but was eventually defeated by 128 votes to 109.[4]

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punishment in state schools.

[1]Parl Debs (HL) (1988-89) Vol 503 cols 542-548.

[2]Ibid at col 548.

[3]Parl Debs (HL) (1988-89) Vol 504 cols 345-352 and Vol 505, cols 407-410.

[4]Parl Debs (HL) (1988-89) Vol 503, cols 1443-1453.

2.46 It is abundantly clear from the Parliamentary debates, and from media coverage of this issue, that the question of abolishing the parental right to administer reasonable corporal punishment is one which arouses strong feelings and is of considerable public interest. Although there are technical legal aspects to it, as the debates on the proposed amendment to section 1(7) of the 1933 Act showed, it is primarily a question of social policy. Nonetheless we think that we would be failing in our duty if we reviewed the law on parental responsibilities and parental rights without mentioning, and consulting on, the right to administer reasonable corporal punishment. We do not think, however, that we should do more at this stage than set out arguments for and against retention of this right, and invite views, comments and further arguments.

2.47 **Arguments for retaining a parent's right to administer reasonable corporal punishment.** The following arguments might be put forward for retaining a parent's right to administer reasonable corporal punishment. We do not necessarily endorse any of these arguments and we express no view on their weight.

(a) If parents wish to bring up their children in this way, and if there is no danger of lasting harm, the State ought not to interfere.

(b) The fact that a minority of parents go beyond what is reasonable is no reason why the remainder of parents should be treated as criminals if they so much as slap a child on the hand.

(c) Children have to be taught standards of behaviour or not to do dangerous things. Sometimes, if a child is too young to be

reasoned with, physical punishment may be the only "language" he or she will understand.[1]

(d) Case law makes it clear that punishment must not go beyond what is reasonable.[2] This provides a safeguard against abuse and provides a test which is capable of reflecting changes in knowledge and in general perceptions of what is acceptable.

(e) Even if it became unlawful for a parent to use corporal punishment on his or her child such a law would be unenforceable and would be broken on a very wide scale.

(f) Outlawing something which nearly all parents do from time to time will not stop those who really are doing their children harm and may prevent potential child abusers from seeking professional help before it is too late.

(g) The question has recently been debated in Parliament, in relation to the law of England and Wales, and the debates do not suggest that there is majority support for abolition.

2.48 **Arguments for abolishing a parent's right to administer reasonable corporal punishment.** Again we merely set out arguments which have been, or might be, made. We do not necessarily endorse any of them and we express no view on their weight.

(a) A child, like any other individual, has a right not to be assaulted.

(b) Even although it is unlikely that many

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[1]Hodgkin "Parents and Corporal Punishment", 10 Adoption and Fostering (1986) p.47.

[2]See Guest v Annan, B v Harris and Peebles v MacPhail, supra.

prosecutions would result from parents hitting their children in a way which would be lawful under the existing law, the law should attempt to encourage restraint. Even a law which was difficult to enforce might have an effect on conduct and might thereby reduce abuse and make easier the conviction of abusers.

(c) The existing requirement of "reasonableness" is an inadequate safeguard. Different cultures adhere to different values[1] and so long as corporal punishment is allowed to continue there will be no consensus on what is reasonable.[2]

(d) If all corporal punishment is made unlawful there is less chance of violent abuse taking place.[3] Parents will know where the line is drawn. There will be less chance of conduct which begins as chastisement ending up as violent abuse because a parent does not know his or her own strength or because the initial chastisement does not produce the desired response.

(e) We should follow the lead taken by other countries. Sweden prohibited physical punishment of children in 1979 and was followed by Finland, Denmark, Norway and

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[1]Cf. R v Derriviere (1969) 53 Cr App R 637.

[2]Freeman, "Time to Stop Hitting our Children", 51 Childright (1988) p5.

[3]Hodgkin, "Parents and Corporal Punishment" supra at p48.

Austria.[1] An American assessment of the Swedish legislation reported that:[2]

> "The 1979 law is now taken for granted in Sweden. Whereas in 1981 parents reported 'thinking twice' before using any physical punishment, in 1988 parents simply say they do not use it".

It does not appear that State intervention in Swedish family life has increased as a result of the legislation.[3]

(f) The right to administer corporal punishment to pupils in state schools has been abolished,[4] and if that is right as a matter of principle it is difficult to see why it is not also right to abolish corporal punishment in the home.

(g) Some local authorities already prohibit all corporal punishment of foster children by local authority foster parents. If this is right for foster children why is it not also right for a parent's own children?

(h) The Committee of Ministers of the Council of Europe has recommended that member states should

> "review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even

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[1]In 1984,1986, 1987 and 1989 respectively. See Newell, Children are People Too: the Case Against Physical Punishment.

[2]Haeuser, Assessment of Swedish Reforms: Reducing Violence Towards US Children: Transferring Positive Innovations from Sweden (1988)University of Wisconsin, Milwaukee, School of Social Welfare.

[3]Parl Debs (HC) Standing Committee B, 13 June 1989, col 555.

[4]Education (No 2) Act 1986, s48.

if violation of such a prohibition does not necessarily entail a criminal penalty",[1]

(i) The United Nations Convention on the Rights of the Child, adopted by the General Assembly in November 1989, requires that States must take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment while in the care of parents, legal guardians or any other person who has the care of the child.[2]

2.49 No doubt further arguments will occur to consultees. We would be grateful for views in response to the following question:-

11 Should the parent's right to administer reasonable corporal punishment to his or her child be retained or abolished?

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[1]Recommendation No 85(4) (1985) para 12. The explanatory memorandum notes (at p14) that "It is the very assumption that corporal punishment of children is legitimate that opens the way to all kinds of excesses and makes the traces or symptoms of such punishment acceptable to third parties".

[2]Article 19.

PART III - GUARDIANSHIP

Introduction

3.1 The existing law on guardianship is in many respects archaic and unclear. It would be simplified considerably, so far as the appointment of guardians is concerned, if the recommendations in our report on The Legal Capacity and Responsibility of Minors and Pupils[1] were implemented, but other aspects would remain unsatisfactory. We think that there would be great advantages in modernising the law on this subject, as has recently been done in England and Wales,[2] and specifying clearly how a guardian can be appointed, how an appointment can be revoked, when an appointment takes effect, and what the responsibilities and rights of a guardian are. Under the existing law tutors are included within the definition of trustees for the purposes of the legislation on trusts.[3] This is confusing, as a tutor is not the titular owner of the child's property. New provisions on guardianship might make it unnecessary to resort to this kind of expedient.

3.2 We do not have much information about how guardianship actually operates in practice at the present time, but it seems likely that its function is different from what it was in the 17th century when the basis of the present law was laid down. It seems likely

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[1]Scot Law Com No 110 (1987).

[2]Children Act 1989, implementing the Law Commission's report on Guardianship and Custody (Law Com No 172, 1988).

[3]Trusts (Scotland) Act 1921, s2.

that in most cases a parent's main concern nowadays is likely to be about the physical care and upbringing of the child after the parent's death,[1] rather than about the administration of property, which was a major concern of the early law. Most children have little or no property: if there is substantial property it is likely to be put into a trust for the benefit of the children rather than left to be administered by a tutor. It seems probable too that guardianship is not very widespread in modern conditions. Cases where children are orphaned below the age of 16 are comparatively rare.[2] In many such cases the children will be looked after by relatives or step-parents without any formal appointment of a guardian. In some cases the local authority will take over the care of the children under section 15 of the Social Work (Scotland) Act 1968. Nonetheless, like the English Law Commission,[3] we think that there is still a need for the law to provide for private guardianship, if only because it will often be a reassurance to parents to know that there is a way in which they can make some provision for the care of their children if they should die while the children are still young.

Appointment of guardian

3.3 **Appointment by parent.** The Law Reform (Parent and Child) (Scotland) Act 1986 provides that

"The parent of a child may appoint any person to be

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[1]See the report of the research by J Priest in the north east of England, appended to the Law Commission's Working Paper on Guardianship (Working Paper No 91, 1985), at pp198-199.

[2]See the Law Commission's Working Paper No 91 at pp23 to 26.

[3]Working Paper No 91, pp68 to 75.

tutor or curator of the child after his death, but any such appointment shall be of no effect unless--

(a) the appointment is in writing and signed by the parent; and

(b) the parent at the time of his death was tutor or curator of the child or would have been such tutor if he had survived until after the birth of the child."[1]

We see no reason to suggest any change in this provision, apart from minor changes in terminology to take account of suggestions already made. These minor changes would involve changing the reference to tutor or curator in the opening part of the provision to a reference to "guardian", and the references to tutor or curator in paragraph (b) to a reference to having the right of legal representation in respect of the child.

3.4 **Appointment by court.** The Court of Session and the sheriff courts have power to make orders relating to tutory or curatory (including appointment, regulation and termination) under the very general provision in section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986. This gives the court power to make orders relating to parental rights, which are defined as including tutory and curatory.[2] Again we see no reason to suggest any change to the substance of this provision, although certain technical changes would be necessary if tutory and curatory were to be replaced by a unitary concept of guardianship and if guardianship (as distinct from the right of legal representation) were no longer to be included within the definition of parental rights. These are matters which can be dealt

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[1] S4(1).

[2] S8.

with later when a draft Bill is being considered. We have already recommended elsewhere that other, archaic methods of appointing guardians should be abolished.[1]

3.5 **Appointment by existing guardian.** The Children Act 1989 provides that, in England and Wales:

> "A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death."[2]

The Law Commission found, on consultation, that the balance of opinion amongst respondents was in favour of this solution. They pointed out that -

> "if appointing a guardian is an aspect of responsible parenthood, it can be no less an aspect of responsible guardianship."[3]

Although the situation is unlikely to arise very often, we think that there could be value in a provision expressly allowing a guardian to appoint a replacement.[4] An elderly grandparent, for example, might be acting as a sole guardian and might be anxious about the arrangements for the child in the event of his or her death. We suggest that

> 12 **A guardian of a child should be able to appoint another individual to take his or her place as the child's guardian in the event of his or her death.**

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[1]Report on The Legal Capacity and Responsibility of Minors and Pupils (Scot Law Com No 110, 1987) recommendation 20(d).

[2]S5(4).

[3]Law Com No 172 (1988) para 2.25.

[4]It is already possible for a trustee to assume a new trustee, and a tutor is deemed to be a trustee for this and various other purposes. Trusts (Scotland) Act 1921, ss2 and 3.

Revocation of appointment

3.6 Section 6 of the Children Act 1989 makes provision in England and Wales for the revocation of appointments as guardian. The relevant provisions are as follows

> "(1) An appointment ... revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as the result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian.
>
> (2) An appointment ... (including one made in an unrevoked will or codicil) is revoked if the person who made the appointment revokes it by [the appropriate form of writing]
>
> (3) An appointment ... (other than one made in a will or codicil) is revoked if, with the intention of revoking the appointment, the person who made it--
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> (a) destroys the instrument by which it was made; or
>
> (b) has some other person destroy that instrument in his presence.
>
> (4) For the avoidance of doubt, an appointment ... made in a will or codicil is revoked if the will or codicil is revoked."

The question for consideration is whether provisions on the lines of section 6(1) to (4) of the Children Act would be useful in Scotland.

3.7 An appointment of a tutor can be revoked under the existing Scots law but the authorities on this are very old and do not cover all the points covered in subsections (1) to (4) above.[1] We think that there would be advantages in having similar provisions in Scots law

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[1]See Stair 1.6.6; Scott v Wilson (1773) Mor 6585; Fraser, Parent and Child (3rd edn 1906) p242.

although, of course, the precise terms of these would be a matter for consideration at the stage of producing a draft Bill. We therefore suggest that

13 **Provision should be made for the revocation of an appointment of a nominated guardian, on similar lines to the provisions in section 6(1) to (4) of the Children Act 1989 (set out in paragraph 3.6).**

When should appointment take effect?

3.8 **Need for acceptance.** The guardianship of a child is a very heavy responsibility indeed and it seems to us to be important, in the interests of the child as well as the guardian, that it should not be imposed on anyone who is not willing to accept it. It may be supposed that a parent would normally seek the consent of a person in advance before naming him or her as guardian in a will or other writing, but there is no guarantee that this will be done in all cases and, in any event, the circumstances may have changed materially by the time of the parent's death. The existing law in Scotland is that "no person is obliged to accept of the office of tutor or curator"[1] and we think this should continue to be the case. Under the existing law acceptance may be express (for example, by a minute or letter of acceptance addressed to the executors of the deceased parent) or may be implied from acts which are not consistent with any other intention.[2] Although the authorities on this

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[1]Erskine, Principles 1.7.16. See also Stair 1.6.11 ("with us all tutors are free to accept or refuse").

[2]Beatson v Beatson (1678) Mor 16298; Lockhart v Ellies (1682) Mor 16301; Watson v Watson (1714) Mor 12767; Mollison v Murray (1833) 12 S 237 (summons in name of parties as tutors and curators, coupled with other evidence, held to indicate acceptance of office).

point are very old they seem to us to establish a sound principle. The position under the Children Act 1989 in England and Wales is different. Under that Act an appointment takes effect automatically but may be disclaimed by an instrument in writing registered in a way to be prescribed.[1] It seems to us to be preferable not to place the burden of formal disclaimer, which would normally involve the inconvenience and expense of obtaining legal advice, on someone who may never even have been consulted about the appointment. The traditional Scottish approach seems preferable, but could conveniently be put into statutory form. We suggest therefore that:

14 An appointment as guardian should not take effect until accepted, either expressly, or impliedly by acts which are not consistent with any other intention.

3.9 **Acceptance by one of several.** A question which gave rise to difficulty in the old law was whether, if two or more tutors were appointed, it was possible for one or more to accept even if all did not accept. It was eventually established that, if the deceased parent had not indicated to the contrary, any one or more could accept.[2] It might be useful to embody this rule, for the avoidance of doubt, in a modern statute on the subject. We suggest therefore that:

15 If two or more persons are appointed as guardians any one or more should be able to

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[1] S6(5).

[2] Young v Watson (1740) Mor 16346; Drumore v Somerville (1742) Mor 14703.

accept office, even if both or all do not accept, unless the appointment expressly provides otherwise.

3.10 **Acceptance where there is a surviving parent.** An interesting and difficult question is whether a guardian should be precluded from accepting office so long as the child has a surviving parent with full parental rights. Under the existing law in Scotland there is no such bar. The surviving parent will (in the usual case) continue to have full parental rights and responsibilities. In such circumstances a guardian would not usually wish to accept office, with all the difficulties and responsibilities that that would involve, unless there was some very good reason, such as the absence or unsuitability of the surviving parent, for doing so. Even if the guardian did accept office, that would not deprive the surviving parent of parental rights. Both would have parental rights, either being able to act without the other, unless the deed appointing the guardian had provided otherwise.[1] Again, in many cases it would be expected that the guardian would be content for the surviving parent to exercise parental responsibilities and rights but the guardian would be available, in reserve as it were, just as an absent parent would be, in case of emergencies. This system is therefore capable of providing a flexible solution, depending on the circumstances. In some cases there might be conflict between the guardian and the parent. For example, the mother may have been divorced from the father, and may have appointed her mother or her new husband as guardian. On the mother's death the father

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[1]Law Reform (Parent and Child) (Scotland) Act 1986, s2(4).

may claim custody and this claim may be resisted by the grandmother or stepfather. However, such conflicts can arise in any event even if there has been no appointment of a guardian. Whether they result in litigation or difficulty is, we think, likely to depend on the facts of the case and the relationships between the parties, rather than on whether the law has a rule precluding a guardian from accepting office during the life of the surviving parent.

3.11 In England and Wales the Children Act 1989 provides that an appointment by one parent does not take effect until the other parent dies or ceases to have parental responsibility for the child.[1] However, the appointment takes effect immediately if the appointing parent immediately before his or her death had a residence order (which is equivalent to a custody order in Scottish terminology) in his or her favour, and in force.[2] We are not convinced that this exception covers all the cases. It is quite possible for the parents of a child to be separated and yet for there to be no custody order (or residence order) in favour of one of them. The father, for example, may simply have abandoned his family. Moreover, the idea that both parents should retain full parental responsibilities and rights after separation, and not seek court orders unless this is necessary in the interests of the child, is gaining ground. Section 3(2) of the Law Reform (Parent and Child)(Scotland) Act 1986 already provides that a court should not make any order relating to parental rights "unless it is satisfied that to do so will be in the interests of the child" and there is a similar provision

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[1] S5(8).

[2] S5(7)(b).

for England and Wales in the Children Act 1989, which is expressed even more firmly.[1] In the future therefore there will be many cases of separated parents where there is no custody order or residence order. In many of these cases it might well be desirable for an appointment of a guardian to be capable of coming into operation, even although there is a surviving parent somewhere.

3.12 Having reconsidered this question in the light of the solution adopted in the Children Act 1989 we are not persuaded that the existing rule in Scotland needs to be changed. It is open to a parent who is content for the other parent to have sole parental responsibilities and rights after his or her death to provide that an appointment of a guardian is not to take effect until after the other parent's death.[2] If he or she does not so provide it seems to us that the more flexible solution, which is more likely to ensure that there is someone to look after the child's interests, is not to preclude a guardian from accepting office merely because there is a surviving parent in existence. We suggest therefore that

16 **There is no need to change the existing rule that a guardian appointed by a parent to act after his or her death is not precluded from accepting office merely because the other parent is surviving.**

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[1] S1(5).

[2] See eg Lockhart v Ellies (1682) Mor 16301.

Responsibilities and rights of guardian

3.13 A guardian is a substitute parent and we agree with the view of the English Law Commission,[1] now embodied in the Children Act 1989,[2] that the most appropriate approach in modern conditions is to give a guardian the normal parental responsibilities and rights. This would mean, if the suggestions made earlier in this paper are accepted, that a guardian would be responsible for the care of the child for safeguarding and promoting the child's welfare and for administering the child's property.[3] Under existing legislation the guardian would be bound to aliment the child (that is, provide such support as is reasonable in the circumstances) once he or she accepted the child as a child of his or her family.[4] A guardian already counts as a parent for the purposes of the Education (Scotland) Act 1980[5] and for most purposes of the Social Work (Scotland) Act 1968.[6] To give the guardian the general parental responsibilities with which we are here concerned would therefore be consistent with existing legislation. To enable the guardian to fulfil his or her responsibilities he or she would, on this approach, have the normal parental rights of legal representation, custody and access.

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[1]Law Com No 172 (1988) para 2.25.

[2]S5(6),

[3]See para 2.5 above.

[4]Family Law (Scotland) Act 1985, s1(1)(d).

[5]S135(1).

[6]See eg ss15, 16, 30(2).

3.14 What we are suggesting is to some extent a reversal of the scheme of the existing law. The existing law defines some parental rights and duties in terms of a guardian's rights and duties. We are suggesting that, as is the case in England and Wales under the Children Act 1989, parenthood should be regarded as the primary concept and that a guardian's rights and responsibilities should be defined in terms of a parent's rights and responsibilities. We consider the implications of this for the administration of the child's property later. In the meantime we suggest that:

17(a) **A guardian should have the same responsibilities in relation to the child as a parent has.**

(b) **To enable him or her to fulfil these responsibilities a guardian should have the same rights of legal representation, custody and access as a parent has.**

3.15 We envisage that the rules applying to parental responsibilities and rights would apply to guardians with these responsibilities and rights. For example, the rule that where two or more persons have any parental right each of them may exercise it without the consent of the other or others, unless the deed or decree conferring the right provides otherwise,[1] would apply to cases where there were two or more guardians.

Termination of guardianship

3.16 Although a person should be free to accept or refuse the guardianship of a child, the interests of the child require that, once the guardian has unequivocally accepted office, he or she should not be able to

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[1]Law Reform (Parent and Child) (Scotland) Act 1986 s2(4).

surrender or transfer his or her responsibilities, other than by means of an appropriate court order or orders. This was probably the position under Scots law, prior to 1921, although some doubt has been introduced by the Trusts (Scotland) Act of that year.[1] It is the position under the Children Act 1989 in England and Wales.[2] If this rule were to be adopted, or re-adopted, in Scotland, it would follow that, unless the appointment provided for an earlier termination, guardianship would terminate (a) on the child's attaining the age of 16[3] (b) on the death of the child or the guardian or (c) by virtue of a court order (including an adoption order). At present a court order terminating tutory could be made, on the application of any person claiming interest, under section 3 of the Law Reform (Parent and Child)(Scotland) Act 1986.[4] If guardianship were separated out from parental rights there would have to be drafting changes, but these should not affect the

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[1]See eg Dow v Seaton (1708) 2 Fount Dec 451 (a curator "having once accepted, he could not be legally freed"); Gordon v Dunbar (1711) Mor 16333 (curators, once having accepted, could not resign). Robertsons (1865) 3 M 1077. Under s31 of the Judicial Factors Act 1849 the Court of Session has power to accept the resignation of a tutor "on cause shown". Under the Trusts (Scotland) Act 1921, s3 a trustee (a term which includes a tutor) can resign office and assume new trustees. This, however, seems inappropriate in relation to guardians.

[2]Ss2(9) and 6(7).

[3]Under the existing law tutory terminates when the child is 12 (if a girl) or 14 (if a boy). A v B (1533) Mor 16218. When our proposals in Scot Law Com No 110 (1987) are implemented, guardianship will terminate on the child's attaining the age of 16.

[4]See also s31 of the Judicial Factors Act 1849 which gives the Court of Session power to remove a tutor on cause shown.

basic policy. We suggest that:

18 Once a guardian has accepted office then, unless the appointment provides for earlier termination, guardianship should be terminated only by

(a) the child's attaining the age of 16 years,

(b) the death of the child or the guardian, or

(c) a court order.

PART IV - ADMINISTRATION OF CHILDREN'S PROPERTY

Introduction

4.1 Nowadays any substantial family property which is left or donated to children is usually tied up in a trust. Where a child acquires substantial property in his or her own right, and free from a trust, this is usually as a result of (a) an award of damages (b) a payment by the Criminal Injuries Compensation Board or (c) an inheritance resulting from a bequest, where the prospect of the child inheriting while under age has not been provided for,[1] or the death, intestate, of a parent, or the right to legitim. We consider these three cases and other cases in turn and then consider the court's general powers to protect the property of children by appointing a judicial factor or otherwise. Finally we consider the general question of how a parent's or guardian's right of legal representation should operate in relation to the administration of property.

4.2 One general point which must be borne in mind throughout this discussion of the administration of a child's property is that children develop and gain in cognitive ability and experience as they grow older. At present Scots law recognises that minors above the age of 12 (girls) or 14 (boys) can manage their own property, with the consent of their curators where necessary. In shifting to a single age limit of 16 (as recommended in our Report on The Legal Capacity and

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[1]For example, a bequest intended for the child's parent may pass to the child if the parent has predeceased the testator.

Responsibility of Minors and Pupils[1]) we are anxious that the law should continue to recognise, and promote, the development of a child's capacity. In relation to property it seems to us that this can best be done by enabling the child to gain experience by being allowed to manage small sums, increasing as the years pass, himself or herself. We have therefore tried to build into our suggestions provision for payments direct to the child whenever this is appropriate. The way to encourage the development of a mature and responsible approach is not, in our view, to treat a young person as completely incapable until a certain date and as completely capable thereafter. Our approach to property questions is, in this respect, intended to fit in with our approach to contracts in our previous report, where we recommended that children under the age of 16 should have legal capacity to enter into transactions, on reasonable terms, of a type commonly entered into by children of their age and circumstances.[2] In short we think that the law should be such that it does not rule out opportunities for children to undertake some financial responsibility even before attaining the age of 16.

Damages

4.3 There are rules of court which deal with the situation where damages are awarded to a child. In the Court of Session, rule 131 provides as follows:

> "(a) In any action of reparation in which decree is granted for payment of a sum of damages to, or in which decree of absolvitor has been pronounced following upon an extra-judicial settlement in favour of, any

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[1]Scot Law Com No 110 (1987).

[2]Ibid paras 3.41 to 3.49 and 3.51.

(i) pupil child, acting with the concurrence of a curator ad litem; or

(ii) minor pubes acting with or without the concurrence of his or her father or of a curator ad litem; or

(iii) parent acting on behalf of his or her pupil child,

it shall be competent for the court granting such decree, if it appears that there is no person available to give a full and valid discharge for the damages, or if the court is satisfied that the administration of the damages for the benefit of such minor or pupil cannot otherwise be reasonably secured, to appoint de plano some responsible person as factor in accordance with the provisions hereinafter contained.

(b) Every appointment of a factor under this rule shall be limited to take effect in so far only as regards the said damages.

(c) In appointing any such factor, the court may give him such powers of disbursing both the capital and the income of said damages to or for behoof of the minor or pupil, and such other powers as may be thought necessary or expedient in the interest of such minor or pupil, and may direct that the said damages (both capital and income) shall be paid to or for behoof of the minor or pupil in such amounts and at such times as the court may fix.

(d) Such factor shall be bound to find caution for his intromissions and shall be under the superintendence of the Accountant of Court by virtue of the Pupils Protection (Scotland) Act 1849, and the Judicial Factors (Scotland) Act 1889."

The procedure for applying for the appointment of a factor is regulated[1] and provision is made for the discharge of a factor.[2] On the death or resignation of a factor, any person interested, or the Accountant of

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[1]Rule of Court 132.

[2]Rule of Court 134(a).

Court, can apply for a new appointment.[1] A judicial factor is normally a solicitor or accountant. He or she must prepare an inventory of the property under his or her management, and must submit annual accounts to the Accountant of Court, a public official based in Edinburgh.[2]

4.4 In the sheriff courts the relevant rule provides as follows.[3]

> "(1) Where in any action of damages by or on behalf of a person under legal disability, arising out of injury sustained by such person, or out of the death of some other person in respect of whose death the person under legal disability is entitled to damages, a sum of money becomes payable to such person, such sum shall, unless otherwise ordered, be paid into court and shall be invested, applied, or otherwise dealt with and administered by the court for the benefit of the person entitled thereto, and the receipt of the sheriff clerk shall be a sufficient discharge in respect of the amount paid in.
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> (2) The sheriff clerk of any sheriff court is also authorised at the request of any competent court to accept custody of any sum of money paid into such court in any action of damages by or for behoof of a person under legal disability provided always that such person is then resident within the jurisdiction of such sheriff court and such sum shall be invested or otherwise dealt with as in this rule.
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> (3) Where any money is paid into court under this rule it shall thereafter be paid out by the sheriff clerk or otherwise applied for the benefit of the person entitled thereto after such intimation and service and such inquiry as the sheriff may direct.

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[1]Rule of Court 134(b).

[2]See the Judicial Factors Act 1849 and the Judicial Factors (Scotland) Act 1889.

[3]Sheriff Courts (Scotland) Act 1907, First Schedule, rule 128, as substituted by SI 1983 No 747.

(4) On payment into court under this rule of money which has become payable to a person under legal disability, the sheriff clerk shall:-

(a) issue to the person making the payment a receipt in or as nearly as may be in terms of Form P as set out in the Appendix to this Schedule to which receipt there shall be added a form in terms of Form Q as set out in the Appendix to this Schedule;

(b) transmit forthwith to the Secretary of State a copy of the said receipt, having appended thereto the additional particulars specified in Form R as set out in the Appendix to this Schedule and the person making the payment shall forthwith complete and transmit to the Secretary of State Form Q intimating the payment into court.

(5) Any sum which in terms of this rule is ordered to be invested, shall be invested in any manner in which trustees are authorised to invest by virtue of the Trustee Investments Act 1961 and no such sum shall be invested otherwise than in accordance with this rule."

Paragraph (2) in the above rule used to refer to any competent court within the British Dominions,[1] which may help to give some idea of its purpose. The above procedure is used quite frequently in the sheriff courts and appears to function well.[2] In practice the investment of the funds, and questions of disbursements for special purposes, are decided by the sheriff after discussion with the child's parent or parents.[3] If the child is old enough, then he or she may also be

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[1]Act of Sederunt, 16th July 1936; Dobie, Sheriff Court Practice (1952) 82.

[2]In April 1990 funds of over £150,000 were held in Glasgow sheriff court under rule 128 on behalf of 39 entitled persons. Letter from Mr McLay, Regional Sheriff Clerk, 4 April 1990.

[3]Macphail, Sheriff Court Practice, 698.

consulted before any substantial payment is authorised.[1]

4.5 It is for consideration whether these rules ought to be generalised and extended so that all courts would have the same options available. There seems to be no good reason for having different rules for different courts, when the problems and the available solutions are the same.

4.6 The first question is when the court's special powers should be available. If the recommendations in our report on The Legal Capacity and Responsibility of Minors and Pupils[2] were implemented, references to pupils and minors could be replaced by references to persons under legal disability by reason of non-age. In this paper we will confine ourselves to such cases. We propose to issue a further discussion paper on the guardianship of adults who are under a legal incapacity and in that context it could be considered whether any similar provision is necessary for them.[3]

4.7 Although cases involving awards of damages are likely to provide almost all the examples of court proceedings involving awards of money to children, it is conceivable that other types of proceedings (such as an action for payment of an amount due under a trust, or an action of count, reckoning and payment, or a multiplepoinding) might also result in a decree for

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[1] Ibid.

[2] Scot Law Com No 110 (1987).

[3] In most cases involving adults under an incapacity the action will be raised by a curator bonis to whom the damages can be paid. See Macphail, loc cit. 697.

payment to a child. There seems to be no reason why the same rules should not apply in such cases. The important point is not the nature of the proceedings but the fact that a sum is payable to a person under legal disability.

4.8 The Court of Session rule applies specifically to extra-judicial settlements.[1] The sheriff court rule refers to a sum of money becoming payable "in" an action. In practice care is taken to see that the agreed sum is consigned in court before decree of absolvitor is granted.[2] We think that the court's powers should extend expressly to sums payable under settlements.

4.9 The power of the Court of Session to appoint a factor arises only if there is no-one who can give a good discharge or if the court is satisfied that the administration of the damages for the child's benefit cannot otherwise be reasonably secured. This may be too narrow. It means that if the court does appoint a factor where the child has a parent it is casting a serious doubt on the parent's ability or integrity or both. The sheriff court rule perhaps goes too far in the other direction by providing for payment to the sheriff clerk "unless otherwise ordered". This seems to create a presumption of parental irresponsibility or incompetence. It seems to us that the most flexible solution would be to give the court a wide discretion.

4.10 The most important point in relation to sums payable to children in court proceedings is the range of

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[1]For a recent example, see Scott v Occidental Petroleum (Caledonia) Ltd 1990 SCLR 278.

[2]Macphail, loc cit 697.

powers available to the court. The sums may range from small sums (say, £150), through moderate sums (say, £5,000) to very substantial sums (say, £50,000 or more). Moreover, the circumstances of the child and the parents may vary greatly. The child may be very young or may be an intelligent and responsible teenager. The parents may appear to the court to be very reliable or very unreliable. There would seem to be a case for giving the courts a fairly wide range of powers. In the case of very substantial sums, likely to need a considerable amount of management and capable of producing a good income, a judicial factor may be the most appropriate solution, and we would suggest that this option should be available in the sheriff courts as well as the Court of Session. In the case of moderate sums, where the income would not justify the appointment of a judicial factor but where some safeguard against improvidence seems advisable, the present procedure adopted in the sheriff courts may be the most appropriate solution. The Court of Session (being a "competent court" within the meaning of paragraph (2) of the sheriff court rule quoted above) could use this procedure by asking the appropriate sheriff clerk to accept custody of a sum paid into court for a person under legal disability but it may be that a more direct option, perhaps involving payment to the Accountant of Court, should be available to the Court of Session. In many cases, of course, payment to a parent or guardian may be regarded as satisfactory.[1] In appropriate cases a parent who lacked financial experience might wish to appoint a factor to

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[1]See eg Riddoch v Occidental Petroleum (Caledonia) Ltd 1990 GWD 11-594.

administer all or most of the funds.[1] If the child is a responsible young person, payment of a small sum directly to him or her may be entirely appropriate. Many young people already operate their own bank accounts in a sensible way. In relation to sums ordered to be invested for the benefit of the child it is for consideration whether investments should be restricted, as under the sheriff court rule quoted above, to those available to trustees under the Trustee Investments Act 1961. We are aware that some people regard this Act as too restrictive, and it may not be necessary in the case of public officials such as sheriff clerks or the Accountant of Court. On the other hand it provides some guidance.

4.11 We have given some thought to the option of a private trust for the benefit of the child. The idea would be that the court would be given power to order the money to be paid to trustees to be held for the benefit of the child on terms proposed by the parent (or, more probably, the parent's legal advisers) and approved by the court. This is not competent under the existing law.[2] The trustees might be a responsible friend of the family and, say, a solicitor or bank manager. At first sight there are attractions in this idea. We have been interested to note, however, that in England, where this option has been available for a very long time, it is perceived as having serious

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[1]See Scott v Occidental Petroleum (Caledonia) Ltd 1990 SCLR 278.

[2]Boylan v Hunter 1922 SC 80. Scott v Occidental Petroleum (Caledonia) Ltd 1990 SCLR 278 was concerned with a different question - namely, whether a parent, having received damages on behalf of the child, could then hand them over to trustees.

disadvantages and as being suitable for use only in exceptional cases involving sums of at least £75,000. The perceived disadvantages are

(a) that "all trusts are notably more expensive than administration by the Court, which is free",

(b) "the difficulty of finding trustees who are both competent and impartial", and

(c) "the difficulty of drafting the deed so as to reconcile flexibility ... with prudence and security".[1]

We can see the force of these objections. In Scotland, where the technique of appointing a judicial factor is well-established, a further objection might be that, where the funds are large enough and the other circumstances are such that administration by someone other than the parent is appropriate, it is better on principle that the administration should be by a judicial factor rather than by private trustees who "are under no supervision, find no caution, and are not officers of Court".[2] It seems fair to say that in the recent case of Scott v Occidental Petroleum (Caledonia) Ltd[3] the Court of Session did not show a great deal of enthusiasm for the device of a private trust to administer a child's damages. We do not think that the idea of a private trust should be promoted in any new rules as a desirable option for normal cases. There may, however, be exceptional cases (where, for example, there is an existing testamentary trust for the benefit of a child) in which payment to private trustees might be an

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[1]Jacob, The Supreme Court Practice 1985, vol 1, p1159.

[2]Boylan v Hunter, supra at p81.

[3]Supra.

acceptable option. We would not therefore rule it out altogether.

4.12 We would welcome views on the following tentative suggestions.

19(a) **The powers available to the courts to make special provision for damages payable to children should be extended and generalised and should be the same for all courts.**

(b) **Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a person under legal disability by reason of non-age the court should have power to make such order relating to the payment and management of the money for the benefit of that person as it thinks fit.**

(c) **The court's power should expressly include**

(i) **power to appoint a judicial factor, with appropriate powers, to invest, apply or otherwise deal with, the money for the benefit of the person concerned,**

(ii) **power to order the money to be paid to the sheriff clerk or the Accountant of Court, to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of the person concerned,**

(iii) **power to order the money to be paid to the parent or guardian of the person concerned, to be invested,**

applied or otherwise dealt with, as directed by the court, for the benefit of that person, and

(iv) power to order payment to be made directly to the person concerned.

(d) It should be made clear that the receipt of any person to whom payment is made in terms of the court's order is a sufficient discharge.

(e) Should it be provided that any sum ordered to be invested under these proposals may in the absence of any direction by the court to the contrary, be invested in, and only in, any manner in which trustees are authorised to invest under the Trustee Investments Act 1961?

4.13 Although the question does not have to be decided at this stage, we suggest that the general powers and the provision for discharge should be in primary legislation. The detailed rules should continue to be in rules of court. The advantage of having the main provisions in primary legislation is that the Act could provide uniform powers for all courts and could provide for a receipt by the person receiving the money in pursuance of the court's order to be a good discharge, which is a matter of substantive law and not merely a matter of procedure.

Criminal Injuries Compensation

4.14 Payments, sometimes substantial, may be made to, or for the benefit of, a child under the non-statutory Criminal Injuries Compensation Scheme. The general approach of the Criminal Injuries Compensation Board to cases where it may not be in the interests of a successful applicant for payment to be made directly to

him or her is described in the following paragraph.[1]

> "9. If in the opinion of the Board it is in the interest of the applicant (whether or not a minor or a person under an incapacity) so to do, the Board may pay the amount of any award to any trustee or trustees to hold on such trusts for the benefit of all or any of the following persons, namely the applicant and any spouse, widow or widower, relatives and dependants of the applicant and with such provisions for their respective maintenance, education and benefit and with such powers and provisions for the investment and management of the fund and for the remuneration of the trustee or trustees as the Board shall think fit. Subject to this the Board will have a general discretion in any case in which they have awarded compensation to make special arrangements for its administration ..."

The Board's practice in relation to "special arrangements" for awards to Scottish applicants under the age of 18 is explained in a leaflet issued by the Board.

1. An immediate payment may be made of any amount of the award which represents loss of earnings and out-of-pocket expenses, incurred by the applicant or his parent.
2. An immediate payment may also be made on the parent's undertaking to use it for the applicant's benefit. The amount will depend on the size of the award and the applicant's age and requirements.
3. Subject to the above (and to the applicant's age at the date of the award) the award will be paid into the Board's Deposit Account at Barclays Bank or Investment Account at the National Savings Bank, earmarked in the applicant's name.
4. Advances may be made from the award, while

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[1] 1990 Scheme, para 9.

held in either of these accounts, at the discretion of the Board if it can be shown that the funds will be used solely for the applicant's advancement, education or other benefit.

We have mentioned these arrangements for the purposes of information only and to show that adequate safeguards exist in relation to payments due to children. As payments under the Scheme are ex gratia it is clear that considerable flexibility is possible and that questions of obtaining a good discharge do not arise.

Inherited property

4.15 The greatly improved position of the surviving spouse in the modern law of succession, and improved life expectancy, mean that cases of inheritance by children under the age of 16 are probably less common than they once were. Many of the early cases on tutors are cases where the child's father had died but the mother was still alive. In many such cases nowadays the mother would inherit the whole estate. Even under the existing law the prior rights on intestacy of the surviving spouse exhaust the whole estate in some 78% of cases of intestacy where both a spouse and issue survive.[1] If the recommendations in our report on Succession[2] were implemented the position of the surviving spouse would be improved still further. Nonetheless, there are, and will continue to be, some cases where children under 16 years of age inherit.

4.16 Under the existing law the parent of a pupil child,

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[1]See Jones, Succession Law (Scottish Office, Central Research Unit, 1990) p33.

[2]Scot Law Com No 124 (1990).

as the child's tutor and administrator-in-law can give a good receipt or discharge on behalf of the child, and the executor is bound to pay over to the parent any sum due to the pupil.

> Example. The pupil children of Mrs B inherited about £10,000 from their grandmother, their mother having predeceased their grandmother. The grandmother's testamentary trustees were unwilling to pay over this amount to the father of the children. It was held that they must do so. Lord Young said of the children: "They have a legal guardian, and he is entitled to receive the money due to them and to give an effectual discharge. His duty will be to manage it for them, and he is not obliged by law to find caution."[1]

There are, however, older cases which suggest that if the executor has reason to believe that the parent is in embarrassed circumstances he can insist on the parent's finding caution.[2]

4.17 Prior to the Children Act 1989 the position in England was that an executor could not safely pay to the parent of a minor beneficiary: if he did so he was liable to pay again to the legatee when he or she attained full age.[3] This has been changed by the 1989 Act. Section 3 gives the parent (or other person having

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[1]Murray's Trs v Bloxsom's Trs (1887) 15 R 233 at 237.

[2]Govan v Richardson (1633) Mor 16263; Dumbreck v Stevenson (1861) 4 Macq 86, affirming 19 D 462.

[3]Williams, Mortimer and Sunnucks, Executors, Administrators and Probate (16th edn) 921-922. This rule sometimes caused difficulties for Scottish trustees where a minor beneficiary was domiciled in England. See e g Atherstone's Trs (1896) 24 R 39.

parental responsibility) the rights which a guardian of the child's estate would have had in relation to the child's property, including

> "in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover".[1]

So the new English law on this point would appear to be essentially the same as the Scottish.

4.18 The system whereby the executor can obtain a good receipt or discharge from the parent or guardian, without having to involve a court, has obvious advantages from the executor's point of view, particularly in relation to small legacies or small sums payable on intestacy or by way of legal rights. We do not suggest any fundamental change in that system.

4.19 The question arises, however, whether an executor should be obliged to inform the Accountant of Court if he or she transfers substantial funds or property to, or to be administered by, a child's parent or guardian. Under the existing law, by virtue of a provision which originated in the Guardianship of Infants Act 1886,[2]

> "Any person being an administrator-in-law, tutor-nominate, guardian ... or tutor appointed under the Law Reform (Parent and Child)(Scotland) Act 1986 who shall, by virtue of his office, administer the estate of any pupil, shall be deemed to be a tutor within the meaning of this Act and shall be subject to the provisions thereof, but any such person shall not be bound to find caution in terms of sections 26 and 27 of this Act unless the court, on the application of any party having an interest,

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[1] S3(2) and (3).

[2] S12, as amended and inserted in s25(2) of the Judicial Factors Act 1849 by the Law Reform (Parent and Child)(Scotland) Act 1986.

shall so direct.".

The scheme of the present law is, therefore, that a parent who receives a legacy, or other funds or property, on behalf of his or her pupil child is, as the child's administrator-in-law, under the supervision of the Accountant of Court and is bound to lodge an inventory of the estate under his or her charge and submit annual accounts.[1] The parent is also bound to lodge any money in his or her hands, as administrator-in-law, in one of the banks of Scotland established by Act of Parliament or Royal Charter in a separate account or on deposit, in his or her own name as administrator-in-law.[2] The parent is liable to a fine for any misconduct or failure in the discharge of his or her duty,[3] and may, if the Accountant of Court suspects malversation or misconduct, be reported to the Lord Advocate who may direct such inquiry and take such proceedings as he thinks proper.[4]

4.20 There are two serious problems in this scheme. The first is that the Accountant of Court may never know that money has been paid to, or property transferred to be administered by, a parent or guardian as a child's administrator or legal representative. The second is that the scheme is totally unrealistic in relation to small or modest sums. In such cases, it is excessive, and not likely to be in the child's interest, to require annual accounts and supervision by the Accountant of

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[1]Judicial Factors Act 1849, ss3 and 4.

[2]Ibid s5. The category of receiving institutions is to be widened under the Law Reform (Miscellaneous Provisions) (Scotland) Bill 1990, Sch 7, para 21.

[3]1849 Act, s6.

[4]Ibid s21.

Court.

4.21 We suggest for consideration that it is inappropriate to treat all parents and guardians as judicial factors, but that it may be appropriate to have a judicial factor, or other arrangement, in certain cases involving substantial amounts or special circumstances, such as the parent's bankruptcy. One possible scheme would be to require any executor proposing to pay funds to, or to transfer property to be administered by, a parent or guardian of a child acting on behalf of the child to inform the Accountant of Court of his intention to do so in any case where he or she has reasonable cause to believe that the total value of the funds or property exceeds a certain sum or that the parent is an undischarged bankrupt or has a criminal conviction for any offence involving dishonesty. The executor would also be obliged to furnish a brief report to the Accountant of any arrangements made or proposed for the investment or administration of the funds and of any circumstances known to him affecting the parent's suitability as an administrator. The Accountant of Court would then have a period (say, two months) within which he could either--

(a) direct the executor to apply to the court for the appointment of a judicial factor in respect of all or part of the funds;

(b) require all or part of the funds to be transferred to him to be invested, administered or otherwise dealt with on behalf of the child, or

(c) make such other direction as he might consider appropriate for the investment, administration or use of all or part of the funds for the benefit of the child.

In appropriate cases the Accountant might direct some of the funds to be paid directly to the child. If none of these steps were taken by the Accountant within the specified period, the executor would be free to pay the funds to, or transfer the property to be administered by, the parent or guardian. The executor would not, however, obtain a good discharge if he or she either failed to report to the Accountant of Court, in a case where that was required, or if, having reported, he or she paid or transferred to the parent or guardian within the prescribed period. The above is merely one possible type of scheme. We would welcome views both on the basic idea of an obligation to report, and on the practical working out of a scheme. We would particularly welcome views as to the appropriate level above which reporting would be mandatory. This should, we suggest, be high enough not to overburden executors or the Accountant of Court, or interfere too much with the discretion of ordinary responsible parents. Our preliminary view is that the existing law is inefficient (in that many cases never come to the attention of the Accountant of Court, even although they ought in theory to be under his supervision) and unrealistic (in its application to small sums). We think that some way has to be found to sift out the cases where some control is required, and justified, in the interests of the child from cases where the most appropriate solution is to leave matters to the good sense of the parent or guardian.

4.22 We would welcome comments on the following.

20(a) Is the present law whereby all parents or guardians administering any property of a pupil child are treated as judicial factors for most purposes of the Judicial Factors Acts satisfactory?

(b) Should an attempt be made to distinguish cases where some external control of the administration of a child's property is appropriate from cases where this can be left to the discretion of the parent or guardian?

(c) In relation to funds or property inherited by a child under legal disability by reason of non-age, should an executor before paying the funds to, or transferring the property to be administered by, the child's parent or guardian be obliged to inform the Accountant of Court, in certain cases, of his intention to do so?

(d) Should this obligation arise if the executor has reasonable cause to believe that--

(i) the value of the funds or property is over a certain sum or

(ii) the parent in question is an undischarged bankrupt or has been convicted of an offence involving dishonesty?

(e) If a reporting obligation were introduced on these lines, what level should be set for the purposes of paragraph (d)(i) above?

(f) Are there any other circumstances in which an executor's obligation to report should arise and, if so, what?

(g) If a reporting obligation were introduced should the Accountant of Court be authorised, within a specified period,

(i) to direct the executor to apply to a

court for the appointment of a judicial factor in respect of all or part of the funds,

(ii) to direct all or part of the funds or property to be transferred to him to be invested, administered or otherwise dealt with on behalf of the child, or

(iii) to make such other direction as he might consider appropriate for the investment, administration or use of all or part of the funds or property for the benefit of the child?

(h) The receipt or discharge of any person (including the child concerned) to whom a payment or transfer is made in accordance with a direction of the Accountant of Court should be an effective receipt or discharge.

(i) On the expiry of the period, if none of these options has been exercised by the Accountant of Court, should the executor be free to pay or transfer to the parent or guardian, the latter's receipt or discharge being effective?

Other property

4.23 In rare cases a child may acquire valuable property or substantial sums of money otherwise than by an award of damages, criminal injuries compensation or inheritance. For example, money may become payable to a child under a trust in circumstances where the child's age and lack of capacity have not been foreseen by the drafter of the trust deed. It would seem appropriate to apply a similar set of rules in such circumstances as in the case of property or funds paid or transferred by an executor. We would welcome views.

21 Should similar rules apply to other property (such as trust property) payable to a parent or guardian to be held for a child?

Court's powers

4.24 Under section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 the court has power, on the application of any person claiming an interest, to make orders relating to parental rights. Under the existing law that would include orders relating to tutory or curatory.[1] If the law were recast so that parental rights included the right of legal representation then the court would still have the same wide powers to make orders relating to this right. It might be useful, however, to make it clear in the new context that the court's powers to make orders relating to the legal representation of a child included power to make orders relating to the administration of the child's property and, in particular, power to appoint a judicial factor where appropriate or to order funds belonging to the child to be handed over to the Accountant of Court or sheriff clerk to be invested, administered or otherwise dealt with for the benefit of the child. This would provide an extra layer of protection for those cases where, for example, damages or a legacy or other funds belonging to a child had been entrusted to a parent but where subsequent events showed that the trust had been misplaced. We would welcome views on this suggestion.

22 It should be made clear in any new legislation

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[1]Under s31 of the Judicial Factors Act 1849 the Court of Session also has "power, on cause shown, to remove or accept the resignation of any tutor or curator coming under the provisions of this Act, and to appoint a factor loco tutoris or curator bonis in his room".

that the court's powers to make orders relating to the legal representation of a child include power to make orders relating to the administration of the child's property and, in particular, power to appoint a judicial factor, where appropriate, or to order funds belonging to the child to be handed over to the Accountant of Court or sheriff clerk to be invested, administered or otherwise dealt with for the benefit of the child.

Powers of parent or guardian

4.25 The right to act on behalf of the child in relation to the child's property is merely an aspect of the right of legal representation. We suggest that, for the avoidance of any doubt, this should be made clear in any new legislation. We would not wish the abolition of tutory to leave a gap in the law. One of the defects in the existing law is the narrow notion that a tutor's function, in relation to heritage, is to preserve the child's property.[1] This has led to the need for a tutor to obtain special authority to take certain steps in relation to the property which might be regarded as being at variance with that primary function. As it may not be clear in advance whether, for example, a sale of heritable property is at variance with the purposes of the tutor's "trusteeship" it is often necessary to seek the court's authority, even if the result is expected to be that the application will be dismissed as unnecessary.[2] It seems to us that this state of affairs leads to unnecessary expense and inconvenience and that

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[1]See Linton v Inland Revenue 1928 SC 209 at 213.

[2]See Cunningham's Tutrix 1949 SC 275.

it should be made clear in any new legislation that the child's legal representative (whether parent or guardian) has power, in relation to the child's property, to do any act which the child could have done if of full age and not subject to any legal disability. The representative would, of course, be liable to account to the child[1] but this would not affect the position of third parties dealing with him or her. They could deal with the representative on the footing that he or she had full powers in relation to both moveable and heritable property. The transaction could not be set aside later on the ground that it was beyond the representative's powers. We therefore suggest for consideration that:

> 23 **It should be made clear that, subject to the obligation of the parent or guardian to account to the child, the right of legal representation in relation to a child carries with it the right to do any act in relation to the child's property which the child is legally incapable of doing but could have done if of full age and capacity.**

4.26 A rule on the above lines would make it clear that third parties acquiring property from a parent or guardian acting as the child's legal representative would not need to be concerned about the extent of the representative's powers. Applications to the court for special powers would become unnecessary.

4.27 We think that a parent or guardian acting as a child's legal representative should no longer be regarded as a trustee for the purposes of the Trusts

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[1]See para 4.28 below.

(Scotland) Acts. That is inappropriate because the parent or guardian, unlike a trustee, does not have title to the property. The property belongs to the child and the parent or guardian merely acts on behalf of the child in relation to it. Moreover some rules applying to trustees, such as the power to resign and the power to assume new trustees,[1] are not appropriate in the case of parents or guardians. We think that the main restrictions on the parent's or guardian's actings should be those imposed by the general parental responsibilities including in particular the responsibilities to safeguard and promote the child's welfare throughout his or her childhood and to administer the child's property for the child's benefit. We deal in the following paragraphs with the obligations of a parent or guardian to account for his or her administration. In the meantime we suggest for consideration that:

24 **A parent or guardian acting as a child's legal representative in relation to the child's property should no longer be regarded as a trustee for the purposes of the Trusts (Scotland) Acts.**

Obligation to account

4.28 Under the existing law, as we have seen, a parent or tutor is liable to account to the child, on the termination of the tutory, for his or her intromissions with the child's funds.[2] Although it must be right, as a matter of principle, that the child should be able to call the parent or guardian to account, and to hand over any property belonging to the child when the child is no

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[1]Trusts (Scotland) Act 1921, s3.

[2]See Fraser, Parent and Child (3rd ed 1906) 418-419.

longer under legal disability, it is necessary in our view that the law should be realistic about the position of the parent who has had the management and control of small funds and who may have used them for the child's benefit or the promotion of the child's welfare.[1] We suggest that the right balance would be achieved if the parent or guardian were not to be liable to the child in respect of sums used in the proper discharge of his or her responsibility to promote the child's welfare.

25(a) A parent or guardian who has, as a child's legal representative, held, administered or dealt with the child's property should continue to be liable (as under the existing law) to account to the child, when the parent or guardian ceases to be the child's legal representative, for his or her intromissions with the property.

(b) In accounting, the parent or guardian should not be liable to the child in respect of any of the child's funds used in the proper discharge of the parent's or guardian's responsibility to promote the child's welfare.

Standard of care

4.29 At common law the standard of care expected of a tutor who is administering a child's property varies according to the type of tutor concerned.[2] Generally, a

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[1]Cf Polland v Sturrock's Trs 1952 SC 535 (no absolute rule that father could not encroach on daughters' capital for their maintenance and education).

[2]See Fraser, op cit, 390-393. Section 13 of the Judicial Factors Act 1849, however, provides that the Accountant of Court is to audit factors' accounts (and

tutor appointed by a court is expected to come up to the standard of a prudent person managing his own affairs. However, a testamentary tutor need only show the same degree of care as he exercises in the management of his own affairs, and a parent is liable only for gross negligence. We suggest that one standard of care should apply to any parent or guardian acting as a child's legal representative. Trustees are required to follow the ordinary course of business that would be used by a prudent man in his own affairs[1] and we propose that a similar standard of care should be applied to all parents and guardians acting as a child's legal representative in relation to the administration of the child's property. A parent or guardian would therefore continue to be liable to the young person for his actions as legal representative in relation to property and would, in particular, be liable to make good to the child any loss occasioned by his failure to act in that capacity in accordance with the required standard of care.

4.30 Consultees are accordingly invited to comment on the following proposition:

26 **A parent or guardian acting as a child's legal representative in relation to the administration of the child's property should be required to act in that capacity as a reasonable and prudent man would act on his own behalf.**

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that includes tutors' accounts) "on the general principles of good ordinary management for the real benefit of the estate and of those interested therein".

[1]See Wilson and Duncan, Trusts, Trustees and Executors (1975) p385.

PART V - COURT ORDERS

Introduction

5.1 The law on court orders relating to tutory, curatory, custody, access and other parental rights was greatly simplified by section 3 of the Law Reform (Parent and child) (Scotland) Act 1986. This provides as follows.

> **"Orders as to parental rights**
>
> 3--(1) Any person claiming interest may make an application to the court for an order relating to parental rights and the court may make such order relating to parental rights as it thinks fit.
>
> (2) In any proceedings relating to parental rights the court shall regard the welfare of the child involved as the paramount consideration and shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child."

There are also provisions, sometimes overlapping and sometimes supplementary, in the Sheriff Courts (Scotland) Act 1907, the Matrimonial Proceedings (Children) Act 1958, the Children Act 1975, the Family Law (Scotland) Act 1985, the Family Law Act 1986, and the Court of Session Act 1988. One of our purposes in this part of the discussion paper is to consider whether these provisions could be rationalised, with a view to an eventual consolidation of Scottish family law.

5.2 A second purpose of this part is to consider whether any of the innovations in relation to court orders made by the Children Act 1989 should be adopted in Scotland. That Act makes radical changes in the English law on court orders relating to children. In particular it introduces a whole new terminology. Once the Act comes into force, courts in England and Wales will not make custody orders or access orders. Instead they will make

residence orders or contact orders. The Act makes other important changes which are noted later. There is no question of simply adopting the provisions in the Children Act 1989 as they stand. For one thing, some of them deal with peculiarly English problems, such as the different meanings of custody orders in different courts. For another, some of the policies of the 1989 Act, such as a wide title to sue, have already been enacted in Scotland by the Law Reform (Parent and Child) (Scotland) Act 1986 and have been in operation for some years. There would be little point in changing these provisions, if they are working well, merely to conform to the slightly different way in which the same policies have now been implemented in England. Nonetheless the innovative and forward-looking provisions on court orders in the Children Act 1989 must be a point of reference in any consideration of this topic. We discuss them in the appropriate contexts in the rest of this part.

Who can apply?

5.3 The Law Reform (Parent and Child) (Scotland) Act 1986, following the policy of the previous Scottish case law,[1] deliberately conferred title to apply for an order relating to parental rights on "any person claiming interest". There are obvious advantages in allowing wide access to the courts in matters relating to the welfare of children and we see no reason to change the basic philosophy of Scots law, now embodied in section 3 of the 1986 Act, in this matter. However, we should discuss two specific restrictions which appear in the English Children Act 1989, because they raise matters of policy

[1]Wilkinson, "Children Act 1975" 1976 SLT (News) 221 and 237 at 239-40.

relating to local authorities' child care powers.

5.4 Section 9(2) of the Children Act 1989 provides that no application may be made by a local authority for a residence order or contact order. These orders correspond approximately to a custody order or access order in Scottish usage. The Children Act also makes it clear that only an individual can apply for guardianship of a child.[1] The reason for these restrictions is that there are special statutory rules regulating the circumstances in which a child can be taken into care, or parental rights can be assumed, by a local authority and that it would be wrong to allow a local authority to by-pass these rules by applying for guardianship, custody or access. This reason applies in Scotland too and, although there is no evidence that local authorities in Scotland have attempted to by-pass statutory restrictions by applying for tutory, custody or access under section 3, it would seem to be desirable that policy on this matter should be the same throughout the United Kingdom. We therefore suggest that:-

27 **It should be made clear that a local authority cannot apply for an award of custody of, access to, or guardianship of a child under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986.**

5.5 Section 9(3) of the Children Act 1989 imposes restrictions on an application by a person who is, or was at any time within the previous six months, a local authority foster parent of the child. The idea behind this provision is to enable parents to feel confident, in placing a child voluntarily in local authority care,

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[1] S5(1).

that foster parents will not apply for a residence order. However, the restriction is not absolute. The foster parent can apply if he or she has the consent of the local authority, or is a relative of the child, or has had the child for at least three years.[1] So a parent's reassurance would not be total. We are not satisfied that there is a need to introduce a similar restriction in Scots law. Foster parents have had title to sue for custody in Scotland since before the 1986 Act[2] and we are not aware that this has led to any abuse or to any reluctance on the part of parents to seek child care help from local authorities. The court, it must be remembered, will regard the welfare of the child as the paramount consideration and will not make any order unless satisfied that to do so will be in the interests of the child.[3] Our preliminary view, on which we would welcome comments, is that:-

28 There is no need to place any restrictions on applications by local authority foster parents under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986.

5.6 There is a bizarre set of pseudo restrictions in section 47(2) of the Children Act 1975. This, as amended in 1986, provides as follows.

> " (2) Notwithstanding the generality of section 3(1) of the Law Reform (Parent and Child) (Scotland) Act 1986, custody of a child shall not be granted in any proceedings to a person other than a parent, tutor, curator or guardian of the child unless that person--

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[1] S9(3).

[2] Cheetham v Glasgow Corporation 1972 SLT (Notes) 50 at p51.

[3] 1986 Act s3(2).

(a) being a relative or step-parent of the child, has the consent of a parent, tutor or curator or guardian of the child and has had care and possession of the child for the three months preceding the making of the application for custody;

(b) has the consent of a parent, tutor, curator or guardian of the child and has had care and possession of the child for a period or periods, before such application, which amounted to at least twelve months and included the three months preceding such application; or

(c) has had care and possession of the child for a period or periods before such application which amounted to at least three years and included the three months preceding such application; or

(d) while not falling within paragraph (a), (b) or (c), can show cause why an order should be made awarding him custody of the child."

This provision was a modified extension to Scotland of provisions on custodianship designed for English law.[1] It was criticised from the start.[2] The fundamental defect in it is that paragraph (d) makes the whole subsection pointless. The welfare of the child is the paramount consideration in any custody application.[3] So the "cause" which has to be shown under section 47(2)(d) must relate to the child's welfare. A person who can satisfy the court that a custody order in his favour would be in the child's best interests would have shown cause why the order should be made. However, this test has to be met by <u>any</u> applicant for custody. So section 47(2)(d) adds nothing to the general law. <u>Any</u> person who would obtain a custody award under the general law can

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[1]Wilkinson, <u>loc cit</u>.

[2]<u>Ibid</u>.

[3]Law Reform (Parent and Child) (Scotland) Act 1986, s3.

obtain one, by virtue of section 47(2)(d), notwithstanding the pseudo restrictions in the earlier part of section 47(2). Section 47(2) is therefore completely pointless. In our report on Illegitimacy[1] we recommended the repeal of section 47(2) for the reasons given above. We see no reason to change our view. The remaining parts of section 47, in so far as they are still in force, are purely ancillary to section 47(2). We suggest therefore that:-

29. Section 47 of the Children Act 1975 is futile and unnecessary and should be repealed.

5.7 We should add that in England and Wales the Children Act 1975 has now been repealed by the Children Act 1989. There are provisions in section 10 of the 1989 Act which enable certain persons to apply for certain orders as of right and other persons to apply with the leave of the court. The scheme is much more flexible than that which formerly applied in England and Wales under the Children Act 1975. It is still, however, more restrictive (at least procedurally) than the Scottish rules and we would not favour the introduction of a similar scheme in Scotland. The idea of obtaining leave to apply is not a familiar one in Scottish procedure. Moreover, a requirement of applying for leave to apply would duplicate proceedings unnecessarily, particularly as matters relevant to the grant or refusal of leave would often be relevant also to the grant or refusal of the order sought.

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[1]Scot Law Com No 82 (1984).

5.8 In view of doubts which have arisen[1] it might be for consideration at a later stage whether it would be useful to add some such words as "whether or not a parent of the child concerned" after the words "any person claiming interest" in section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986. This, however, is a matter of drafting which might depend on what other changes are made in section 3 and it would be premature to form a view on it at this stage. The policy is clear. "Any person" is not confined to any parent.

In what proceedings can applications be made?

5.9 Section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986 is quite general in scope and, so far as the sheriff courts are concerned, is a sufficient basis for orders relating to custody, access and other parental rights. This is because the sheriff courts have a general jurisdiction to deal with applications under section 3.[2] There is no need for the provision in section 38C of the Sheriff Courts (Scotland) Act 1907 which deals specifically with the position in actions for divorce or separation. This was inserted as a by-product of the consolidation of legislation relating to the Court of Session[3] and, given that consolidation should not change the law, was quite properly inserted. As a matter of policy, however, there is no need to have two overlapping provisions.

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[1] A B Petr 1988 SLT 652, not followed in M v Lothian Regional Council 1989 SLT 426 and 1990 SLT 116, nor in Whyte v Hardie 1990 SCLR 23.

[2] Section 5(2C) of the Sheriff Courts (Scotland) Act 1907 (as inserted by the Law Reform (Parent and Child) (Scotland) Act 1986).

[3] Court of Session Act 1988.

5.10 The position is different in the Court of Session. At common law the Outer House had no jurisdiction to deal with custody in a divorce or separation action: a separate petition had to be presented to the Inner House. This state of affairs was remedied by section 9 of the Conjugal Rights (Scotland) Act 1861 which gave the Outer House judges jurisdiction to deal with custody in the course of certain consistorial actions. The modern equivalent of section 9 is section 20(1) of the Court of Session Act 1988 which provides that:

> "In any action for divorce, judicial separation or declarator of nullity of marriage, the Court may make, with respect to any child of the marriage to which the action relates, such order (including an interim order) as it thinks fit relating to parental rights and may vary or recall such order."

This is too narrow in that it does not enable parental rights to be dealt with in the Court of Session in an action, such as an action for declarator of marriage or parentage, which is not one for divorce, separation or nullity of marriage.[1] We suggest for consideration that:-

30(a) **Section 38C of the Sheriff Courts (Scotland) Act 1907 and section 20(1) of the Court of Session Act 1988 should be repealed.**

(b) **It should be provided in section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986 that an application under that section may be made either**

(i) in independent proceedings in the Court of Session or a sheriff court

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[1]See Hogg v Dick 1987 SLT 716 (declarator of paternity).

(whether or not the application is accompanied by an application for any other remedy which can competently be sought in those proceedings) or

(ii) in an action for divorce, or judicial separation or for a declarator of marriage, nullity of marriage, parentage, non-parentage, legitimacy or illegitimacy.

Some words in sub-paragraph (ii) would fall to be omitted if, as we have suggested elsewhere, actions for judicial separation, and declarators of legitimacy or illegitimacy were abolished.[1]

5.11 A change on the above lines would expand the jurisdiction of the Outer House of the Court of Session not only in relation to the type of action in which parental rights could be dealt with but also in relation to the children concerned. The jurisdiction would no longer be confined to "any child of the marriage" - a term which includes any child who (a) is the child of both parties to the marriage or (b) is the child of one party to the marriage and has been accepted as a child of the family by the other party.[2] We can see no objection to this extension. It is consistent with the philosophy of a wide title to sue in relation to parental rights.

5.12 There is one other minor point. It would help to simplify the statute book if it were provided that in a

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[1]See our Discussion Paper (No 85, 1990) on Family Law: Pre-consolidation reforms Parts VII and XI.

[2]Court of Session Act 1988, s20(2)(b).

divorce action (or other consistorial action) the court could make an order under section 3 even if it refused the principal remedy sought, provided always that the application for the parental rights order had been made before the action was dismissed or decree of absolvitor was granted. This would enable section 9(1) of the Matrimonial Proceedings (Children) Act 1958 and section 13(2) and (4) of the Family Law Act 1986 to be repealed, and the references to custody, education and access in section 21 of the Family Law (Scotland) Act 1985 to be removed. It would tidy up the statute book considerably. This, however, is a matter of drafting, not policy, and we mention it only to save consultees from having to point out that there is scope for improvement in this respect.

What orders can be applied for?

5.13 The changes suggested already in relation to the legal representation and guardianship of children and the administration of the property of children would mean certain changes in section 3 of the 1986 Act. It might, for example, cover

> "an order relating to parental rights, the guardianship of a child, or the administration of property belonging to a child".

This, however, is a question of drafting which can be considered later.

5.14 A more important question is whether the broad, general scheme of the 1986 Act, which leaves scope for all types of order, should be replaced by a scheme modelled on that in Part II of the English Children Act 1989 which provides for only four main types of order -a residence order, a contact order, a prohibited steps order or a specific issue order - in addition to orders

relating to guardianship, and various ancillary orders. We do not think that it should be. The main reasons for the change in England were,

(i) that there was confusion about the meaning of an award of custody, with different meanings in different courts,

(ii) that the new terminology was intended to reflect more closely the practical realities of bringing up a child, rather than theoretical rights, and

(iii) that it was hoped that the new orders would be less productive of controversy, by helping to preserve each parent's responsibilities as much as possible and by allowing for and even encouraging more flexible arrangements, which might in turn avoid giving the impression that one parent is the good parent who has custody and the other is the bad parent who is restricted to access.[1]

There may also have been a distaste for the existing terminology - a feeling that an "award" of "custody" has unfortunate connotations. For these reasons custody orders, which on one view had very sweeping effects on the whole bundle of parental rights, are to be replaced by "residence orders" which, as between the parents, will simply settle "the arrangements to be made as to the person with whom a child is to live".[2] We have a lot of sympathy with these objectives. Nonetheless we do not think that exactly the same considerations apply in

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[1]Law Com No 172 (1988) paras 4.1 to 4.24.

[2]Children Act 1989, s8(1). Note, however, that a residence order in favour of a non-parent carries with it full parental responsibilities and rights. S12(2).

Scotland. The meaning of an award of custody is fairly clear (and will be even clearer if the suggestions made in this paper are adopted). There is certainly no suggestion that an award to one parent deprives the other parent of his or her role as tutor or curator or of his or her position as a parent in any respect other than custody of the child, in the sense of residence and day-to-day control of upbringing. Nor is there the problem that custody means different things in the Court of Session and the sheriff courts. We are not convinced that a complete change of terminology is necessary in order to avoid confusion in Scotland. So far as concentration on the practical realities of bringing up a child is concerned, we think that the Scottish concepts of custody and access have always focussed on the realities. Custody has always been seen as relating to where the child lives rather than to an abstract bundle of rights. Nor are we convinced that a change in terminology would significantly reduce controversy in the Scottish context. Flexibility of arrangements is already possible under the existing law in Scotland. A greater use of orders involving more equal sharing would not require any change in terminology. We have some doubts about the likely benefits of a change in terminology by itself. We would welcome views from conciliators and others with practical experience in this area, but we suspect that if the parties are in dispute about where the child is to live, the level of dispute is likely to be much the same whether the order obtainable is called a custody order or a residence order. If they are in dispute about whether one parent is to be allowed to have the child on Saturdays or on Christmas day the level of dispute is, we suspect, likely to be much the same whether the order obtainable is called an access order or a contact order.

We can certainly see advantages in getting away, so far as possible, from any idea that sole custody is a reward for the "good" parent, but we suspect that this is a matter of good advice and counselling and of stressing the paramountcy of the child's welfare rather than renaming court orders. Without such advice and counselling a residence order "in favour of"[1] one person might be seen in exactly the same way as a custody order in his or her favour. The law already stresses, as strongly as it can, that the welfare of the child is the paramount consideration. That, in our view, is the important point. We would be interested to know whether the word "custody" itself is regarded as having unfortunate connotations. Would it, even if defined as suggested earlier,[2] carry the implication that the child is a sort of prisoner or object? Or is the word "custody" used and thought of differently in the context of children? We suspect the latter. Certainly, the term is widely used in other countries and in international conventions.[3] In any event if the word is objectionable it would have to be changed not only at the level of court orders but also at the level of parental rights, and at this second level it is not easy to think of a neat alternative. The Children Act 1989 itself suggests no alternative at this level. "Parental responsibility"

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[1]This terminology is used in several places in the Children Act 1989. Cf ss5(6), 11(7), 12(1), 12(2), 14.

[2]The right of custody would be defined as "the right of the person concerned to have the child living with him or her, or otherwise to regulate the child's residence, and to control the child's day to day upbringing". See para 2.20.

[3]See the Hague Convention on the Civil Aspects of International Child Abduction 1980, arts 3 and 5 and the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children 1980, art 1.

means, among other things, all the rights which by law a parent of a child has in relation to the child, and that presumably includes custody. We would also be interested to know whether the word "access" is regarded as objectionable, or would be so regarded if defined as suggested earlier.[1] If it is, then again change would be required not only at the level of court orders but also at the level of underlying rights.

5.15 It is important to remember that the Scottish courts, under section 3 of the 1986 Act, have very wide powers and could make "residence orders" in the English sense in appropriate cases. If it is assumed that access or "contact" is separately regulated, then the difference between such a "residence order" and a custody order would be slight but identifiable. It would lie in the right to control the child's whereabouts and upbringing. There may be cases in which a court in Scotland would regard it as being in the child's best interests to leave both parents with rights to custody while regulating only the person or persons with whom the child is to live, perhaps for specified periods. A "residence order" of this type would mean that in theory both parents would retain not only their rights of legal representation and their legal positions as parents (which in Scotland would be the case anyway even with a custody order) but also equal rights to control the child's whereabouts and day-to-day upbringing. Whether the right of the absent parent to have an equal say in such matters as when a 10 year old child should stay

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[1]The right of access would be defined as "the right to have reasonable contact with the child, either by visiting the child, or by being allowed to take out the child, or by being allowed to have the child to stay ... or by other appropriate means."

overnight with a school friend, or what clothes the child should wear, or what time he or she should go to bed, would be meaningful would depend on the circumstances. In certain cases - for example, where the parents live near each other on amicable terms, and are in constant communication with each other, and the child spends equal time with each - it might be.[1] (In such cases, however, a better solution might often be to have no court order at all.) In others, it might be more realistic, and in the child's interests, to let control of the child's whereabouts and day-to-day upbringing rest exclusively with the parent with whom the child lives and to make a normal custody order. At present the courts in Scotland have a discretion and that seems to us to be desirable.

5.16 Any advantages of a complete change of terminology in Scotland would have to be set against the disadvantage that it would create confusion, work and expense - for example, in amending many existing statutes, in revising rules of court and in re-training officials and advisers.

5.17 The essential point, we think, is that whereas in England and Wales the new scheme of orders brings uniformity, flexibility and clarity in place of diversity, rigidity and confusion, in Scotland a similar change would be more restrictive than the present law and very largely cosmetic. There is also a difference of approach to rights and remedies in the two legal systems which may be reflected in our preference on this issue.

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[1]Cf McKechnie v McKechnie 1990 SCLR 153 where, however, joint custody was refused and an order made granting custody to one parent and substantial periods of access to the other.

Scots law tends to stress rights and to let remedies follow. Where there is a right let there be a remedy. In English law there has, in various areas, been a tendency to concentrate on remedies and to let the rights follow. It seems to us to be natural to define parental rights as clearly as possible (with due stress also on parental responsibilities and the welfare of the child) and to confer remedies which may relate expressly to these rights and may, where appropriate, use the same terminology. We would feel uncomfortable with a scheme of things which recognised that a parent had a right of custody and legal representation but which prevented a court from making orders relating expressly to custody or legal representation.

5.18 We have considered whether some of the advantages of the English approach - including the use where appropriate of residence orders leaving both parents with full parental rights - might be achieved within the general framework of section 3 of the 1986 Act by specifying certain types of order which could be made under it. It could, for example, be provided that an order in relation to a child under section 3 might, without prejudice to the generality of that provision, include -

(a) an order granting sole custody to one of the parents of the child;

(b) an order granting custody, or sole custody, to a person other than a parent of the child;

(c) an order (a "residence order") settling the arrangements to be made as to the person with whom the child is to live where two or more persons have rights of custody, either by operation of law or by virtue of a court order;

(d) an order conferring, regulating or terminating a right of access to the child;

(e) an order conferring, regulating or terminating a right of legal representation of the child;

(f) an order appointing a guardian to the child, regulating guardianship or terminating a guardian's appointment;

(g) an order appointing a judicial factor to administer the child's property, or directing funds belonging to the child to be handed over to the Accountant of Court or sheriff clerk to be invested, administered or otherwise dealt with for the benefit of the child, or making other arrangements for the administration of the child's property;[1]

(h) an order relating to any specific issue which has arisen or which may arise in connection with any aspect of parental rights, guardianship of the child, or the administration of the child's property;

(i) an interdict prohibiting the taking of any step in the exercise of parental rights, or guardianship or the administration of the child's property;

(j) an interim order or interim interdict on any of the above matters.[2]

We have reached no firm conclusion as to the merits of

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[1]We have already suggested in para 4.24 that it should be made clear that the court has these powers. We include them here for the sake of completeness.

[2]It has been held that interim orders can be made under s3 as it stands Johnston v Carson (unreported) Sheriff Principal Nicholson, March 1990. However, there might be no harm in making this clear in the Act itself.

such a provision. On one view it would be unnecessary but harmless. On another view it would be undesirable, because legislators and the users of legislation ought to be able to have confidence in the plain meaning of general words, without having to give lists of examples. On yet another view it would be helpful to make clear some of the more common types of provision which could be made under section 3 and, in particular, to make it clear that a court could make residence orders without depriving either parent of his or her parental rights. We invite views.

31(a) **The provision on the types of order obtainable under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986 should not be replaced by provisions on the model of section 8 of the Children Act 1989.**

(b) **Would there be any advantage in specifying, without prejudice to the generality of section 3 of the 1986 Act, some of the types of order obtainable under that section?**

(c) **If so, would a list such as that set out in paragraph 5.18 be useful? Are any additions, deletions or modifications suggested?**

Avoidance of unnecessary orders

5.19 An important objective of the Children Act 1989 was the avoidance of unnecessary court orders relating to children. The English Law Commission explained the position in this way in their report on Guardianship and

Custody.[1]

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

3.3 For these reasons, the Working Paper proposed a more flexible approach, in which it was not always assumed that an order should be made, but the court would be prepared to make one even in uncontested cases if this would promote the children's interests. Most of those who responded agreed with this approach. In particular, the

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[1]Law Com No 172 (1988) paras 3.2-3.3 (footnotes omitted).

> Association of Chief Officers of Probation, who are responsible for the work of divorce court welfare officers, supported a change in practice towards fewer orders being made. Such a change would be consistent with the view that anything which can be done to help parents to keep separate the issues of being a spouse and being a parent will ultimately give the children the best chance of retaining them both. On the other hand, the impression should not be given that an application or an order is a hostile step between them. We therefore recommend that the court should only make an order where this is the most effective way of safeguarding or promoting a child's welfare."

This recommendation was implemented in the Children Act 1989 which provides that

> "Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all".[1]

5.20 We agree with the English Law Commission about the undesirability of unnecessary custody orders. At one time an award of custody of a child was often sought by the mother in order to enable a claim for aliment for the child to be made. Under the Family Law (Scotland) Act 1985, however, this is no longer necessary. Either parent (or indeed anyone having care of a child) can apply for aliment for the child without applying for custody.[2] This provision was based on a recommendation in our report on Aliment and Financial Provision which was expressly designed to reduce unnecessary applications for custody.[3]

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[1] S1(5).

[2] S2(4).

[3] Scot Law Com No 67 (1981) para 2.63.

5.21 The concern about unnecessary orders relating to parental rights is also recognised in Scotland by section 3(2) of the Law Reform (Parent and Child) (Scotland) Act 1986. This provides that a court

> "shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child"

This provision, if properly applied, ought to go a long way to discourage unnecessary orders, particularly orders of sole custody to one parent. It will rarely, if ever, be in a child's interests to deprive one parent unnecessarily of any parental rights. However, we would welcome views on this point.

32 Is the provision in section 3(2) of the Law Reform (Parent and Child) (Scotland) Act 1986 that a court must "not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child" sufficient to discourage unnecessary orders relating to parental rights?

Criterion to be applied

5.22 Under section 3(2) of the 1986 Act the court must regard the welfare of the child involved as the "paramount consideration". The same formula has been used in the Children Act 1989[1] and we suggest no change.

A statutory checklist of factors

5.23 The Children Act 1989 provides that where a court is considering whether to make, vary or discharge a section 8 order (that is, in our terminology, an order relating to parental rights) and the making, variation or discharge of the order is opposed by any party to the

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[1] S1(1).

proceedings, the court must "have regard in particular to" the following factors.[1]

> "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
> (b) his physical, emotional and educational needs;
> (c) the likely effect on him of any change in his circumstances;
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
> (e) any harm which he has suffered or is at risk of suffering;
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
> (g) the range of powers available to the court under this Act in the proceedings in question."

5.24 A statutory checklist of this type was recommended by the English Law Commission, after the idea had received "a large majority of support" from consultees who considered the matter.[2] Supporters of a checklist considered that it would help to ensure that the same factors were taken into account by the wide range of professionals involved in such matters, including judges, social workers and legal advisers. They also considered that it would be useful to those lacking experience in the area, and might assist parents and children in understanding how judicial decisions were arrived at, and even in reaching agreement as to the appropriate outcome.

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[1] S1(3) and (4).

[2] Law Com No 172 (1988) paras 3.17 to 3.21. The checklist recommended by the Commission was essentially the same as that enacted in the Children Act, although there are some differences in wording.

5.25 The arguments against a statutory checklist are that, although necessarily incomplete, it might divert attention from other factors that ought to be considered, and that it might cause the process of decision making to become more mechanical, with judges routinely listing the statutory factors merely to minimise the prospect of a successful appeal. On the other hand a short, non-exhaustive list of important factors which ought always to be taken into account would be unlikely to cause serious problems in these respects. We have not reached a conclusion on this question but would welcome views.

33(a) Should there be a statutory checklist (on the lines of that in section 1(3) of the Children Act 1989) of factors which a court should take into account in contested cases relating to parental rights?

(b) If so, are any additions to, deletions from, or modifications of the list in section 1(3) of the Children Act 1989 suggested? (The list is reproduced in paragraph 5.23 above.)

Duty to be satisfied

5.26 In an action for divorce, nullity of marriage or separation the court is under a duty, subject to certain qualifications, not to grant decree of divorce, nullity or separation until it is satisfied as to the arrangements made for any children of the marriage under the age of 16. The duty is imposed by section 8 of the Matrimonial Proceedings (Children) Act 1958. Its main provisions are as follows.

"8--(1) Subject to the provisions of this section, in any action for divorce, nullity of marriage or separation the court shall not grant decree of divorce, nullity of marriage or separation unless and until the court is satisfied as respects every child for whose custody the court has power to make provision in that action -

(a) that arrangements have been made for the care and upbringing of the child and that those arrangements are satisfactory or are the best which can be devised in the circumstances; or

(b) that it is impracticable for the party or parties appearing before the court to make any such arrangements.

In this subsection 'child' does not include a child with respect to whom the court has made an order under section 13(6) or 14(2) of the Family Law Act 1986 [ie declining or refusing jurisdiction because custody etc is to be dealt with or has been dealt with by another court].

(2) The court may, if it thinks fit, proceed to grant decree of divorce, nullity of marriage or separation without observing the requirements of the foregoing subsection if it appears that there are circumstances making it desirable that decree should be granted without delay and if the court has obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children before the court within a specified time."

5.27 This provision was based on a recommendation of the Royal Commission on Marriage and Divorce which reported in 1956.[1] It reflects a very widespread and continuing concern about the welfare of children when a marriage breaks down. The Royal Commission's main concern was "the desirability of bringing home to the parties to the divorce suit their continuing parental

[1]Cmnd 9678, paras 360-428.

responsibility."[1] The provision in section 8 can, however, be criticised on the ground that the time of the legal divorce is rather late for bringing home to the parties their responsibilities for their children. The interests of the children should have been considered before words were said, acts were done and decisions were taken which led to the breakdown of the relationship. By the time the marriage has broken down and a legal divorce is being sought, perhaps years after the parties have separated, the damage has been done. The provision in section 8 can also be criticised on the ground that it places a duty on courts without giving them the means of fulfilling it.[2] It may raise unrealistic expectations about what can be achieved. In practice there is no way in which a court can be fully satisfied that the arrangements for children are satisfactory or are the best which can be devised in the circumstances. However, to attempt to rectify this by, for example, providing for an independent welfare report in all cases, would be an extremely expensive and wasteful use of resources, given that the options available to the court, where the parties are agreed on who is to look after the child, are very limited. In spite of these criticisms, and in spite of the fact that the court's involvement is confined to one point in time and does not provide any continuing monitoring of the arrangements proposed for the children, we consider that section 8 serves a useful symbolic purpose in emphasising the importance of considering the welfare of the children involved in marriage breakdown. The question, as we see it, is whether the positive features

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[1] Ibid para 377.

[2] See the Report of the Royal Commission on Legal Services in Scotland (Cmnd 7846, 1980) vol 1, pp157-160.

of section 8 could be preserved while making the duty imposed on the court relate more closely to what it is realistic to expect a court to do at the time of a divorce.

5.28 In England and Wales the equivalent of section 8 of the 1958 Act is section 41 of the Matrimonial Causes Act 1973. This used to be essentially the same as section 8. However, it has been replaced by a new, and more realistic, version.[1] The new version of section 41, as substituted by the Children Act 1989, begins as follows.

> "--(1) In any proceedings for a decree of divorce or nullity of marriage, or a decree of judicial separation, the court shall consider -
>
> (a) whether there are any children of the family to whom this section applies; and
>
> (b) where there are any such children, whether (in the light of the arrangements which have been, or are proposed to be, made for their upbringing and welfare) it should exercise any of its powers under the Children Act 1989 with respect to any of them.
>
> (2) Where, in any case to which this section applies, it appears to the court that -
>
> (a) the circumstances of the case require it, or are likely to require it, to exercise any of its powers under the Act of 1989 with respect to any such child;
>
> (b) it is not in a position to exercise that power or (as the case may be) those powers without giving further consideration to the case; and
>
> (c) there are exceptional circumstances which make it desirable in the interests of the

[1] Children Act 1989, Sch 12 para 31.

child that the court should give a direction under this section,

it may direct that the decree of divorce or nullity is not to be made absolute, or that the decree of judicial separation is not to be granted, until the court orders otherwise."

The Children Act 1989 provides elsewhere that the court can make certain orders relating to children even though no application for them has been made.[1] If such a provision were to be adopted in Scotland it would have to be made clear that the court could make an order relating to parental rights even if no application had been made for it. In Scotland, the provision would apply to children under the age of 16 and the reference to making the decree absolute would simply be a reference to granting decree of divorce. We consider later the question of which children should come within the scope of the court's duty.[2]

5.29 The solution adopted in the Children Act 1989 is based on a recommendation of the English Law Commission who had found on consultation that there was a large measure of support for the idea of substituting a duty to consider the arrangements proposed for the duty to be satisfied. As the Commission observed,

"requiring the court to find the arrangements satisfactory may be imposing higher standards on those who divorce than on those who remain happily married. It may even encourage the court to interfere unnecessarily to impose its own views on them."[3]

We can see great attractions in the new provision in the Children Act 1989. It seems to us that it meets the

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[1]Children Act 1989, s10(1)(b).

[2]Para 5.30 below.

[3]Law Com No 172 (1988) para 3.10.

criticisms that have been made of the duty currently imposed on the courts and that it fits in better with the idea that a divorce does not terminate the parent and child relationship. It is, we think, a more realistic way of taking account of the very natural concern which is felt about the children of broken marriages. We suggest therefore that:

34(a) A court dealing with an action of divorce, nullity of marriage or judicial separation should have power to make an order relating to parental rights even if no application has been made for such an order.

(b) The court's existing duty to be satisfied as to the arrangements for children in any such actions should be replaced by a duty to consider whether it should make an order relating to parental rights. Accordingly, section 8 of the Matrimonial Proceedings (Children) Act 1958 should be replaced by a provision on the lines of section 41 of the Matrimonial Causes Act 1973 as substituted by the Children Act 1989. (The new version of section 41 is set out in paragraph 5.28 above.)

5.30 Whether or not section 8 is replaced as suggested, there is a question as to the children to whom the court's duty should extend. At present, in Scotland, the court's duty extends to any "child of the marriage" and this includes not only a child of both the parties but also a child of one party to the marriage who has been accepted as a child of the family by the other

party.[1] This does not cover a child of neither party who has been taken into the family. Moreover, the notion of acceptance may exclude a child who has been in fact a child of the family, if one party to the marriage has not "accepted" the child as a child of the family.[2] In England and Wales the court's duty extends to any child of the family and this is defined, in relation to the parties to a marriage, as

> "(a) a child of both of those parties; and
>
> (b) any other child, not being a child who is placed with those parties as foster parents .... who has been treated by both of those parties as a child of their family."[3]

The English provision is closer to the original intention of the Royal Commission on Marriage and Divorce.[4] It brings within the scope of the court's duty a wider class of children who have been in fact members of the broken family. It leaves less scope for legalistic argument about what is meant by "acceptance".[5] We suggest that

> **34(c) The court's power and duty under paragraphs (a) and (b) should extend to any child of the family and that term**

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[1]Court of Session Act 1988, s20(2)(b); Sheriff Courts (Scotland) Act 1907, s38 C (2)(b).

[2]Cf R v R [1968] P 414.

[3]Matrimonial Causes Act 1973, s52(1), as amended by the Children Act 1989, sch 12 para 33.

[4]Cmnd 9678 (1956) para 392.

[5]See eg Bowlas v Bowlas [1965] P 450; Holmes v Holmes [1966] 1WLR 187; R v R [1968] P 414; Dixon v Dixon [1968] 1WLR 167; B v B and F [1969] P 37; P v P [1969] 1WLR 898; Kirkwood v Kirkwood [1970] 1WLR 1042; Snow v Snow [1972] Fam 74.

should mean any child of both the parties to the marriage and any other child, not being a child placed with those parties as foster parents, who has been treated by both of those parties as a child of their family.

(d) Even if section 8 of the 1958 Act is not replaced as suggested in paragraph (b) the court's duty under it should extend to any child of the family as defined in paragraph (c).

5.31 We should add, for the avoidance of any doubt, that we are not suggesting any change in the category of children for whose support or aliment a person is liable.[1] A much narrower definition is appropriate for that purpose as it requires a strong justification before an onerous obligation can be placed on a person to support a child who is not legally his or her own child.

Effect of orders

5.32 The standard form of conclusion in relation to child custody in the Court of Session is simply "for custody".[2] A decree in similar terms leaves room for doubt about its effect. First, in the normal case of a child born in marriage both parents have full parental rights, including custody, at the start of the

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[1]See the Family Law (Scotland) Act 1985, s1(1).

[2]Rules of Court, App, Form 2(20).

proceedings.[1] An award of custody to one parent merely gives what that parent already has. The intention, however, is clearly to award exclusive custody. We think that this should be made clear. In a matter as important as this is to the parties the effect of a decree should be as clear as possible. It should not be left to implication. Secondly, the effect of an award of exclusive custody may not be entirely clear. Parental rights include access and, in the normal case of a child born in marriage, both parents have full parental rights.[2] As rights are not normally taken away by implication, it is presumably the case that an award of exclusive custody to one parent does not deprive the other parent of his or her rights of access. Of course, if there is any difficulty over exercising access then a court order regulating access may be necessary and in making such an order the court will regard the welfare of the child as the paramount consideration. We have reason to believe that the effect of an award of custody or sole custody to one parent on the access rights of another is not always clear to parties or their advisers. We think that any doubts on this matter should be removed. Thirdly, there is some doubt as to the effect of an award of sole custody to one of two parents who both have parental rights if that parent dies while the child is still under the age of 16. Has the order deprived the other parent of custody altogether, or only so long as the order itself remains effective?

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[1]Law Reform (Parent and Child) (Scotland) Act 1986, ss2 and 8.

[2]Ibid.

5.33 The governing principle, it seems to us, should be that parental rights should not be removed unnecessarily or by implication. We suggest therefore that

> **35 An order granting custody or any other parental right to a person should deprive any other person of any parental right only so far as the order expressly so provides and only to the minimum extent necessary to give effect to the order.**

One effect of this would be that an award intended to be of exclusive custody or sole custody would have to be made expressly in such terms.

5.34 The Children Act 1989 provides that a residence order in favour of one of two parents who both have parental responsibility ceases to have effect if the parents live together for a continuous period of more than six months.[1] The Law Commission recommended this on the ground that, although it might be seen as an impediment to reconciliation,

> "it is unrealistic to keep in being an order that the child should live with one parent rather than the other when both are living together. If they separate again, the circumstances may well be different and it would be wrong to place one in an automatically stronger position than the other".[2]

A contact order which requires the parent with whom a child lives to allow the child to visit, or otherwise to have contact with, his other parent also ceases to have effect if the parents live together for a continuous

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[1] S11(5).

[2] Law Com No 172 (1988) para 4.13.

period of more than six months.[1] Although this matter is not likely to be of great practical importance in many cases, we would be interested to know whether there would be support for the introduction of similar provisions in Scotland.

36(a) Should an order under which a child is to live with one of two parents who both have parental rights cease to have effect if the parents live together for a continuous period of more than six months?

(b) Should it be provided that an order regulating access by one parent to a child living with the other parent ceases to have effect if the parents live together for a continuous period of more than six months?

5.35 The Children Act 1989 gives a residence order a special effect in relation to change of a child's surname or removal of the child from the United Kingdom.[2] It provides as follows -

> "(1) Where a residence order is in force with respect to a child, no person may -
>
> (a) cause the child to be known by a new surname; or
> (b) remove him from the United Kingdom;
>
> without either the written consent of every person who has parental responsibility for the child or the leave of the court.
>
> (2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by

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[1] S11(6).

[2] S13.

the person in whose favour the residence order is made.

(3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes."

This provision is a statutory development of rules and practices already existing in England.[1]

5.36 So far as change of surname is concerned, this could be dealt with in Scotland by means of a specific order relating to parental rights. We are not convinced that anything more is needed. Nor are we convinced that the existence of a custody order or residence order ought to bring a special rule into operation. Many separated parents will not have a custody order or a residence order. This is a good thing, because unnecessary court orders are to be discouraged, and yet problems about change of name could arise equally easily in such situations. Our impression is that English law has shown itself to be over-concerned with change of name and has got itself into an unsatisfactory position. We do not suggest any change in Scots law.

5.37 So far as removal from the United Kingdom is concerned, Scottish courts already have wide powers to grant interdict or interim interdict prohibiting the removal of a child from the United Kingdom or any part of the United Kingdom.[2] Breach of such a prohibition by a person connected with the child is a criminal

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[1]See W v A (Child - Surname) [1981] Fam 14; Matrimonial Causes Rules 1977 r 92(8) and 94(2).

[2]Family Law Act 1986, s35(3) and (4).

offence.[1] Moreover, under the Child Abduction Act 1984 it is an offence for a person connected with a child to take the child out of the United Kingdom without the appropriate consent if there is an order of a court in the United Kingdom awarding custody of the child to any person. In our report on Child Abduction in 1987 we recommended certain improvements in the above provisions,[2] but even as they stand they seem to us to provide adequate protection in the type of case covered by section 13 of the Children Act 1989.

5.38 We invite views on these questions but our preliminary view is that:

> **37 There is no need to introduce in Scotland provisions equivalent to those in section 13 of the Children Act 1989 (set out in paragraph 5.35 above) on change of a child's name or removal from the United Kingdom.**

Avoidance of delay

5.39 The English Law Commission found, on consulting on proposals relating to custody proceedings, that there was serious concern, particularly among the judiciary, about delays.[3] Following on recommendations made by the Commission, the Children Act 1989 provides, for England and Wales, that

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[1]Child Abduction Act 1984, s 6(1)(b).

[2]Scot Law Com No 102 (1987) paras 6.5 and 6.18. We recommended, for example, that an offence would be committed if any person (and not just a person connected with the child) removed the child in contravention of a court's prohibition.

[3]Law Com No 172 (1988) para 4.56.

"In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."[1]

Given that the courts are already directed to regard the welfare of the child as the paramount consideration, and given that they are well aware of the dangers of delay, a provision of this nature would probably be unnecessary in Scotland.

5.40 Of more interest and importance is section 11 of the Children Act 1989 which, in a significant move towards a more court-controlled procedure in cases concerning children, provides as follows -

"(1) In proceedings in which any question of making a section 8 order, or any other question with respect to such an order, arises, the court shall (in the light of any rules made by virtue of subsection (2)) -

(a) draw up a timetable with a view to determining the question without delay; and

(b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

(2) Rules of court may -

(a) specify periods within which specified steps must be taken in relation to proceedings in which such questions arise; and

(b) make other provision with respect to such proceedings for the purpose of ensuring, so far as it is reasonably practicable, that such questions are determined without delay."

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[1] S 1(2).

5.41 Our preliminary view is that this type of question would be more appropriately dealt with by rules of court than by primary legislation. We would, however, welcome views on the following questions.

38(a) Is harm being caused by avoidable delays in court proceedings relating to parental rights?

(b) If so, are there any suggestions as to how these delays could be avoided?

Care and supervision orders

5.42 Under the existing law a court dealing with a divorce action, and certain other types of action, in which a child is involved has power to commit the care of the child to a local authority, or place the child under the supervision of a local authority.[1] This is an anomalous route into care or supervision. In their forthcoming report the Child Care Law Review Group conclude that it is undesirable for children in care to be subject to "multiple legislation" and that the children's hearings system, which is the normal source of supervision requirements, offers a better way of deciding whether a child should be subject to local authority care or supervision. They recommend that, where a court in matrimonial, guardianship or adoption proceedings considers that grounds exist for compulsory measures of care and that the child might be likely to be caused unnecessary suffering or serious impairment to health, development or well-being because of lack of parental care, the court should be able to certify such grounds as established and to remit the case to the reporter to consider arranging a children's hearing.

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[1]Matrimonial Proceedings (Children) Act 1958 ss10 and 12; Guardianship Act 1973, s11; Adoption (Scotland) Act 1978, s26.

We endorse this recommendation and, subject to a consideration of any comments made by consultees, would propose to include appropriate amendments in the draft Bill to be appended to our report on this subject.

Other reforms?

5.43 We would welcome any other suggestions for improvements to the law on court orders relating to parental rights, guardianship or the administration of property belonging to children.

39 Are there any suggestions for any other reforms of the law on court orders relating to parental rights, guardianship of children or the administration of property belonging to children?

PART VI - PRIVATE INTERNATIONAL LAW

Introduction

6.1 Questions of jurisdiction and recognition and enforcement of judgments in relation to orders relating to custody and other parental rights are very largely regulated by recent statutes[1] which could not readily be changed without negotiation with the other countries involved. In this part of the discussion paper we confine ourselves primarily to a discussion of choice of law.[1] Our concern is to suggest simple, coherent and acceptable answers to the following questions.

(a) Which law should determine whether a person has parental responsibilities and rights?

(b) Which law should determine whether a person is the guardian of a child and regulate the legal consequences of guardianship?

(c) Which law should govern the administration of a child's property?

We are concerned with parental responsibilities and rights as defined earlier in this paper, and not with such topics as aliment and succession.

Parental responsibilities and rights

6.2 In matters relating to responsibilities and rights of a personal or family nature the traditional connecting factor in Scots law is the law of the domicile.[2] In relation to jurisdiction and recognition of judgments in custody matters, however, the law of the

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[1] Except in relation to a few aspects of administration of a child's property. See para 6.8 below.

[2] Fraser, Parent and Child (3rd edn, 1906) p731; Anton, Private International Law, pp155-157.

domicile has been receding and the law of the child's habitual residence advancing.[1] We have considered whether a similar change ought to be reflected in the choice of law rules. On balance we think that it ought to be. If a family is habitually resident in Scotland then it seems reasonable and proper that Scots law should regulate the long-term parental responsibilities and rights even if the persons concerned retain, by virtue of a clearly expressed intention to return, a domicile in another country.[2] Habitual residence seems a better connecting factor than mere presence, except in relation to laws designed for immediate protection, such as those on corporal punishment.

6.3 The existing law is not very helpful in cases where the parents and the child have different domiciles or habitual residences. There is an absence of modern authority and the older authorities date from a time when the father had all or most of the relevant rights and responsibilities and when his domicile determined the domicile of the whole family. The type of case which could arise nowadays is as follows.

> A father is habitually resident and domiciled in, and is a national of, country A. By the law of country A he alone has parental rights and the mother has none. The mother and child are domiciled and habitually resident in Scotland. By the law of Scotland she has parental rights as well as the father and can exercise them alone. The mother wishes to act as the child's legal

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[1]See Family Law Act 1986, ss9 and 26.

[2]Some modern authors in Scotland take the view that the law of the country where the child and parents are "living" or "residing" already governs important parental rights and duties. See Walker, Principles (4th edn, 1988) vol 1 p168; Leslie in Stair Memorial Encyclopaedia vol 17, p75.

representative in relation to medical treatment of a non-urgent nature and in relation to a legacy left to the child by a maternal relative. Can she do so?

We suggest that in this type of situation the decisive factor ought to be the habitual residence of the child. We are aware that English law appears to apply the lex fori in such matters, whenever an English court has jurisdiction, but this seems an inadequate solution. We are primarily concerned with cases where there are no court proceedings and hence no forum: once a case comes before a court then, no matter who has parental rights, the welfare of the child becomes the paramount consideration.[1] We suggest for consideration that

40(a) **Whether a person has, by operation of law, parental responsibilities and rights (as these terms are used in this paper) in relation to a child, and the nature and extent of those responsibilities and rights, should depend on the law of the child's habitual residence.**

(b) **However, the applicability of any rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.**

(c) **These rules should be subject to the rule that in court proceedings in Scotland relating to parental rights the welfare of the child is the paramount consideration.**

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[1]Law Reform (Parent and Child) (Scotland) Act 1986, s 3(2).

Guardianship

6.4 The separation of guardianship from parental rights, and the new quasi-parental role of the guardian, which we suggest in this paper, require a new look to be taken at choice of law rules. The most general rules of the existing law are that whether a person is guardian of a child and the extent of his or her rights (except in relation to immoveable property, as noted below) depend on the law of the country where the child is domiciled.[1] This seems more or less suitable for the new rules suggested in this paper, although we suggest that the connecting factor should be the child's habitual residence. It seems reasonable that the question whether a person is validly constituted guardian (eg by will, or by a court, or by operation of law on the death of a parent) should depend on the law of the child's habitual residence at the time of the appointment or constitution but that the responsibilities, powers and rights of the guardian at any time should depend on the law of the child's habitual residence at that time. A foreign guardian who comes to Scotland with his ward, should have, while habitually resident with the child here, the responsibilities and rights conferred on guardians by Scots law. Similarly, if a Scottish parent who has gone to live in another country appoints a friend or relative in Scotland as guardian, and the child comes to Scotland to live with the guardian on the parent's death, it would be more convenient that the responsibilities and rights of the guardian should be governed by Scots law rather than the law of the country where the child was habitually resident when the parent died. The position

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[1]Cf Sawyer v Sloan (1875) 3 R 271; Seddon (1891) 19 R 101; (1893) 20 R 675; Atherstone's Trs (1896) 24 R 39; Elder (1903) 5 F 307; McFadzean 1917 SC 142.

of the guardian is the same as that of a parent and, as in the case of a parent, we would suggest that the applicability of rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.

6.5 There is authority to the effect that the guardian of a child domiciled abroad may not deal with a child's immoveable property in Scotland even if he has power to do so by the law of the child's domicile.[1] This seems an old-fashioned and inconvenient rule. If a person is recognised as the child's guardian and legal representative, and if by the law governing his powers he can deal with immoveable property anywhere, then there seems to be no reason why he should not be able to deal with immoveable property in Scotland. We suggest that this restriction should not be reproduced.

6.6 We suggest for consideration that:

41(a) The question whether a person is validly appointed or constituted guardian of a child should depend on the law of the child's habitual residence at the time the appointment is made (which, in the case of a testamentary appointment, should be regarded as the date of the appointer's death) or the constituting event occurs.

(b) The responsibilities and rights of a guardian of a child at any time should

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[1]Anton, Private International Law, p383-384; Ogilvy v Ogilvy's Trs 1927 SLT 83 (guardian of child domiciled abroad could not grant a discharge for conveyance of Scottish heritage to child); Waring 1933 SLT 190.

depend on the law of the child's habitual residence at that time.

(c) However, the applicability of any rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.

(d) The rules suggested in paragraphs (b) and (c) should be subject to the rule that in court proceedings in Scotland relating to guardianship the welfare of the child is the paramount consideration.

Administration of child's property

6.7 We are concerned here only with cases not already covered by the rules on the responsibilities and rights of parents and guardians. We are therefore concerned primarily with the reporting duty suggested earlier and with the jurisdiction of the court to make orders relating to a child's property. We suggest for consideration that

42(a) If a reporting duty of the type mentioned in paragraph 4.22 of this discussion paper is introduced it should apply to any person who proposes to hand over property to, or to be administered by, the parent or guardian of a child habitually resident in Scotland.

(b) The Scottish courts should have jurisdiction to make orders relating to the administration of a child's property

(i) if the child is habitually resident in Scotland or

(ii) if the property is situated in Scotland.

6.8 The general theme running through the above suggestions is that the most appropriate connecting factor for the matters considered in this paper is the child's habitual residence. This is consistent with the primary rules on jurisdiction and recognition of judgments in the Family Law Act 1986 and also with the approach of the Hague Convention of 1961 on jurisdiction and applicable law in the area of protection of minors.[1] The provision suggested for the lex situs in the last proposition is designed to cater for cases where a Scottish court is the only court which can deal with the matter effectively[2] or where there is a need for emergency action to protect the property.

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[1]This Convention has not been signed or ratified by the United Kingdom but has been ratified by 8 European countries.

[2]For example, the law of the child's habitual residence may not give the child's guardian power to deal with immoveable property in Scotland and it might therefore be necessary for a Scottish court to appoint a factor with the necessary powers.

PART VII - SUMMARY OR PROPOSITIONS AND QUESTIONS FOR CONSIDERATION

1 (a) Should there be a statutory statement of parental responsibilities?

(b) If so, should it be provided that a parent has a responsibility

(i) to care for his or her child throughout childhood,

(ii) to safeguard and promote the child's welfare throughout childhood, and

(iii) to administer, during the child's childhood, for the benefit of the child, any property belonging to the child.

(c) Should "childhood" for this purpose last until the child attains the age of 16?

(Para 2.5)

2 Should it be made clear in any new legislation on this topic that parental rights are conferred on a parent in order to enable him or her to fulfil his or her parental responsibilities?

(Para 2.20)

3 (a) It is suggested that parental rights should include legal representation, custody and access.

(b) The right of legal representation (which would replace the parent's rights as tutor and administrator-at-law) should be defined as the right to administer the child's property and to act, or give consent, on behalf of the child in any legally significant matter where the child is incapable of acting or consenting on his or her own behalf.

(c) The right of custody should be defined as the right of the person concerned to have the child living with him or her, or otherwise to regulate the child's residence, and to control the child's day to day upbringing.

(d) The right of access should be defined as the right to have reasonable contact with the child, either by visiting the child, or by being allowed to take out the child, or by being allowed to have the child to stay ("residential access") or by other appropriate means.

(e) If legal representation, custody and access were defined on the above lines, and if any rights conferred on parents by any other enactments were expressly preserved, would it be necessary to confer any other parental rights and, if so, which?

(Para 2.20)

4 (a) Should the law confer parental responsibilities and rights on the father of a child even if he is not, and has not been, married to the mother of the child?

(b) Should there be an exception for the case where the child is the result of rape and the father did not have a continuing relationship with the mother?

(c) Should there be any other exceptions?

(Para 2.31)

5 If parental responsibilities and rights are not conferred automatically on the father of a child where he is not, and has not been, married to the mother of the child, should the law enable the

father and mother to confer parental responsibilities and rights on the father by agreement?

(Para 2.32)

6 If new legislation were to include a statement of parental responsibilities should it be made clear that these responsibilities do not cease solely because some other person subsequently acquires any parental right?

(Para 2.36)

7 Should it be provided that the fact that a person has parental responsibilities or rights in relation to a child does not entitle him or her to act in any way which would be incompatible with any court decree relating to the child, or the child's property, or any supervision requirement relating to the child made by a children's hearing?

(Para 2.38)

8 It should be provided that

(a) a person who has parental responsibilities or rights in relation to a child may not surrender or transfer any part of these responsibilities or rights to another but may arrange for some or all of them to be met by one or more persons acting on his behalf;

(b) the person with whom any such arrangement is made may himself be a person who already has parental responsibilities or rights in relation to the child concerned;

(c) the making of any such arrangement does not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibilities for the child concerned.

(Para 2.39)

9 It should be provided that a person who does not have the relevant parental rights in relation to a child but who has care of the child may do what is reasonable in all the circumstances for the purpose of safeguarding or promoting the child's welfare.

(Para 2.40)

10 Should it be provided that a person with parental rights, in reaching any major decision relating to the child in the exercise of those rights, must so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to the child's age and understanding?

(2.43)

11 Should the parent's right to administer reasonable corporal punishment to his or her child be retained or abolished?

(Para 2.49)

12 A guardian of a child should be able to appoint another individual to take his or her place as the child's guardian in the event of his or her death.

(Para 3.5)

13 Provision should be made for the revocation of an appointment of a nominated guardian, on similar lines to the provisions in section 6(1) to (4) of the Children Act 1989. (These provisions are set out in paragraph 3.6 above.)

(Para 3.7)

14 An appointment as guardian should not take effect until accepted, either expressly, or impliedly by acts which are not consistent with any other intention.

(Para 3.8)

15 If two or more persons are appointed as guardians any one or more should be able to accept office,

even if both or all do not accept, unless the appointment expressly provides otherwise.

(Para 3.9)

16 There is no need to change the existing rule that a guardian appointed by a parent to act after his or her death is not precluded from accepting office merely because the other parent is surviving.

(Para 3.12)

17 (a) A guardian should have the same responsibilities in relation to the child as a parent has.

(b) To enable him or her to fulfil these responsibilities a guardian should have the same rights of legal representation, custody and access as a parent has.

(Para 3.14)

18 Once a guardian has accepted office then, unless the appointment provides for earlier termination, guardianship should be terminated only by

(a) the child's attaining the age of 16 years,

(b) the death of the child or the guardian, or

(c) a court order.

(Para 3.16)

19 (a) The powers available to the courts to make special provision for damages payable to children should be extended and generalised and should be the same for all courts.

(b) Where in any court proceedings a sum of money becomes payable to, or for the benefit of, a person under legal disability by reason of non-age the court should have power to make such order relating to the payment and management of the money for the benefit of that person as it thinks fit.

(c) The court's power should expressly include

(i) power to appoint a judicial factor, with appropriate powers, to invest, apply or otherwise deal with, the money for the benefit of the person concerned,

(ii) power to order the money to be paid to the sheriff clerk or the Accountant of Court, to be invested, applied or otherwise dealt with, under the directions of the court, for the benefit of the person concerned,

(iii) power to order the money to be paid to the parent or guardian of the person concerned, to be invested, applied or otherwise dealt with, as directed by the court, for the benefit of that person, and

(iv) power to order payment to be made directly to the person concerned.

(d) It should be made clear that the receipt of any person to whom payment is made in terms of the court's order is a sufficient discharge.

(e) Should it be provided that any sum ordered to be invested under these proposals may in the absence of any direction by the court to the contrary, be invested in, and only in, any manner in which trustees are authorised to invest under the Trustee Investments Act 1961?

(Para 4.12)

20 (a) Is the present law whereby all parents or guardians administering any property of a pupil child are treated as judicial factors for most purposes of the Judicial Factors Acts satisfactory?

(b) Should an attempt be made to distinguish cases where some external control of the administration of a child's property is appropriate from cases where this can be left to the discretion of the parent or guardian?

(c) In relation to funds or property inherited by a child under legal disability by reason of non-age, should an executor before paying the funds to, or transferring the property to be administered by, the child's parent or guardian be obliged to inform the Accountant of Court, in certain cases, of his intention to do so?

(d) Should this obligation arise if the executor has reasonable cause to believe that--

(i) the value of the funds or property is over a certain sum or

(ii) the parent in question is an undischarged bankrupt or has been convicted of an offence involving dishonesty?

(e) If a reporting obligation were introduced on these lines, what level should be set for the purposes of paragraph (d)(i) above?

(f) Are there any other circumstances in which an executor's obligation to report should arise and, if so, what?

(g) If a reporting obligation were introduced should the Accountant of Court be authorised, within a specified period,

(i) to direct the executor to apply to a court for the appointment of a judicial factor in respect of all or part of the funds,

(ii) to direct all or part of the funds or property to be transferred to him to be invested, administered or otherwise dealt with on behalf of the child, or

(iii) to make such other direction as he might consider appropriate for the investment, administration or use of all or part of the funds or property for the benefit of the child?

(h) The receipt or discharge of any person (including the child concerned) to whom a payment or transfer is made in accordance with a direction of the Accountant of Court should be an effective receipt or discharge.

(i) On the expiry of the period, if none of these options has been exercised by the Accountant of Court, should the executor be free to pay or transfer to the parent or guardian, the latter's receipt or discharge being effective?

(Para 4.22)

21 Should similar rules apply to other property (such as trust property) payable to a parent or guardian to be held for a child?

(Para 4.23)

22 It should be made clear in any new legislation that the court's powers to make orders relating to the legal representation of a child include power to make orders relating to the administration of the child's property and, in particular, power to appoint a judicial factor, where appropriate, or to order funds belonging to the child to be handed over to the Accountant of Court or sheriff clerk to be invested, administered or otherwise dealt with for the benefit of the child.

(Para 4.24)

23 It should be made clear that, subject to the obligation of the parent or guardian to account to the child, the right of legal representation in relation to a child carries with it the right to do any act in relation to the child's property which the child is legally incapable of doing but could have done if of full age and capacity.

(Para 4.25)

24 A parent or guardian acting as a child's legal representative in relation to the child's property should no longer be regarded as a trustee for the purposes of the Trusts (Scotland) Acts.

(Para 4.27)

25 (a) A parent or guardian who has, as a child's legal representative, held, administered or dealt with the child's property should continue to be liable (as under the existing law) to account to the child, when the parent or guardian ceases to be the child's legal representative, for his or her intromissions with the property.

(b) In accounting, the parent or guardian should not be liable to the child in respect of any of the child's funds used in the proper discharge of the parent's or guardian's responsibility to promote the child's welfare.

(Para 4.28)

26 A parent or guardian acting as a child's legal representative in relation to the administration of the child's property should be required to act in that capacity as a reasonable and prudent man would act on his own behalf.

(Para 4.30)

27 It should be made clear that a local authority cannot apply for an award of custody of, access to,

or guardianship of a child under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986.

(Para 5.4)

28 There is no need to place any restrictions on applications by local authority foster parents under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986.

(Para 5.5)

29. Section 47 of the Children Act 1975 is futile and unnecessary and should be repealed.

(Para 5.6)

30 (a) Section 38C of the Sheriff Courts (Scotland) Act 1907 and section 20(1) of the Court of Session Act 1988 should be repealed.

(b) It should be provided in section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986 that an application under that section may be made either

(i) in independent proceedings in the Court of Session or a sheriff court (whether or not the application is accompanied by an application for any other remedy which can competently be sought in those proceedings) or

(ii) in an action for divorce, or judicial separation or for a declarator of marriage, nullity of marriage, parentage, non-parentage, legitimacy or illegitimacy.

(Para 5.10)

31 (a) The provision on the types of order obtainable under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1986 should not be replaced by provisions on the model of section 8 of the Children Act 1989.

(b) Would there be any advantage in specifying, without prejudice to the generality of section 3 of the 1986 Act, some of the types of order obtainable under that section?

(c) If so, would a list such as that set out in paragraph 5.18 be useful? Are any additions, deletions or modifications suggested?

(Para 5.18)

32 Is the provision in section 3(2) of the Law Reform (Parent and Child) (Scotland) Act 1986 that a court must "not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child" sufficient to discourage unnecessary orders relating to parental rights?

(Para 5.21)

33 (a) Should there be a statutory checklist (on the lines of that in section 1(3) of the Children Act 1989) of factors which a court should take into account in contested cases relating to parental rights?

(b) If so, are any additions to, deletions from, or modifications of the list in section 1(3) of the Children Act 1989 suggested? (The list is reproduced in paragraph 5.23 above.)

(Para 5.25)

34 (a) A court dealing with an action of divorce, nullity of marriage or judicial separation should have power to make an order relating to parental rights even if no application has been made for such an order.

(b) The court's existing duty to be satisfied as to the arrangements for children in any such

actions should be replaced by a duty to consider whether it should make an order relating to parental rights. Accordingly, section 8 of the Matrimonial Proceedings (Children) Act 1958 should be replaced by a provision on the lines of section 41 of the Matrimonial Causes Act 1973 as substituted by the Children Act 1989. (The new version of section 41 is set out in paragraph 5.28 above.)

(c) The court's power and duty under paragraphs (a) and (b) should extend to any child of the family and that term should mean any child of both the parties to the marriage and any other child, not being a child placed with those parties as foster parents, who has been treated by both of those parties as a child of their family.

(d) Even if section 8 of the 1958 Act is not replaced as suggested in paragraph (b) the court's duty under it should extend to any child of the family as defined in paragraph (c).

(Paras 5.29 - 5.30)

35 An order granting custody or any other parental right to a person should deprive any other person of any parental right only so far as the order expressly so provides and only to the minimum extent necessary to give effect to the order.

(Para 5.33)

36 (a) Should an order under which a child is to live with one of two parents who both have parental rights cease to have effect if the parents live together for a continuous period of more than six months?

(b) Should it be provided that an order regulating access by one parent to a child living with the other parent ceases to have effect if the parents live together for a continuous period of more than six months?

(Para 5.34)

37 There is no need to introduce in Scotland provisions equivalent to those in section 13 of the Children Act 1989 (set out in paragraph 5.35 above) on change of a child's name or removal from the United Kingdom.

(Para 5.38)

38 (a) Is harm being caused by avoidable delays in court proceedings relating to parental rights?

(b) If so, are there any suggestions as to how these delays could be avoided?

(Para 5.41)

39 Are there any suggestions for any other reforms of the law on court orders relating to parental rights, guardianship of children or the administration of property belonging to children?

(Para 5.43)

40 (a) Whether a person has, by operation of law, parental responsibilities and rights (as these terms are used in this paper) in relation to a child, and the nature and extent of those responsibilities and rights, should depend on the law of the child's habitual residence.

(b) However, the applicability of any rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.

(c) These rules should be subject to the rule that in court proceedings in Scotland

relating to parental rights the welfare of the child is the paramount consideration.

(Para 6.3)

41 (a) The question whether a person is validly appointed or constituted guardian of a child should depend on the law of the child's habitual residence at the time the appointment is made (which, in the case of a testamentary appointment, should be regarded as the date of the appointer's death) or the constituting event occurs.

(b) The responsibilities and rights of a guardian of a child at any time should depend on the law of the child's habitual residence at that time.

(c) However, the applicability of any rules designed for the immediate protection of the child should depend on the law of the place where the child is for the time being.

(d) The rules suggested in paragraphs (b) and (c) should be subject to the rule that in court proceedings in Scotland relating to guardianship the welfare of the child is the paramount consideration.

(Para 6.6)

42 (a) If a reporting duty of the type mentioned in paragraph 4.22 of this discussion paper is introduced it should apply to any person who proposes to hand over property to, or to be administered by, the parent or guardian of a child habitually resident in Scotland.

(b) The Scottish courts should have jurisdiction to make orders relating to the administration of a child's property

(i) if the child is habitually resident in Scotland or

(ii) if the property is situated in Scotland.

(Para 6.7)

Printed in Scotland by HMSO Reprographic Unit, Edinburgh
1m 10/90 (029359) (CRC supplied)