The Law Commission and The Scottish Law Commission

(LAW COM. No. 138)
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FAMILY LAW

CUSTODY OF CHILDREN— JURISDICTION AND ENFORCEMENT WITHIN THE UNITED KINGDOM

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*)
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AND
THE SCOTTISH LAW COMMISSION

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To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain, the Right Honourable George Younger, M.P., Her Majesty's Secretary of State for Scotland, and the Right Honourable the Lord Cameron of Lochbroom, Q.C., Her Majesty's Advocate.

PART I

INTRODUCTION

A Background

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

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

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

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

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

1.2 Lying behind the technical language of our terms of reference was the recognition of human problems which may seriously affect the child and the parents or others who have, or may have assumed, responsibility for the welfare of the child, and who may seek the assistance of the courts in obtaining orders for custody. A dispute over custody may jeopardise the child's welfare and happiness, and the emotional distress may drive the parents or others concerned to have recourse to unlawful remedies. In an extreme case the child may be taken from the jurisdiction of the court which has made an order for its custody to another jurisdiction where another court may make a different and inconsistent order.

1.3 Furthermore, custody disputes may be aggravated by lack of co-operation between the courts of different jurisdictions. A court may decline to enforce the custody orders of a court in another country. There may be

[1] I.e. the United Kingdom, the Channel Islands and the Isle of Man.

conflicts between such courts, leading to concurrent proceedings or incompatible decisions or both. When legal rights to custody can be flouted with impunity and when orders for custody are found to have no effect when a child is taken across a border, the law itself is brought into disrepute.

B The central problems

1.4 At an early stage of our work on custody conflicts,[2] two features of the legal systems in the United Kingdom emerged as in need of particular attention—namely, the diversity of jurisdictional rules and the limited enforceability of orders.

(1) *The diversity and multiplicity of the present rules of custody jurisdiction*

1.5 The diversity and multiplicity of the present jurisdictional rules are factors of which informed parents can take advantage, and the mischief done can be very serious. In Scotland, the domicile of the child is the main criterion of jurisdiction,[3] whereas in England and Wales, where much broader rules of jurisdiction exist, the personal presence of the child is the principal criterion.[4] In the past these differences in jurisdictional rules have led to sharp conflicts within the United Kingdom. Under the present rules of jurisdiction, it is relatively easy for a person to remove a child from one part of the United Kingdom to another, with the aim of evading compliance with a custody order which has already been made (or of frustrating custody proceedings which are anticipated or already under way) and perhaps of invoking the jurisdiction of the courts in the second country. The intention of the person removing a child in these circumstances may well be to obtain a tactical initiative. The sudden removal of a child from one jurisdiction to another not only creates confusion and uncertainty, and gives rise to unnecessary anxiety and expense, but also may give the person responsible an unfair advantage.

1.6 The existing bases of jurisdiction, which are to a considerable extent the product not of any rational scheme but of accidents of legal history, have thus given rise to a serious risk of concurrent assumptions of custody jurisdiction by courts in different parts of the United Kingdom and the possibility, at least, of conflicting orders.[5]

(2) *Limited recognition and enforceability of custody orders*

1.7 The second feature of the present law which calls for attention is that there is no procedure for the recognition throughout the United Kingdom of custody orders made in the United Kingdom corresponding to the automatic

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[2]Custody of Children—Jurisdiction and Enforcement within the United Kingdom (1976), Working Paper No. 68/Memorandum No. 23, paras. 2.6–2.29. See paras. 1.10–1.11 below.

[3]*Ponder* v. *Ponder* 1932 S.C. 233; *McLean* v. *McLean* 1947 S.C. 79; *Babington* v. *Babington* 1955 S.C. 115; *Oludimu* v. *Oludimu* 1967 S.L.T. 105.

[4]See *Re C., The Times,* 14 December 1956; *Re P.(G.E.)* [1965]Ch. 568, 582.

[5]See, e.g., *Johnstone* v. *Beattie* (1848) 10 Cl. & F. 42; (1856) 18 D. 343; *Stuart* v. *Moore* (1861) 9 H.L.C. 440; also (1860) 22 D. 1504; (1861) 23 D. 51, 446, 595, 779 and 902; and *sub nom. Stuart* v. *Stuart* (1861) Macq. 1; *Babington* v. *Babington* 1955 S.C. 115; and *Hoy* v. *Hoy* 1968 S.C. 179. The possibility of conflict has, however, been reduced in recent years by the willingness of the courts in the different parts of the United Kingdom to make summary orders for the immediate return of children in child abduction cases. See *Re H.* [1966] 1 W.L.R. 381; *Sergeant* v. *Sergeant* 1973 S.L.T. (Notes) 27; *Re L.* [1974] 1 W.L.R. 250; *Kelly* v. *Marks* 1974 S.L.T. 118; *Campbell* v. *Campbell* 1977 S.L.T. 125; *Lyndon* v. *Lyndon* 1978 S.L.T. (Notes) 7; *Thomson, Petr.,* 1980 S.L.T. (Notes) 29.

recognition of divorces and judicial separations[6] or to the procedures for the reciprocal enforcement of maintenance orders.[7] The result is that the issue of custody may be fought a second time even though a custody order has been made after a thorough and fair investigation and despite the fact that the courts throughout the United Kingdom treat the welfare of the child as the first and paramount consideration in deciding the merits of the case.[8] In any event, if it is desired to obtain an effective custody order in another part of the United Kingdom it will usually[9] be necessary to seek a further order by engaging in further proceedings, which may be protracted as well as expensive. Although it may be generally accepted that practical difficulties can be encountered in seeking to enforce in a foreign country a custody order which has been made by a court in the United Kingdom, it is highly unsatisfactory that no provisions for the reciprocal recognition and enforcement of custody orders (unlike maintenance orders) exist within the constituent parts of the United Kingdom.

(3) *The need for a solution*

1.8 These problems are of long standing and, in an attempt to resolve them, a committee of English and Scottish representatives was appointed by the Lord Chancellor in 1958, under the chairmanship of Lord Justice Hodson (as he then was), to examine conflicts of jurisdiction and the enforcement of custody orders within the different parts of the United Kingdom. However, the recommendations contained in the committee's report,[10] that pre-eminent jurisdiction should belong to the courts of that part of the United Kingdom in which the child is ordinarily resident (subject, in cases of emergency, to the courts of that part in which he is physically present), and that custody orders should be the subject of reciprocal enforcement within the United Kingdom in the same way as maintenance orders now are, did not command general acceptance[11] and have not been implemented.

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[6]Recognition of Divorces and Legal Separations Act 1971, which gives effect to the recommendations of the Law Commissions in their joint report on the Hague Convention on Recognition of Divorces and Legal Separations (1970), Law Com. No. 34; Scot. Law Com. No. 16. In our Report on Foreign Nullity Decrees and Related Matters (1984), Law Com. No. 137; Scot. Law Com. No. 88, we have proposed new statutory provisions for the recognition of annulments which we recommend should be included in a composite Bill governing the recognition of divorces, annulments and legal separations, replacing the 1971 Act.

[7]Maintenance Orders Act 1950.

[8]Guardianship of Infants Act 1925, s.1 (Scotland), re-enacted for England and Wales by Guardianship of Minors Act 1971, s.1. There is no similar provision in Northern Ireland, but the provision has been generally regarded as declaratory of the law: see the Report of the Committee on the Supreme Court of Judicature of Northern Ireland (1970), Cmnd. 4292, para. 12. Cf. Children and Young Persons Act (Northern Ireland) 1968, s.48; *Ward* v. *Laverty* [1925] A.C. 101, 108; and *J.* v *C.* [1970] A.C. 668, 707–709.

[9]In Scotland, a custody order pronounced by the court of the child's domicile (whether in England and Wales or Northern Ireland or elsewhere) is entitled to recognition, but it will not be blindly enforced any more than a Scottish order will be blindly enforced: *Westergaard* v. *Westergaard* 1914 S.C. 977; *Radoyevitch* v. *Radoyevitch* 1930 S.C. 619; *Kelly* v. *Marks* 1974 S.L.T. 118. Moreover, since domicile is not a basis of custody jurisdiction in England and Wales or Northern Ireland, it will not normally be apparent on the face of the order whether the court happened to be the court of the domicile or not.

[10]Report of the Committee on Conflicts of Jurisdiction Affecting Children (1959), Cmnd. 842, para. 60.

[11]One member of the committee, Michael Albery, Q.C., dissented from the proposed criterion of ordinary residence, and most commentators regarded the report unfavourably. See, for example, G. H. Jones, (1960) 9 I.C.L.Q. 15 and O. Kahn-Freund, (1960) 23 M.L.R. 64; cf. Lord Denning, M.R. in *Re P. (G.E.)* [1965] Ch. 568, 586.

1.9 The present state of legal disorder affecting custody orders not only serves to prolong litigation but also militates against the welfare of children. In the exercise of their custody jurisdiction the courts throughout the United Kingdom regard the welfare of the child as the paramount consideration. The difficulties to which we have referred stem essentially not from any fundamental difference of approach within the United Kingdom but from the existence of three separate legal systems. The time has now come for these systems to accept common rules of custody jurisdiction and mutually to recognise and enforce custody orders made in accordance with those rules. A change of this nature is in the interests of children as well as in the interests of the administration of justice. That is the basis of our report.

C Joint consultation paper

1.10 In the preparation of this report we have benefited greatly by the expert advice given by the Joint Working Party[12] set up by the two Law Commissions under the chairmanship of Lord Justice Scarman (as he then was). Their provisional recommendations formed the basis of a consultation paper,[13] which was published in 1976. We sought advice from concerned bodies and members of the public on the issues raised by our terms of reference. We wish to record once more our appreciation of the assistance then, and subsequently, given to us by the Chairman and members of the Working Party and to thank those who responded to the consultation paper by writing to us with their views.[14]

1.11 The consultation paper put forward provisional proposals for unified rules of jurisdiction, for the recognition and reciprocal enforcement of custody orders and for the stay of concurrent proceedings started in different parts of the United Kingdom. It also made suggestions for dealing with some of the administrative problems associated with enforcement procedures.

1.12 Although these provisional proposals received a broad measure of support, we received some critical comments, in particular from members of the judiciary in England and Northern Ireland, which caused us to reconsider our approach on the common grounds of jurisdiction. For example, it was argued that the limitation of the proposed scheme to "United Kingdom cases", which were defined in the consultation paper[15] as cases where the child in question was habitually resident in some part of the United Kingdom, would not necessarily exclude the possibility of conflict between the English and Scottish courts in cases with a wider, international element. This argument may be illustrated by the following example. A married couple, both of whom are domiciled in Scotland, move to one of the Gulf States where their child is born. The parents subsequently quarrel and the mother brings the child to the home of a grandmother, in England. The mother immediately makes an application to the High Court for custody. Such a case would not be a "United Kingdom case" as defined in the consultation paper, because at no time would the child

[12]The members of the Joint Working Party are listed in Appendix B.

[13]Custody of Children—Jurisdiction and Enforcement within the United Kingdom (1976), Working Paper No. 68/Memorandum No. 23.

[14]A list of those who submitted comments is contained in Appendix C.

[15](1976) Working paper No. 68/Memorandum No. 23, para. 3.2.

have been habitually resident in the United Kingdom. As a result, the case would fall outside the scheme provisionally proposed and the English court would be entitled to assume jurisdiction founded on the physical presence or nationality of the child, while the Court of Session in Scotland would be entitled to assume jurisdiction based upon the child's Scottish domicile acquired at birth. The risk of potential conflicts of custody jurisdiction within the United Kingdom would remain.

1.13 In the light of the criticism of the jurisdictional proposals in the consultation paper, detailed discussions took place between the two Commissions, which in 1980 resulted in broad agreement about a scheme of uniform jurisdictional rules for the making of custody orders whose application would not be confined to "United Kingdom cases". This scheme formed the basis of further, informal consultation with a view to ensuring that the approach we decided to recommend in this report would be likely to command support both north and south of the border and in Northern Ireland. We are grateful to all those who assisted us in our various consultations.

D The recommended solution

1.14 Although our consultations and discussions have led us to modify our provisional proposals in several respects, they have also confirmed our view that the right solution of the problems to which we have referred is to unify the existing jurisdictional rules so far as concerns the making of custody orders and to provide a simple procedure for the recognition and enforcement in one United Kingdom country of custody orders made in another. The recommendations in this report are designed to effect and work out those solutions.

E Scope of the report

(1) *The international aspects*

1.15 Since the publication of the Hodson Report the international aspects of the problems associated with the removal of children from one jurisdiction to another have become more acute, owing to the increase in travel and temporary residence abroad for work or holidays and the increase in the number of divorces. The seriousness of these problems has been recognised and several initiatives have been taken to reduce opportunities for the unilateral removal or seizure of children from one country to another and from one law district to another within the same country. For example, in the United States the Uniform Child Custody Jurisdiction Act, which has now been adopted by almost all the States,[16] is designed both to harmonise State laws and to apply to recognition of foreign custody orders.[17] There is also federal legislation in this field, namely the Parental Kidnapping Prevention Act of 1980. This legislation incorporates the Uniform Child Custody Jurisdiction Act

[16]The following States have not enacted the Act into law: Massachusetts (but see *Murphy* v. *Murphy*, 404 N.E. 2d 69 (1980)), Texas and the two American jurisdictions of the District of Columbia and Puerto Rico. See also (1983) XVII Fam. L.Q. 345.

[17]Uniform Child Custody Jurisdiction Act, ss. 1 and 23.

and requires State courts to accord formal recognition to custody orders of other States.[18]

1.16 In 1980 two international Conventions, designed to resolve the problems arising in child custody cases, were concluded: the Council of Europe Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children[19] (referred to hereafter as "the Council of Europe Convention") and the Hague Convention on the Civil Aspects of International Child Abduction[20] (referred to hereafter as "the Hague Convention"). The United Kingdom is a member both of the Council of Europe and of the Hague Conference on Private International Law and consideration is currently being given by the Government to the implementation of the two Conventions in the United Kingdom.[21] Although this report is not concerned with the resolution of conflicts of jurisdiction affecting countries outside the United Kingdom, in formulating our proposals for reform we have kept the international aspects of the problem in mind.[22]

Council of Europe Convention

1.17 In essence, the Council of Europe Convention gives any person who has obtained in a Contracting State a decision relating to the custody of a child under the age of 16 the right to apply for that decision to be recognised or enforced in another Contracting State.[23] The requirements to recognise and enforce foreign custody decisions are more stringent if the child has been improperly removed,[24] but any individual State may enter a reservation[25] relaxing these requirements. The United Kingdom has entered such a reservation, the effect of which is that recognition and enforcement of a custody order

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[18]For a general discussion of the American legislation, see S. Katz, *Child Snatching: The legal response to the abduction of children* (1981), and Coombs (1982) 66 Min. L. Rev. 711. The question of child abduction within the Commonwealth was discussed at the meeting of Commonwealth Law Ministers at Barbados in 1980; see *1980 Meeting of Commonwealth Law Ministers, Memoranda* (1980), p. viii, paras. 15–17 and J. M. Eekelaar, "The International Abduction of Children by a Parent or Guardian", *ibid.*, p.197. For a general review of Commonwealth developments, see J. D. McClean, *Recognition of Family Judgments in the Commonwealth* (1983), Ch. 9.

[19](1981) Cmnd. 8155. The Council of Europe Convention is in force in France, Luxembourg, Portugal and Switzerland. It has also been signed by Austria, Belgium, Cyprus, the Federal Republic of Germany, Greece, the Republic of Ireland, Italy, Liechtenstein, the Netherlands, Spain and the United Kingdom, but is not yet in force in those countries. For a note on the Convention, see R. L. Jones, (1981) 30 I.C.L.Q. 467.

[20]Published in the current Collection of Conventions edited by the Permanent Bureau of the Hague Conference on Private International Law. The Hague Convention is in force in France, Switzerland, Portugal and the Canadian Provinces of British Columbia, Manitoba, New Brunswick and Ontario. It has also been signed by Belgium, Greece and the United States of America, but is not yet in force in those countries. For a discussion of the Hague Convention, see A. E. Anton, (1981) 30 I.C.L.Q. 537.

[21]*Hansard* (H.C.), 2 December 1982, vol. 33, Written Answers, col. *285*; 7 February 1983, vol. 36, Written Answers, col. *242*.

[22]Our consultation paper envisaged a second paper dealing with the recognition and enforcement of custody orders made abroad: (1976) Working Paper No. 68/Memorandum No. 23, para. 1.3. However, in view of the United Kingdom's subsequent participation in the two Conventions, we decided not to attempt to cover the same ground.

[23]Art. 4.

[24]Arts. 8 and 9. "Improper removal", which is defined in Art. 1(d), includes, e.g., retention in breach of rights of access.

[25]Art. 17.

made in another Convention country could be refused on the grounds specified in the Convention.[26]

Hague Convention

1.18 Although dealing with a closely related problem, the Hague Convention differs in significant respects from the Council of Europe Convention. It is more limited in its effects but of broader application.[27] It is designed, first, to secure the prompt return of a child under the age of 16 who has been wrongfully removed from the Contracting State in which he was habitually resident to another Contracting State, and, secondly, to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States irrespective of whether there is a custody decision in existence.[28] The Hague Convention, unlike the Council of Europe Convention, applies only to cases of wrongful removal.[29] Although there are grounds on which the return of the child may be refused,[30] they are different from and in some respects narrower than those provided in the Council of Europe Convention.

(2) *Northern Ireland*

1.19 In the past it has been rare for the Law Commission to make recommendations for Northern Ireland. Section1(5) of the Law Commissions Act 1965 precludes the Law Commission from considering "any law of Northern Ireland which the Parliament of Northern Ireland has power to amend". Read with section 40(2) of the Northern Ireland Constitution Act 1973, the Law Commission's remit is limited (in so far as Northern Ireland is concerned) to matters over which the Northern Ireland Parliament did not have legislative competence under the Government of Ireland Act 1920: that is, "excepted" and "reserved" matters. Jurisdictional rules in matters relating to the custody of children and the enforcement of custody orders would be outside the competence of the Parliament of Northern Ireland as they deal, *inter alia,* with nationality and domicile—"excepted" and "reserved" matters respectively.

1.20 We believe, therefore, that there is no statutory bar to our dealing also with the law of Northern Ireland in so far as it affects the subject matter of this report. Furthermore, we believe that jurisdiction and enforcement in child custody disputes can (as was envisaged in the consultation paper) be dealt with more satisfactorily on a United Kingdom rather than a Great Britain basis.

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[26]These include, e.g., that the respondent had not been served, that none of the parties or the child had a connection by way of habitual residence with the State in which the decision was given, or that the effects of the decision are manifestly incompatible with the fundamental principles of law relating to the family and children in the State addressed.

[27]Whereas the Council of Europe Convention is limited in the first instance to those States which are members of the Council of Europe, the Hague Convention may be ratified by the 31 Member States of the Hague Conference on Private International Law drawn from all over the world. There are however provisions in each Convention for the accession of non-member States on certain conditions (Council of Europe Convention, Art. 23; Hague Convention, Art. 38).

[28]Art. 1.

[29]Defined, in Art. 3, to mean removal or retention in breach of custody rights attributed to a person, or institution, under the law of the State in which the child was habitually resident immediately before his removal or retention.

[30]Arts. 13 and 20.

Accordingly, in this report, in the light of the consultations we have had with the appropriate authorities in the Province, we make recommendations for reform of the law applicable in Northern Ireland.

(3) *Channel Islands and Isle of Man*

1.21 In this report we make no proposals affecting those parts of the British Isles which are not part of the United Kingdom. The draft Bill annexed makes provision for uniform rules of jurisdiction throughout the United Kingdom as well as for the recognition and enforcement in one part of the United Kingdom of custody orders made in another part of the United Kingdom. We hope, however, that (as indicated in our consultation paper[31]) our recommendations for the United Kingdom may form the basis for discussions between the United Kingdom and the authorities in the Channel Islands and the Isle of Man.

(4) *Age of children to whom recommendations apply*

1.22 The powers of courts in the United Kingdom to make orders relating to the custody of children[32] differ according to the age of the child. In England, as well as in Northern Ireland, these powers are confined to persons under the age of 18,[33] although in practice it is not usual for an order to be made in respect of a child who has attained the age of 16.[34] In Scotland, however, the courts have in general power to make custody orders only in respect of children under the age of 16.[35] The question arises whether our recommendations should apply to children under the age of 18 or some other age. We do not recommend any change in the present rules as to age so far as the jurisdiction of the courts is concerned. This will mean that courts in England and Wales and in Northern Ireland would continue to be able to make custody orders in respect of persons under the age of 18, whilst the jurisdiction of the Scottish courts would in general remain limited to those under 16. As regards the recognition and enforcement of custody orders, the two international Conventions to which we have referred above[36] are confined in their application to children under the age of 16.[37] The consultation paper, on the other hand, defined the term "child" to mean any person under the age of 18,[38] and its provisional proposals were framed accordingly. The choice of any particular age for the purpose of our recommendations on recognition and enforcement is not an easy one. We are, however, influenced by the fact that a person over 16 has a mind of his own which cannot easily be ignored by his parents or by the court.[39] Moreover, it would not be satisfactory to require a Scottish court to recognise and enforce orders relating to persons over 16 made in England or Northern Ireland when the Scottish court could not itself make such an order. There would also be advantages in adopting throughout the United Kingdom the same age limit as

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[31](1976) Working Paper No. 68/Memorandum No. 23, para. 1.3.

[32]See Part II of this report.

[33]Family Law Reform Act 1969, s.1(1); Age of Majority Act (Northern Ireland) 1969, s.1(1).

[34]See, for example, *Hall* v. *Hall* (1945) 62 T.L.R. 151.

[35]Custody of Children (Scotland) Act 1939. But see *Harvey* v. *Harvey* (1860) 22 D. 1198.

[36]Paras. 1.16–1.18.

[37]See Art. 4 of the Hague Convention and Art. 1(a) of the Council of Europe Convention.

[38](1976) Working Paper No. 68/Memorandum No. 23, p.21, n.3.

[39]"[Custody] is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice", *per* Lord Denning M. R. in *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 369.

that specified in the international Conventions. *We therefore recommend* that our proposals on the recognition and enforcement of custody orders should be confined in their application to persons under the age of 16.

(5) *Definition of custody orders: general*

1.23 In formulating proposals for reform we had to decide what should be covered by the term "custody order". To some extent this was straightforward. We had no difficulty in concluding, for example, that orders relating to access to a child should generally be included, as should orders relating to the education of a child. Similarly we had no difficulty in concluding that orders relating to the property of children should fall outside our scheme. As a corollary of this, various orders relating to wardship and guardianship or in Scotland to the tutory or curatory of a child (all of which can have property implications) are excluded from the joint scheme, although some improvements are recommended in the internal Scots law on jurisdiction to make these orders. Broadly speaking, therefore, the custody orders to which our proposed uniform scheme relates are those which affect the person but not the property of a child.

(6) *Custody orders and the wardship jurisdiction*

1.24 We have not found it easy to fit the wardship jurisdiction of the High Court in England and Wales and Northern Ireland into our scheme. There is no such jurisdiction in Scotland. In addition to the problems (discussed in paragraph 1.22 above) arising from the fact that there is no uniform age limit throughout the United Kingdom at which the courts cease to exercise control over children, two features of wardship have caused us particular difficulty—

(1) the nature of the existing jurisdictional rules, and

(2) the rule that an application to make a child a ward of court results automatically in a prohibition on removal of the child from the jurisdiction.

These two features are inter-related but it will be convenient to consider them in order.

1.25 The first feature of the wardship jurisdiction which caused us difficulty is that the court has jurisdiction in relation to a child who is a British subject or who is present in England and Wales or Northern Ireland,[40] as the case may be, even if the child is domiciled and habitually resident in Scotland. The rule that English and Northern Ireland courts have jurisdiction, on the basis of nationality or mere presence (even where there is no emergency), over "Scottish" children has long been considered unacceptable in Scotland. Our scheme deals with this problem[41] in relation to custody orders, as defined, in a way which is regarded as acceptable and satisfactory by both Commissions and by those whom we consulted on it. The jurisdiction of the courts in all three parts of the United Kingdom would be limited to the common grounds; and the scheme is thus based upon the principle of reciprocity—that the courts of each

[40]See paras. 2.9 and 2.92 below.
[41]See paras. 4.41–4.47 below.

United Kingdom country should enforce those orders of the other countries' courts which they themselves would have power to make. We regard this as a significant advance. Our scheme of jurisdiction does not, however, deal with the problem of wardship jurisdiction in relation to the residual category of orders which, although they may relate to the person of the child, fall outside our mutually agreed definition of "custody order". The Scottish Law Commission regards this as unsatisfactory, particularly because orders restricting the removal of wards from England and Wales, or Northern Ireland, would continue to be capable of being made on the basis of the unchanged grounds of jurisdiction even if the child concerned were habitually resident in Scotland[42] and there were no emergency.[43] The Law Commission is of the opinion that a review of the wardship jurisdiction beyond the core areas of care and control, access and education would require further consultation and could not now be undertaken in this exercise without causing unacceptable delay, and the Scottish Law Commission regretfully acknowledges this. The Law Commission has, however, now embarked upon a review of the private law relating to the upbringing of children,[44] including the law on wardship, and in doing so will consider ways of reducing still further the potential for difficulties within the United Kingdom. In this review it will, in accordance with its usual practice, act in consultation with the Scottish Law Commission on wardship and other matters which affect Scottish as well as English interests.

1.26 The second feature of the wardship jurisdiction which has caused us difficulty is the rule that an application to make a child a ward of court has the automatic effect of prohibiting his removal from the jurisdiction of the court for a limited period unless leave of the court for the removal is obtained. Thus the mere making of a wardship application in England operates, without any court order, temporarily to prohibit the removal of a child from England and Wales, even if the child is habitually resident in Scotland or Northern Ireland, even if he is the subject of a custody dispute being dealt with in divorce proceedings in Scotland or Northern Ireland and even if a Scottish or Northern Ireland court has already made a custody order relating to him.[45] The operation of this rule could be particularly at odds with the objectives of our proposed uniform scheme and we therefore recommend later that it should be modified in relation to the movement of children within the United Kingdom.[46] The Scottish Law Commission does not think the proposed modification goes far enough, and regards it as an interim measure.[47] The rule will be subject to further consideration in the Law Commission's review mentioned above.

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[42]This gave rise to considerable resentment for example in the case of *Babington* v. *Babington* 1955 S.C. 115. Although in more recent reported cases the High Court took a different line (cf. *In re G. (J.D.M.)* [1969] 1 W.L.R. 1001; *In re S.(M.)* [1971] Ch. 621), the continued existence of potential conflict in this area seems undesirable.

[43]The Scottish Law Commission would see no objection to such orders being made on the basis of the child's presence in any case where the court considered that for the protection of the child it was necessary to make an order immediately. This would correspond to the emergency jurisdiction forming part of the agreed scheme in relation to custody orders.

[44]See para. 2.52 below.

[45]Similarly, *mutatis mutandis*, where the application is made in Northern Ireland.

[46]See para. 6.28 below.

[47]See paras. 6.24–6.30 below.

1.27 To sum up, in so far as orders made under the wardship jurisdiction fall within the definition of custody orders they have been brought under our general scheme of uniform rules of jurisdiction and mutual recognition and enforcement of orders, and we consider that they have been dealt with in a satisfactory manner. So far as restrictions on the removal of a child are concerned, we recommend a modification of the rule that an application to make a child a ward of court operates as an automatic temporary prohibition on the removal of the child from the jurisdiction. The modification is designed to avoid the more obvious conflicts between the automatic prohibition and the objectives of our uniform scheme for the allocation of custody jurisdiction. We recognise that some orders, other than "custody orders", which affect the person of a child are still governed by the common law rules of jurisdiction which, as regards their implications for Scottish children, the Scottish Law Commission considers unsatisfactory. These issues require further consideration and consultation, which will be undertaken in the Law Commission's current review of the private law relating to the upbringing of children.

(7) *Other matters*

(a) Public law excluded

1.28 In formulating our proposals we have considered whether orders committing the care of a child to a local authority ("care orders") or authorising the child's detention in a place of safety ("place of safety orders") should be included within our scheme.[48] For the reasons we give later in this report,[49] we have decided not to include such orders within our proposals, which are intended to apply only in the context of custody disputes arising between individuals and governed by private law.

(b) Criminal law excluded

1.29 The criminal law relating to the abduction of children is outside our terms of reference. However, any criminal offence involving the abduction of a child has some bearing on our new proposals because it can operate as a deterrent against the removal of the child out of the jurisdiction of the court and because when it is committed powers of arrest become exercisable. We discuss the effect of these offences on our proposals at paragraphs 6.31 and 6.34 below.

F Structure of the report

1.30 The structure of this report is as follows. In Part II we outline the present law relating first to the bases of jurisdiction of the courts in each part of the United Kingdom to make custody orders and, secondly, to the recognition and enforcement of such orders in other parts of the United Kingdom. In Part III we indicate the general nature and scope of our recommendations, which are set out and explained in Part IV and Part V in relation respectively to the jurisdiction of courts in the United Kingdom to make custody orders, and to the reciprocal recognition and enforcement of these orders throughout the United Kingdom. In Part VI we consider administrative and procedural problems concerning the enforcement in each jurisdiction of an order made in

[48]The Joint Working Party did not consider this matter.

[49]See paras. 3.4–3.6 below.

another part of the United Kingdom. Part VII concerns transitional provisions. Our recommendations are summarised in Part VIII, and Appendix A contains a draft Bill to give effect to them, together with explanatory notes on clauses.

PART II

THE PRESENT LAW IN OUTLINE

2.1 In this Part of the report we indicate, for each part of the United Kingdom separately, the nature of what may broadly be termed "custody orders", and we summarise the present law relating to the bases of jurisdiction to make such orders and to their enforcement.

A England and Wales

(1) *Introduction: the nature of custody orders*

2.2 The precise scope and nature of parental rights and duties under English law have never been defined.[50] Nor does the law provide precise guidance as to the orders which the courts may make with regard to those rights and duties. Although an attempt has been made in the Children Act 1975 to standardise terminology,[51] there exists no comprehensive legal definition of the term "custody". Moreover the conceptual framework contained in the 1975 Act does not extend to cover cases where a child is made a ward of court or where the divorce court makes an order for the custody and education of a child. Indeed, it is not very clear what rights are conferred by a divorce court order for custody.[52] For these reasons, it is impossible to classify custody orders with complete accuracy. However, the concepts of custody have certain characteristics which are material to a proper understanding of a prime topic of this report, namely the rules by which jurisdiction in custody matters is determined. We examine these concepts below.

2.3 In the legal parlance of the common law, the term "custody" is used in at least two senses. In one sense, it has been held to mean the "bundle of powers" exercisable by parents over their children, including not merely physical control but also such matters as the control of education and of the choice of religion, the power to withhold consent to marriage, and the power to administer the child's property. In another, and narrower sense, "custody" means the power of physical control over a child.[53]

2.4 Under statute, a somewhat similar distinction is made between "legal custody" and "actual custody". Section 86 of the Children Act 1975 defines

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[50]For a general discussion of the concept of parental rights and duties see P. M. Bromley, *Family Law*, 6th ed. (1981), pp.282–290; S.M. Cretney, *Principles of Family Law*, 4th ed. (1984), pp.293–322; and see also J. C. Hall [1972] C. L. J. 248; J. M. Eekelaar, (1973) 89 L.Q.R. 210; S. Maidment, [1981] C. L. J. 135.

[51]See para. 2.4 below.

[52]See S. M. Cretney, *Principles of Family Law*, 4th ed. (1984), pp.313–315; *Dipper* v. *Dipper* [1981] Fam. 31, 45; S. Maidment, [1981] C.L.J. 135 and (1981) 44 M.L.R. 341; and Mrs. Justice Booth, [1982] Stat. L.R. 71.

[53]*Hewer* v. *Bryant* [1970] 1 Q.B. 357, 372.

legal custody in terms of the parental rights and duties[54] which relate to the person of the child (including the place and manner in which his time is spent); and section 87(1) provides that a person has *actual custody* of a child if he has actual possession of his person whether or not that possession is shared with one or more other persons. This definition of legal custody is particularly important, because since the passage of the 1975 Act legal custody has become an accepted concept in new legislation and the definition is now embodied in the Interpretation Act 1978[55] for use in future legislation.

(2) *The basis of jurisdiction to make custody orders*

2.5 In England and Wales, the court has jurisdiction to make orders relating to the custody of children in the following proceedings:

(*a*) wardship;[56]
(*b*) guardianship;[57]
(*c*) custodianship;[58]
(*d*) divorce, nullity of marriage and judicial separation;[59]
(*e*) financial provision under section 27 of the Matrimonial Causes Act 1973;[60]
(*f*) financial provision under the Domestic Proceedings and Magistrates' Courts Act 1978;[61] and
(*g*) adoption.[62]

2.6 The basis of jurisdiction to make a custody order differs according to the type of proceedings in which the custody of a child is in issue. In certain cases the jurisdiction of the court to make such an order depends on the ability of one or other of the parties to the proceedings to satisfy criteria specified in rules governing the internal allocation of jurisdiction between different courts

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[54]"The parental rights and duties" are defined in s.85 in general terms as the rights and duties which the mother and father have in relation to the child and his property, including the right of access. It is to be noted that the definition includes rights and duties in relation to the child's *property*, which are not included in the definition of "legal custody" in s.86.

[55]Sect. 5 and Sched. 1, replacing Interpretation Act 1889, s.19A (inserted by Children Act 1975, s.89).

[56]Paras. 2.7–2.9 below. In 1983 2,140 wardship summonses were issued in the High Court: Judicial Statistics Annual Report 1983 (1984) Cmnd. 9370, Table 4.2.

[57]I.e. Proceedings under the Guardianship of Minors Acts 1971–1973: see paras. 2.10–2.17 below. In 1983 39 applications under the Acts were issued in the High Court and 1,735 in county courts: Cmnd. 9370, Table 4.4.. In 1983 about 12,000 such applications were heard in the magistrates' courts: Home Office Statistical Bulletin (Issue L14/84), para. 3.

[58]Paras. 2.18–2.22 below. The provisions of Part II of the Children Act 1975, which enable the court to vest the legal custody of a child in a custodian, have not yet been brought into force. It is planned to bring them into force in the Spring of 1985.

[59]Paras. 2.23–2.25 below. In 1982 in divorce proceedings there were 1,620 applications relating to the custody of children in the Principal Registry of the Family Division, and 51,086 applications in county courts and district registries: Cmnd. 9065, Table 4.14. (The 1983 statistics do not contain separate figures for custody applications.)

[60]Paras. 2.26–2.27 below. In 1983 there were 21 applications under section 27 in the Principal Registry and 281 in county courts: Cmnd. 9370, Table 4.8.

[61]Paras. 2.28–2.31 below. In 1983 about 10,300 applications were heard for custody or access under the 1978 Act: Home Office Statistical Bulletin (Issue L14/84), para. 3.

[62]See para. 2.32 below. For the reasons given in para. 3.7 below, we have not included within the scope of this report custody orders (other than custodianship orders) made in the course of adoption proceedings.

of the same standing. We now examine the nature and jurisdictional bases of the proceedings referred to above.

(a) Wardship

2.7 The inherent jurisdiction of the court to make a child a ward of court derives from the prerogative power of the Crown acting in its capacity as *parens patriae*: "It is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriae,* is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects."[63] The duty of the Crown to protect those of its subjects who, on account of their tender years, are incapable of looking after their own interest was delegated to the Lord Chancellor, from whom it passed to the Court of Wards and Liveries, thence to the Court of Chancery and thence, in 1875 to the Chancery Division of the High Court, whence it was transferred, in 1971, to the Family Division.[64]

2.8 Where an application is made to the High Court to make a child a ward of court, the child becomes a ward on the making of such an application, but ceases to be a ward after the period prescribed by rules of court has expired unless within that period a wardship order is made.[65] The effect of wardship is that custody (in the wider common law sense[66]) is vested in the court itself. From the moment of the application the High Court has the widest possible powers to make custody orders by which the exercise of parental rights and duties is, as it were, delegated by the court to an individual.[67]

2.9 The primary object of the wardship jurisdiction is to protect those who owe allegiance to the Crown. Hence, historically, jurisdiction to entertain wardship applications has been based on the "allegiance" of the child.[68] On this basis, wardship jurisdiction has been held to be exercisable where the child is a British subject,[69] and (even though he is not a British subject) where he is resident in England and Wales, or physically present within England and Wales.[70] It should be noted, however, that there appears to be no reported

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[63]*Hope* v. *Hope* (1854) 4 De G.M. & G. 328, 345, *per* Lord Cranworth L. C.

[64]See now Supreme Court Act 1981, Sched. 1, para. 3. For an account of the origins of the wardship jurisdiction see Lowe and White, *Wards of Court* (1979), pp.1–6. Section 38 of the Matrimonial and Family Proceedings Act 1984 contains provisions under which wardship proceedings (except applications that a minor be made or cease to be a ward of court) are transferable to a county court.

[65]Supreme Court Act 1981, s.41(2). The prescribed period is 21 days unless further steps are taken in the proceedings: see R.S.C., O.90, r.4.

[66]See para. 2.3 above.

[67]*Re W.* [1964] Ch. 202, 210, 216.

[68]See *Re P (G.E.)* [1965] Ch. 568, 587.

[69]*Hope* v. *Hope* (1854) 4 De G.M. & G. 328; *Re Willoughby* (1885) 30 Ch. D. 324; *Harben* v. *Harben* [1957] 1 W.L.R. 261; *Re P. (G.E.)* [1965] Ch. 568, 582, 587, 592.

[70]*Johnston* v. *Beattie* (1843) 10 Cl. & Fin. 42, 120, 145; *Stuart* v. *Bute* (1861) 9 H.L.C. 440, 464–465; *Nugent* v. *Vetzera* (1866) L.R. 2 Eq. 704, 714; *Brown* v. *Collins* (1883) 25 Ch. D. 56; *Re B.'s Settlement* [1940] Ch. 54; *Re D.* [1943] Ch. 305; *McKee* v. *McKee* [1951] A.C. 352; *Re C., The Times,* 14 December 1956; *Re P. (G.E.)* [1965] Ch. 568, 582, 588, 592; and *J.* v. *C.* [1970] A.C. 668, 700–701 and 720. See also *Re A.* [1970] Ch. 665. The English domicile of the child will not by itself be sufficient to enable the court to assume jurisdiction: *Re P. (G.E.)* [1965] Ch. 568, 583–584, 589–590, 592–593; cf. *Hoy* v. *Hoy* 1968 S.L.T. 413.

decision in which jurisdiction to make a wardship order has been based on the allegiance of a child who was neither resident nor present in England and Wales.

(b) Guardianship legislation

2.10 Under the Guardianship of Minors Acts 1971 to 1973, the courts (i.e. the High Court, county courts and magistrates' courts) have various powers to make orders regarding the legal custody of children and rights of access to them by parents. The court may make such orders on the application of a parent,[71] or where it has ordered that a testamentary guardian is to be sole guardian, [72] or where joint guardians are in dispute and one of them is a parent.[73] In addition, the court may make orders for access by a grandparent on application, either in association with a custody order made on the application of a parent[74] or where one or both parents are dead.[75]

2.11 The bases of jurisdiction to make custody orders in guardianship proceedings differ according to whether the proceedings are brought in the High Court, county courts or magistrates' courts.

(i) High Court

2.12 Although there is no direct authority on the point, it has always been assumed that the bases upon which the High Court exercises jurisdiction under the guardianship legislation[76] are the same as for wardship proceedings.[77] Thus, the High Court has jurisdiction where the child is a British subject[78] or is resident or physically present[79] in England and Wales.

(ii) County courts

2.13 Section 15 of the Guardianship of Minors Act 1971 makes provision as to the jurisdiction of county courts under the Act both in terms of the internal allocation of jurisdiction in England and Wales (i.e., which county court is competent) and as between different parts of the United Kingdom. In relation to the former, the county court has jurisdiction if the application is made in the court of the district in which the respondent or the applicant or the minor resides.[80] In relation to the latter, the county court has no jurisdiction in any case where the respondent resides in Scotland or Northern Ireland unless a summons or other originating process can be served and is served on the respondent in England or Wales.[81]

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[71]Guardianship of Minors Act 1971, s.9(1); Guardianship Act 1973, ss.2(4)(b) and 2(5) (interim orders).

[72]Guardianship of Minors Act 1971, s.10(1)(a).

[73]*Ibid.*, s.11(a).

[74]*Ibid.*, s.14A(1).

[75]*ibid.*, s.14A(2).

[76]Guardianship of Minors Act 1971, s.15(1)(a). The High Court jurisdiction is now vested in the Family Division: Supreme Court Act 1981, Sched. 1, para. 3.

[77]See Dicey & Morris, *The Conflict of Laws*, 10th ed. (1980), pp.424–425, 432.

[78]See n.20 above.

[79]See n.21 above.

[80]Guardianship of Minors Act 1971, s.15(1)(b).

[81]*Ibid.*, s.15(3)(b).

2.14 However, the Act does not give any indication of the circumstances in which a county court may assume jurisdiction in a broader international context. Section 15 deals essentially only with conflicts of jurisdiction within the United Kingdom. In the broader context it would seem that the court is not entitled to assume jurisdiction unless the respondent is present (or, possibly, resident) within the jurisdiction, in view of the general common law principle, enunciated by Lord Selborne L.C. in *Berkley* v. *Thompson*,[82] that ". . . there must be a defendant subject to the jurisdiction of [the court]; and a person resident abroad . . . and not brought by any special statute or legislation within the jurisdiction, is prima facie not subject to the process of a foreign Court—he must be found within the jurisdiction to be bound by it."[83] It is not clear whether the presence of the respondent within the jurisdiction is to be determined at the time when the summons is issued or when it is served upon him or even whether jurisdiction does not, in truth, depend on service on the respondent in England and Wales.[84]

(iii) Magistrates' courts

2.15 Section 15 of the Guardianship of Minors Act 1971 (as amended) also provides jurisdictional rules for magistrates' courts. Like those which apply in relation to county courts, these rules determine the internal allocation of jurisdiction in England and Wales and provide jurisdictional criteria in certain other cases.

2.16 The internal allocation rule gives jurisdiction under the Act to magistrates appointed for the commission area in which either the respondent or the applicant or the minor to whom the application relates is resident.[85]

2.17 The remaining rules of jurisdiction for magistrates' courts are complex. Like those which apply in the county court they are incomplete in that they are designed to deal only with conflicts of jurisdiction between United Kingdom countries. It is provided that a magistrates' court shall not have jurisdiction under the Guardianship of Minors Act 1971 in any case where the respondent resides in Scotland or Northern Ireland unless (a) the applicant *and* the minor reside in England or Wales, or (b) a summons can be and is served on the respondent in England or Wales, or (c) the proceedings are for the revocation, revival or variation of an existing order.[86] No provision is made in the guardianship legislation for the assumption of jurisdiction by magistrates when the respondent is resident abroad. Applying the principle stated in *Berkley* v. *Thompson*,[87] it would seem that the court could only assume jurisdiction in these circumstances if a summons was served on the respondent in England or Wales. However, a respondent in Scotland or Northern Ireland

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[82](1884) 10 App. Cas.45.

[83]*Ibid.*, at p.49.

[84]See *Forsyth* v. *Forsyth* [1948] P.125, 136; *Macrae* v *Macrae* [1949] P.397, 404; *Collister* v. *Collister* [1972] 1 W.L.R. 54, 59. For a general discussion of this issue (albeit in a different context) see P. M. North, *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977), pp.49–51.

[85]Sect. 15(1)(c), as amended by the Domestic Proceedings and Magistrates' Courts Act 1978, s.47(1).

[86]Guardianship of Minors Act 1971, s.15(3)–(5), as amended.

[87](1884) 10 App. Cas. 45; see para. 2.14 above.

may be served under a special procedure prescribed by section 15 of the Maintenance Orders Act 1950, whether or not there is an application for maintenance in addition to custody.

(c) Custodianship

2.18 The recommendation of the Departmental Committee on the Adoption of Children[88] that relatives (particularly step-parents) and foster parents who are caring for a child on a long-term basis should be entitled to apply to the court for "guardianship" of the child under the Guardianship of Minors Act 1971 was met in Part II of the Children Act 1975 by provisions (which it is planned to bring into force in the spring of 1985[89]) for the making of a "custodianship order". Such an order may vest the legal custody[90] in certain relatives (other than parents), step-parents or others.[91] A custodianship order may be made by the High Court, county courts, and magistrates' courts.[92] These courts are also empowered in custodianship proceedings to make ancillary orders including access by the child's mother or father or grandparent.[93]

2.19 The jurisdictional basis of the court to make a custodianship order is the physical presence of the child.[94] The High Court has jurisdiction to make such an order if the child is in England and Wales at the time the application is made.[95] The county court has jurisdiction if the child is within the district of the court or the court is designated by rules of court.[96] The magistrates' court has jurisdiction if the child is within the commission area of the court.[97]

2.20 Where the child is already subject to a custodianship order, whether or not he is present in England and Wales, and an application is made either under section 34 of the 1975 Act for an order for access to or maintenance of the child, or under section 35 to revoke a custodianship order or to vary or revoke an order made under section 34, jurisdiction may be assumed on various bases other than the physical presence of the child. Thus, the court has jurisdiction if it was the court which made the custodianship order or if it is a magistrates' court for the same petty sessions area as the court which made the order;[98] if the applicant is physically present in the district or commission area of the court;[99] or if, on an application under section 35, it is the court where proceedings for divorce, nullity of marriage or judicial separation, in which the child's mother or father or custodian is the petitioner or respondent, are pending.[100]

2.21 The jurisdictional rules contained in sections 33 and 100 do not expressly indicate whether a court could assume jurisdiction if the respondent

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[88](1972) Cmnd. 5107, paras. 120–122.
[89]See n.9 above.
[90]As defined in the Children Act 1975, s.86. See para. 2.4 above.
[91]Children Act 1975, s.33(1).
[92]*Ibid.*, s.100(2).
[93]*Ibid.*, s.34(1).
[94]*Ibid.*, s.33(1).
[95]*Ibid.*, ss.33(1) and 100(1), (2)(a).
[96]*Ibid.*, ss.33(1) and 100(1), (2)(b) and (c).
[97]*Ibid.*, ss.33(1) and 100(1), (2)(d).
[98]*Ibid.*, s.100(7)(a).
[99]*Ibid.*, s.100(7)(b), (c).
[100]*Ibid.*, s.100(7)(d).

is resident abroad. However, given that the basis of the jurisdiction is the presence of the child in England and Wales, it seems that the residence of the parties would not affect the jurisdiction of the High Court and the county courts, provided that appropriate provision is made by rules of court for service abroad.[101] So far as magistrates' courts are concerned, section 46(1) expressly declares that they have jurisdiction under Part II of the 1975 Act notwithstanding that the proceedings are brought by or against a person residing outside England and Wales.[102]

2.22 Where the court's jurisdiction to make a custodianship order arises on an application for an adoption order[103] or on an application for legal custody under section 9 of the Guardianship of Minors Act 1971,[104] the basis of the jurisdiction to make a custodianship order is the same as the basis of the jurisdiction to hear these applications.[105]

(d) Divorce, nullity of marriage and judicial separation

2.23 In any proceedings for divorce, nullity or judicial separation, the High Court and divorce county courts[106] have jurisdiction to make an order for the custody (including access) and education[107] of any child of the family.[108] The meaning of "custody" in this context is not entirely clear.[109] It appears to include something more than the power of physical control.[110] In these proceedings the court has jurisdiction to make a custody order before or on granting a decree or at any time thereafter,[111] and, in cases where the proceedings are dismissed after the beginning of the trial, within a reasonable period after the dismissal.[112] The court may exercise its powers to make a custody order even though the child in question is abroad,[113] in accordance with the general principle in matrimonial proceedings that the court has jurisdiction to make ancillary orders whenever it has jurisdiction in the main suit.

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[101]Presumably by amendment to R.S.C., O. 11, and C.C.R., O. 8: see paras. 4.58–4.61 below, where the question of service is discussed.

[102]A respondent resident in Scotland or Northern Ireland may be served under the special procedure prescribed in s.15 of the Maintenance Orders Act 1950: see para. 2.17 above.

[103]Children Act 1975, s.37(1), (2) as amended by the Health and Social Services and Social Security Adjudications Act 1983, Sched. 2, para. 23.

[104]Children Act 1975, s.37(3).

[105]For adoption, see para. 2.32 below. For an application under the guardianship legislation, see paras. 2.10–2.17 above.

[106]Matrimonial Causes Act 1967, s.2(1), as amended by the Matrimonial Causes Act 1973, s.54 and Sched. 2, para. 6(1)(a).

[107]Matrimonial Causes Act 1973, ss.42(1) and 52(1).

[108]*Ibid.*, s.52(1). "Child of the family", in relation to the parties to a marriage, means a child of both those parties and any other child (unless boarded out with a local authority or voluntary organisation) who has been treated by both of those parties as a child of their family.

[109]See n.3 above.

[110]This seems to follow from the ability of the court to make "split orders", i.e. orders whereby custody is given to one parent and care and control to the other (see, e.g., *Wakeham* v. *Wakeham* [1954] 1 W.L.R. 366). On the other hand the fact that education is specifically referred to in s. 42(1) may mean that "custody" in this context does not have the wider common law meaning (see para. 2.3 above).

[111]Matrimonial Causes Act 1973, s.42(1)(a).

[112]*Ibid.*, s.42(1)(b).

[113]*Philips* v. *Philips* (1944) 60 T.L.R. 395; *Harben* v *Harben* [1957] 1 W.L.R. 261; *Re P. (G.E.)* [1965] Ch. 568, 581–582.

2.24 The only bases of jurisdiction in proceedings for divorce, nullity or judicial separation, including ancillary proceedings relating to custody under the Matrimonial Causes Act 1973, are the domicile or habitual residence of the husband or wife. Under section 5 of the Domicile and Matrimonial Proceedings Act 1973, the High Court and divorce county courts have jurisdiction to entertain these proceedings if either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun or was habitually resident in England and Wales throughout the period of one year ending with that date.[114]

2.25 Where proceedings for divorce, nullity or judicial separation are continuing and there are concurrent proceedings in another jurisdiction, it may be appropriate that one set of proceedings should defer to the other. To this end the Domicile and Matrimonial Proceedings Act 1973 contains detailed provisions whereby the English court is required or enabled to stay proceedings in certain circumstances.[115] A stay in these circumstances may affect custody orders made in the proceedings. For example, where there are concurrent proceedings elsewhere in the British Isles, an existing custody order made in connection with the stayed proceedings ceases to have effect three months after the stay was imposed,[116] unless, in cases of urgency, the court considers it necessary to make an order in connection with the stayed proceedings or to extend an existing order made in connection with those proceedings;[117] and where the court imposes a stay it has no power to make custody or other ancillary orders, except in urgent circumstances.[118] If, when a stay has been imposed, the court in another jurisdiction in the British Isles has made or makes an order for the custody or education of the child, any similar order of an English court ceases to have effect.[119] However, the making of a custody order by another court in the British Isles has no effect on a previous order of an English court restraining a person from removing a child out of the jurisdiction or out of the custody, care or control of another person.[120]

(e) Financial provision under section 27 of the Matrimonial Causes Act 1973

2.26 The High Court and divorce county courts also have power under the Matrimonial Causes Act 1973 to make orders for custody where an order for financial provision on the ground of failure to provide reasonable maintenance has been made in proceedings brought under section 27 of that Act.[121]

2.27 The bases of jurisdiction of the High Court and divorce county courts to make a custody order in such proceedings are the domicile or habitual

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[114]Sect. 5(2). "Habitual residence" is distinguishable from mere residence: "habitual" indicates the quality of residence rather than its duration: *Cruse* v. *Chittum* [1974] 2 All E.R. 940. There are special provisions for nullity proceedings where either party has died (see s.5(3)(c)) and for cases where other matrimonial proceedings in respect of the same marriage are pending (see s.5(5)).

[115]Sect. 5(6) and Sched. 1.

[116]Sched. 1, para. 11(2)(b).

[117]Sched. 1, para. 11(2)(c).

[118]Sched. 1, para. 11(2)(a) and (c).

[119]Sched. 1, para. 11(3)(a).

[120]Sched. 1, para. 11(1) and (3).

[121]Matrimonial Causes Act 1973, s.42(2). In this context there is no reference to "education". Cf. s. 42(1); see para. 2.23 above.

residence of either party to the marriage or the residence of the respondent. Section 27(2)[122] provides that the court shall not entertain an application under the section unless:

(i) the applicant or the respondent is domiciled in England and Wales at the date of the application; or

(ii) the applicant has been habitually resident there throughout the period of one year ending with that date; or

(iii) the respondent is resident there on that date.

(f) Financial provision under the Domestic Proceedings and Magistrates' Courts Act 1978

2.28 Where an application is made by a party to a marriage under the Domestic Proceedings and Magistrates' Courts Act 1978 for an order for financial provision,[123] a magistrates' court has power[124] to make an order (including an interim order)[125] in favour of either party or a parent regarding the legal custody[126] of any child of the family[127] under the age of 18 and access to any such child. When such an order for legal custody is made or is in force, the court may on the application of a grandparent make an order for access in the grandparent's favour.[128] Although the primary purpose of these domestic proceedings is to obtain maintenance for the applicant or a child of the family, the court has power to make a custody order whether or not it makes a financial provision order.[129]

2.29 Jurisdiction to hear an application for an order in domestic proceedings under the 1978 Act, including an order regarding the custody of a child, is governed by the provisions contained in section 30 of that Act. This section, on the basis of recommendations made by the Law Commission,[130] made certain alterations to the rules governing jurisdiction and procedure contained in the Matrimonial Proceedings (Magistrates' Courts) Act 1960, but it retains the basis of jurisdiction founded on the "ordinary residence" of the applicant or the respondent. Section 30(1) of the 1978 Act provides that a magistrates' court has jurisdiction to hear an application for an order under Part I of the Act if at the date of the application either the applicant or the respondent ordinarily resides within the commission area for which the court is appointed. Whether a person is "ordinarily resident" is a matter of fact and degree in every case. The words connote residence in a place with some degree of continuity (apart from accidental or temporary absences).[131]

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[122]As amended by the Domicile and Matrimonial Proceedings Act 1973, s.6(1).

[123]Under s.2, 6 or 7 of that Act.

[124]Sect. 8(2).

[125]Sect. 19(1)(a).

[126]As defined in the Children Act 1975, s.86. See para. 2.4 above.

[127]Defined in s.88. The definition is virtually the same as that contained in the Matrimonial Causes Act 1973, s.52(1): see n.108 above.

[128]Domestic Proceedings and Magistrates' Courts Act 1978, s.14(1).

[129]Sect. 8(2).

[130]Report on Matrimonial Proceedings in Magistrates' Courts, (1976) Law Com. No. 77, para. 4.90.

[131]*Levene* v. *I.R.C.* [1928] A.C. 217, 225. See also *I.R.C.* v. *Lysaght* [1928] A.C. 234; *R.* v. *Barnet L.B.C. Ex parte Shah* [1983] 2 A.C. 309, 340–349, *per* Lord Scarman.

2.30 Where the respondent is resident in Scotland or Northern Ireland the jurisdiction of the English court is exercisable if (in addition to the applicant's residence in England and Wales) the parties last ordinarily resided together as husband and wife in England and Wales.[132]

2.31 Apart from the provision that the jurisdiction of a magistrates' court is exercisable notwithstanding that any party to the proceedings is not domiciled in England,[133] section 30 does not provide an exhaustive statement of the circumstances in which magistrates may assume jurisdiction in domestic proceedings.[134] The Act makes no provision for jurisdiction where the respondent is resident outside the United Kingdom. It would seem that in such a case the magistrates have no jurisdiction to make a custody order, unless the respondent is served within England and Wales even if he or she submits to the jurisdiction of the court.[135]

(g) Adoption

2.32 The law relating to the adoption of children, as originally embodied in the Adoption Act 1958 and since amended by the Children Act 1975[136] and prospectively consolidated in the Adoption Act 1976, contains provisions under which the court may make orders disposing of or affecting the custody of a child. These are as follows:

(*a*) the court may, on an application for an adoption order, make an interim order vesting the custody of the child in the applicants for adoption for a period not exceeding two years;[137]

(*b*) the court may make a provisional order vesting in the applicants parental rights and duties relating to the child pending his adoption abroad;[138]

(*c*) where, following an application by an adoption agency,[139] the court makes an order declaring a child to be free for adoption, the parental rights and duties relating to the child vest in the adoption agency.[140]

Jurisdiction to make an adoption order is defined in some detail. The applicant, or one of the applicants if the application is by a married couple, must be domiciled in a part of the United Kingdom, or in the Channel Islands or the Isle

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[132]Sect. 30(3)(a). A respondent resident in Scotland or Northern Ireland may be served under the procedure prescribed by s. 15 of the Maintenance Orders Act 1950: see para. 2.17 above.

[133]Sect. 30(5). Although not specifically referred to in this subsection, Wales is presumably included for this purpose.

[134]See s.30(4).

[135]*Forsyth* v. *Forsyth* [1948] P. 125, following *Berkley* v. *Thompson* (1884) 10 App. Cas. 45. See also *Macrae* v. *Macrae* [1949] P. 397 and *Collister* v. *Collister* [1972] 1 W.L.R. 54, and paras. 2.14 and 2.17 above.

[136]The great majority of the amending provisions came into force on 27 May 1984. For the commencement provisions, see S.I. 1983/1946.

[137]Children Act 1975, s.19, which is prospectively consolidated in the Adoption Act 1976, s.25.

[138]Children Act 1975, s.25, which is prospectively consolidated in the Adoption Act 1976, s.55.

[139]I.e a local authority or approved adoption society: S.I. 1981/1792, Art.3, Sched. 2, para. 2, and the Children Act 1975, s.1(4) when in force.

[140]Children Act 1975, s.14(6). Under s.23 the parental rights and duties so vested may be transferred to another adoption agency. These provisions are prospectively consolidated in the Adoption Act 1976, ss.18(5) and 21.

of Man, or, if the application is for a "Convention adoption order", must have the specified connections of nationality or habitual residence with the United Kingdom or a Convention country.[141] In addition, if the application is for a Convention adoption order the child must be a national of the United Kingdom or a Convention country and habitually reside in British territory or a Convention country.[142] The child must have had his home with the prospective adopters for a specified period.[143] Internally, within England and Wales, jurisdiction normally rests with the county court or magistrates' court within whose district or commission area the child is, but the jurisdiction of the High Court is not so limited.[144]

(3) *The bases of jurisdiction to vary custody orders*

2.33 It is clear that the courts have power to vary[145] custody orders made in the above proceedings. It is not, however, entirely clear whether and upon what grounds a court is entitled to assume jurisdiction to vary an order if the applicant is no longer able to satisfy the jurisdictional requirements on the basis of which the original order was made and no other basis of jurisdiction is appropriate, for example because the applicant or the respondent is abroad. It would seem likely that a court is able to exercise jurisdiction to vary its own order in these circumstances, but there appears to be no specific provision to this effect in relation to orders made in the course of the proceedings discussed above, save in the case of certain proceedings in magistrates' courts. There are declaratory provisions in Part II of the Children Act 1975 (custodianship) and in the Domestic Proceedings and Magistrates' Courts Act 1978 to the effect that the jurisdiction to vary orders is exercisable notwithstanding that the variation proceedings have been brought by or against a person residing outside England and Wales.[146]

(4) *The enforcement of custody orders*

(a) Enforcement of custody orders made in England and Wales

2.34 Under English law the making of an order relating to the custody of a child does not of itself entitle the person in whose favour the order has been made to enforce his or her rights by legal process. However, such an order, apart from affecting legal rights, does have certain practical consequences[147] if,

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[141]Children Act 1975, ss.10(2) and 11(2), prospectively consolidated in the Adoption Act 1976, ss.14 and 15. The Convention referred to is the Hague Convention of 15 November 1965 relating to the adoption of children (Cmnd. 2613).

[142]Children Act 1975, s.24, prospectively consolidated in the Adoption Act 1976, s.17.

[143]Children Act 1975, s.9, prospectively consolidated in the Adoption Act 1976, s.13.

[144]Children Act 1975, s.100, prospectively consolidated (in relation to adoption) in the Adoption Act 1976, s.62. The High Court has sole jurisdiction in Convention cases.

[145]See, e.g. Guardianship of Minors Act 1971, ss.9(4) and 10(2) (as amended); Children Act 1975, s.35(3) (custodianship); Matrimonial Causes Act 1973, s.42(7) (divorce, nullity, judicial separation, and financial provision under s.27 of that Act); and Domestic Proceedings and Magistrates' Courts Act 1978, s.21.

[146]Children Act 1975, s.46(1); Domestic Proceedings and Magistrates' Courts Act 1978, s.24.

[147]These relate to (i) passports and (ii) the Home Office "stop list" procedure: see paras. 6.9–6.13 below.

as is usually the case,[148] it directs that the child in question is not to be removed from England and Wales without the leave of the court.

2.35 In order to enforce an English custody order itself, however, it will be necessary to take further proceedings. A person seeking to enforce such an order may apply-

(i) for an injunction or prohibitory order;

(ii) for an order for delivery of the child;

(iii) to have the person in breach of an order committed for contempt of court; or

(iv) in unusual circumstances, for *habeas corpus* or sequestration.

In addition to these methods of enforcement by way of legal process, certain administrative measures, designed to prevent the removal of the child from the jurisdiction of the court or to trace the whereabouts of a child,[149] may be taken in co-operation with the police and Government departments.[150]

(i) Injunctions, etc.

2.36 As we have already noted,[151] the High Court has an inherent power, delegated by the Sovereign, as *parens patriae,* to act for the protection of children. It has been said that wardship is the result of and not the ground for the exercise of this jurisdiction.[152] Thus the court has held, apparently on the same basis, that it has power to grant an injunction for the protection of children where the injunction sought is incidental to prospective divorce proceedings and the case is one of urgency.[153] Apart, however, from the inherent power, the court has certain specific powers to grant injunctions in relation to custody orders. We have already seen that, unless otherwise directed, any order relating to the custody or care and control of a child in divorce, etc. proceedings provides for the child not to be removed out of England and Wales without leave of the court.[154] There are also statutory powers in other proceedings involving the custody of children to make orders prohibiting the child's removal from England and Wales;[155] and it is clear that the High Court has a general power in any case where it has made a custody

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[148]Orders under the Matrimonial Causes Act 1973 relating to custody, or care and control have this effect unless the court otherwise directs: M.C.R. 1977, r.94(2). In the case of wardship it is a contempt of court, which may be punished by imprisonment, to take a child named in the summons out of the jurisdiction without leave of the court, and every originating summons by which an application is made to make the child a ward of court is required to contain an endorsement to that effect: *Practice Direction (Ward: Removal from Jurisdiction)* [1977] 1 W.L.R. 1018.

[149]See *Practice Note (Disclosure of Addresses)* [1973] 1 W.L.R. 60, as amended by *Practice Note (Disclosure of Addresses) (No.2)* [1979] 1 W.L.R. 925.

[150]We examine these administrative measures in detail in Part VI of the report.

[151]Para. 2.7 above.

[152]*Re N.* [1967] Ch. 512, 531.

[153]*L. v. L.* [1969] P.25.

[154]M.C.R. 1977, r.94(2). The court may also make such an order during the course of divorce, etc. proceedings: M.C.R. 1977, r.94(1). See para. 2.34 above.

[155]Guardianship of Minors Act 1971, s.13A(1); Children Act 1975, s.43A(1); Domestic Proceedings and Magistrates' Courts Act 1978, s.34(1).

order to support that order by an injunction where it appears just and convenient to do so[156] and that the county court enjoys the same power.[157]

(ii) Orders for delivery

2.37 On or after the making of a custody order by the High Court or a county court, the court may also order a person to deliver the child to the person to whom it has given custody.[158] The High Court also has power to secure through the Tipstaff the enforcement of any direction relating to a ward of court.[159] The court may, therefore, direct the Tipstaff to take the ward into his custody and deliver him to the person named in the order, and the Tipstaff may also be used to ensure compliance with an order directing a party to return the ward to another jurisdiction.

(iii) Committal for contempt

2.38 A person commits a contempt of court if he obstructs the court in the administration of the affairs of a child over whom it exercises a protective jurisdiction [160] or if he disobeys an order relating to the custody of a child.[161] It is a contempt of court, for example, to disobey a mandatory order requiring the delivery up of a child.[162]

2.39 The remedy of committal for contempt is not available to secure compliance with an order of a magistrates' court, but a person who has been served with a custody order made in a magistrates' court and fails to comply with it may be liable to a financial penalty or imprisonment.[163]

2.40 It has been said that committal orders are remedies of last resort and that in family cases they should be the very last resort.[164] In view of the fact that committal is a "quasi criminal" procedure[165] which may result in the imposition of sanctions of a penal nature, the courts have emphasised that the applicant must strictly establish his right to use the procedure and that the rules which regulate its operation have been strictly complied with.[166] An application for a

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[156]Supreme Court Act 1981, s.37(1).

[157]County Courts Act 1984, s.38. See also *Re W.* [1981] 3 All E.R. 401, 403.

[158]See also the statutory provisions relating to magistrates' courts, no. 163 below.

[159]R.S.C., O. 90, r.3A. The services of the Tipstaff are, perhaps, not available to secure compliance with High Court delivery orders other than in wardship proceedings: see (1976) Working Paper No. 68/Memorandum No. 23, para.6.23. No services for the enforcement of delivery orders in custody cases are available in county courts or magistrates' courts.

[160]*Re B. (J.A.)* [1965] Ch. 1112, 1117. See also *Borrie and Lowe's Law of Contempt,* 2nd ed. (1983), pp. 305–306.

[161]*Re Witten* (1887) 4 T.L.R. 36; *Stark* v. *Stark and Hitchins* [1910] P.190, 192; *B. (B.P.M.)* v. *B. (M.M.)* [1969] P.103, 117–118.

[162]*G.* v. *L.* [1891] 3 Ch. 126, 127.

[163]Magistrates' Courts Act 1980, s.63(3). When the order entitles a person to actual custody and is served on a person who has actual custody, it has the additional effect of an order requiring delivery of the child: Guardianship of Minors Act 1971, s.13(1); Children Act 1975, s.43(1); Domestic Proceedings and Magistrates' Courts Act 1978, s.33.

[164]*Ansah* v. *Ansah* [1977] Fam. 138, 144, *per* Ormrod L. J.

[165]*Comet Products U.K. Ltd.* v. *Hawke Plastics Ltd.* [1971] 2 Q.B. 67, 77.

[166]See, e.g., *Gordon* v. *Gordon* [1946] P.99, 103.

committal order in respect of an alleged contempt must be served personally on the person sought to be committed, unless the court otherwise directs.[167]

2.41 If the court is satisfied beyond reasonable doubt that the contempt has been proved,[168] it may make an order of committal or sequestration.[169] Where the court makes a committal order, the judge will issue a warrant for the arrest of the contemnor and his committal to prison.[170] The order is executed by a court official, who may be assisted by the police. An order of committal is a drastic remedy and is only likely to be used when the contempt is of a serious nature. If the court does make a committal order, it has power to suspend the order.[171] If the court does not make a committal order, it may fine[172] the contemnor or dismiss the application and make the contemnor pay the costs.

(iv) Habeas corpus and sequestration

2.42 In theory a parent or guardian who is entitled to the custody of a child may apply in the Family Division[173] for a writ of *habeas corpus ad subjiciendum* relative to the custody, care or control of the child where the child is detained from him, on the basis that unlawful detention of a child is equivalent to his unlawful imprisonment.[174] However, in practice it is thought that proceedings by way of *habeas corpus* in relation to custody disputes are no longer appropriate.[175]

2.43 It is also possible to deal with the contempt of a custody order of the High Court by means of a writ of sequestration,[176] by which the property of the contemnor is placed in the hands of sequestrators who manage the property and who receive the rents and profits. A writ of sequestration may only be issued with the leave of the court. Although it is thought that this remedy is rarely used nowadays in the family context,[177] it could be useful against a contemnor who is abroad and has left assets in England and Wales.[178]

(b) Treatment in England and Wales of custody orders made elsewhere

2.44 Although several procedures exist for the enforcement of custody orders made by courts in England and Wales, custody orders made in another

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[167]R.S.C., O. 52, rr.3(3), 4(2); C.C.R., O. 29, r.1(4). The court may dispense with personal service if it thinks it just to do so: R.S.C., O. 52, rr. 3(4), 4(3); C.C.R., O. 29, r.1(7). See also *Ansah* v. *Ansah* [1977] Fam. 138.

[168]See, e.g., *Re Bramblevale Ltd.* [1970] Ch. 128, 137.

[169]R.S.C., O. 45, r.5(1). On sequestration, see para. 2.43 below.

[170]The term of the committal is now governed by statute: see Contempt of Courts Act 1981, s.14 (as amended) and County Courts (Penalties for Contempt) Act 1983, s.1.

[171]R.S.C., O. 52, r.7; County Courts Act 1984, s.38.

[172]See Contempt of Court Act 1981, s.14 and County Courts (Penalties for Contempt) Act 1983, s.1.

[173]Supreme Court Act 1981, Sched. 1, para. 3. See R.S.C., O. 54, r.11.

[174]*R.* v. *Clarke* (1857) 7 E. & B. 186, 193.

[175]*Re K.* (1978) 122 S. J. 626. However, see *Re G.* (1982) 4 F.L.R. 538, where *habeas corpus* was used.

[176]The remedy does not appear to be available in the county court, but see Miller, *Contempt of Court* (1976), p.268 for a different view.

[177]*Rayden on Divorce,* 14th ed. (1983), p.1091.

[178]*Re Liddell's Settlement Trusts* [1936] Ch. 365; *Romilly v. Romilly* [1964] P.22; *Charder v. Charder* [1980] C.L.Y. 1837.

part of the United Kingdom or elsewhere are at present neither entitled to recognition by courts in England and Wales nor capable of direct enforcement by those courts. This contrasts with the recognition, throughout the United Kingdom, of a decree of divorce or judicial separation granted under the law of any part of the British Isles,[179] and with the procedure whereby maintenance orders made in one part of the United Kingdom may be registered for the purpose of enforcement in any other part of the United Kingdom.[180] Where the custody of a child is concerned, a court in England might make a contrary order in respect of a child who is already the subject of a custody order made in another jurisdiction (whether elsewhere in the United Kingdom, or other parts of the British Isles, or overseas) if, having regard to the welfare of the child, the court considers it appropriate to do so. [181]

2.45 In deciding whether or not to give effect to the substance of a foreign custody order English courts take account of two main factors. The first is that under English law, as under most other Western European legal systems, an order providing for the custody of a child cannot in its nature be final[182] and is at all times subject to review by the court which made it. The second is that in any proceedings in which the custody or upbringing of a child is in question, the welfare of the child is the first and paramount consideration.[183] As Lord Simonds observed, when delivering the judgment of the Privy Council in *McKee* v. *McKee*:[184]

> "It is the law . . . that the welfare and happiness of the infant is the paramount consideration in questions of custody . . . . To this paramount consideration all others yield. The order of a foreign court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment: comity demands, not its enforcement, but its grave consideration."[185]

The weight or persuasive effect of a foreign custody order depends on the circumstances of the particular case which the court has to decide,[186] subject always to the welfare of the child being treated as paramount.[187] The circumstances of the case may vary greatly. The weight to be attached to a foreign

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[179]Recognition of Divorces and Legal Separations Act 1971, s.1, as amended by the Domicile and Matrimonial Proceedings Act 1973, s.15(2). In the United Kingdom, recognition of decrees of nullity granted elsewhere in the United Kingdom is governed by the common law. However, in a recent report on the Recognition of Foreign Nullity Decrees and Related Matters (1984)], Law Com. No. 137/Scot. Law Com. No. 88, the two Law Commissions have recommended replacement of the common law rules by a statutory regime.

[180]See Part II of the Maintenance Orders Act 1950, as amended.

[181]*Re B.'s Settlement* [1940] Ch. 54, 63–64; *McKee* v. *McKee* [1951] A.C. 352, 364–365; *Re Kernot* [1965] Ch. 217, 224; *Re H.* [1966] 1 W.L.R. 381, 393, 402, 403–404; *Re E. (D.)* [1969] 1 W.L.R. 1608; *Re G. (J.D.M.)* [1969] 1 W.L.R. 1001, 1004; *J.* v. *C.* [1970] A.C. 668, 700–701, 714, 720, 728; *Re L.* [1974] 1 W.L.R. 250, 264; *Re C.* [1978] Fam. 105; *Re R.* (1981) 2 F.L.R. 416, 425. For the different position in Scotland, see paras. 2.75–2.77 below.

[182]*McKee* v. *McKee* [1951] A.C. 352, 365.

[183]Guardianship of Minors Act 1971, s.1 (replacing the original provision in the Guardianship of Infants Act 1925). For the recognition of foreign guardianship orders before 1925, see *Nugent* v. *Vetzera* (1866) L.R. 2 Eq. 704; *Di Savini* v. *Lousada* (1870) 18 W.R. 425.

[184][1951] A.C. 352.

[185]*Ibid.*, at p.365.

[186]*Re B.'s Settlement* [1940] Ch. 54, 64; *McKee* v. *McKee* [1951] A.C. 352, 364.

[187]*Re R.* (1981) 2 F.L.R. 416

order is likely to be less where the order was made many years ago and, since its making, there have been modifications by agreement and the child is reasonably close to attaining his majority.[188]

2.46 The fact that one parent has taken a child from the custody of the other, possibly in defiance of a foreign custody order,[189] is certainly one of the circumstances the court will take into account, but the court will not permit questions of public policy or *forum conveniens*[190] to trespass on the principle that the welfare of the child is the first and paramount consideration.[191] Thus the court may consider that, notwithstanding the conduct of the adult (whom, it has been said, the court is not concerned to penalise[192]), the child should remain in his or her care. Alternatively, it may decide that the child should be returned to the jurisdiction from which he or she has been removed, whether (in a simple case) it deals with the matter summarily or it makes a full investigation of the merits.[193] In either case, the welfare of the child concerned is treated as the first and paramount consideration.[194]

2.47 The absence of any procedure for the enforcement of custody orders throughout the United Kingdom means, for example, that a party who is entitled to the custody of a child by virtue of an order made in his or her favour by a court in Scotland is unable to have that order enforced against another by a court in England if he or she crosses the border with the child while taking a holiday. In order to give effect to such an order in England, it will be necessary to commence fresh proceedings in England, which may be both time-consuming and expensive, and the result of those proceedings will be determined on the basis of an assessment by the English court of what it considers the welfare of the child requires.

(5) *The complexity of the present law*

2.48 It will be apparent from the above account that the present law in England and Wales relating to children is exceedingly complex.[195] The last half century has witnessed the enactment of a large number of statutes concerning the interests of children. These provisions have drastically, but only selectively, reformed the principles of the common law and equity. What has emerged is not a comprehensive code covering the legal position of children but a "cascade of legislation"[196] and decisions of the courts in particular cases. This is as true of private law, governing legal relations between individuals, as it is of public law, dealing with legal relations between individuals and the agencies of the state responsible for safeguarding and promoting the interests of children. The complexity of English law may be explained by the fact that traditionally it has

[188]Cf. *Re T.* [1969] 1 W.L.R. 1608, 1611 with *Re H.* [1966] 1 W.L.R. 381.

[189]See, for example, *McKee* v. *McKee* [1951] A.C. 352; *Re H.* [1966] 1 W.L.R. 381; *Re E. (D.)* [1967] Ch. 761; *Re T.* [1968] Ch. 704; *Re T.A.* (1972) 116 S.J. 78; *Re L.* [1974] 1 W.L.R. 250; *Re C.* [1978] Fam. 105.

[190]See *Re H.* [1966] 1 W.L.R. 381, 393.

[191]*Re R.* (1981) 2 F.L.R. 416, 423–425. See also *Re L.* (1982) 4 F.L.R. 368.

[192]*Re L.* [1974] 1 W.L.R. 250, 265, *per* Buckley, L.J..

[193]See *Re B. and S.*, Court of Appeal (Civil Division) Transcript No. 292 of 1976.

[194]*J.* v. *C.* [1970] A.C. 668; *Re K., The Times*, 9 March 1976; *Re C.* (1976) 6 Fam. Law 211; *Re C.* [1978] Fam. 105; *Re R.* (1981) 2 F.L.R. 416, 425.

[195]A matter to which the Law Commission has referred elsewhere. See the Report on Illegitimacy, (1982) Law Com. No. 118, para. 3.1.

[196]*Hewer* v. *Bryant* [1970] 1 Q.B. 357, 371, *per* Sachs L.J.

been concerned not so much to describe general rights as to provide particular remedies, frequently in specified courts and under particular statutes embodying different philosophies and policy objectives.

2.49 The complexity to which we have referred is evidenced by differences in both terminology and concepts and in the many different procedural contexts in which the interests of the child may be in issue. In some enactments a child is referred to as a "child",[197] in others as a "minor"[198] or "young person".[199] Moreover the definitions are not consistent, so that a person may be a child for the purpose of one Act but not of another.[200] Apart from terminological inconsistency there remains the problem of the absence of any comprehensive conceptual framework underlying child legislation. As we have already mentioned,[201] an attempt was made in the Children Act 1975 to clarify the use of expressions such as "custody", but the concept of parental "rights" or "authority" remains full of difficulty and uncertainty, as does the distribution of such rights or authority amongst guardians, custodians and persons with care and control. The bewilderment to which this uncertainty gives rise was eloquently expressed in *Hewer* v. *Bryant*:[202]

> "[O]ne finds scattered, sometimes with and sometimes without definitions, words and phrases such as 'care, control, custody, actual custody, legal custody, guardian, legal guardian and possession.' In the end, so far as comprehensibility on these matters is concerned, one finds that this voluminous and well intentioned legislation has created a . . . citizen's nightmare".[203]

2.50 Added to these problems is the fact that, as we have seen, the welfare of a child may be considered in the course of a number of separate proceedings, possibly in different courts. For example, a child may be made a ward of court on an application to the High Court,[204] or an application may be made for a custody order in proceedings under the Guardianship of Minors Acts in the High Court or a county court or magistrates' court.[205] Alternatively, an application may be made for a custody order in proceedings for divorce[206] in the High Court or divorce county court, or in matrimonial proceedings in a magistrates' court.[207]

2.51 There is a further problem. Many of the statutory provisions relating to children have been enacted without coming into force at the time of

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[197]See, for example, Children Act 1975.

[198]See Guardianship of Minors Act 1971 and Guardianship Act 1973.

[199]See Children and Young Persons Act 1933.

[200]Cf. Children and Young Persons Act 1933, s.107(1), with Children and Young Persons Act 1969, s.70(1).

[201]See para. 2.4 above.

[202][1970] 1 Q.B. 357.

[203][1970] 1 Q.B. 357, 371, *per* Sachs L.J.. This state of uncertainty has resulted in conflicting interpretations of the concept of custody. See J.M.Eekelaar, (1973) 89 L.Q.R. 210; S. Maidment, (1981) 44 M.L.R. 341 and Mrs. Justice Booth, [1982] Stat. L.R. 71.

[204]See paras. 2.7–2.8 above.

[205]See paras. 2.10–2.17 above.

[206]See para. 2.23 above.

[207]See para. 2.28 above.

enactment or within a reasonably short period thereafter. Both laymen and lawyers face real difficulties in ascertaining which parts of some legislation are in force and which are not. For example, although it would seem that Part II of the Children Act 1975 (which deals with custodianship orders) is to be implemented soon,[208] several other provisions of that Act are still not in force.

2.52 In the circumstances it comes as no surprise that many commentators have called for a thorough review and clarification of the law relating to children.[209] Such a review would be well outside the terms of reference of this report. However, we have referred at some length to the complexity of the existing law because it has an important bearing on the structure and form of our draft Bill which inevitably reflects this complexity. For example, since there is no general concept of custody in English law we have had to refer, in Part I of the annexed draft Bill, to a number of specific rules of law and enactments rather than to custody generally. The current proliferation of terms, categories and separate enactments concerning children is obviously unsatisfactory. A review of the relevant private law by the Law Commission, foreshadowed earlier this year,[210] has now begun.

B Scotland

(1) *Introduction: the nature of custody orders*

2.53 The term "custody" has never been very precisely defined in Scots law. It usually includes, but is not limited to, the notion of physical custody of the child. Occasionally, the term "legal custody" is used, by which is meant custody conferring a right to regulate the child's residence and upbringing without necessarily involving actual care or possession of the child.[211] This term has not, however, been given a general statutory definition in Scotland, as it has been for some purposes in England and Wales.[212]

2.54 In addition to orders relating to the custody of children, the Scottish courts may also make orders relating to access to a child,[213] orders committing

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[208]In the Spring of 1985, according to an official announcement on 13 August 1984.

[209]See, for example, J.C. Hall, [1972B] C.L.J. 248, 261, 265; J.M. Eekelaar, (1973) 89 L.Q.R. 210, 234; S. Maidment, [1981] C.L.J. 135, 158; (1981) 11 Fam. Law 15; (1981) 131 N.L.J. 835; A. Samuels, (1982) J.P. 233, 248, 248–250; N.V. Lowe, (1984) 14 Fam. Law 1; N.F. Allen, (1984) 14 Fam. Law 7, 10. The Law Commission has also expressed the view that the law relating to the circumstances in which children are received or taken into the care of a local authority is in need of simplification and rationalisation: Fourteenth Annual Report 1979–80 (1980) Law Com. No. 97, para. 2.30. See also S. Maidment, [1981] J.S.W.L. 21, 35; W. Evans, (1982) 79 L.S. Gaz. 1240.

[210]Eighteenth Annual Report (1982–1983) (1984) Law Com. No. 131, para. 2.43. The public law relating to children in care is also under review: see para. 3.5 below.

[211]See e.g. *McNaught* v. *McNaught* 1955 S.L.T. (Sh.Ct.) 9, 10; *Campbell* v. *Campbell* 1956 S.L.T. 285, 295, *per* Lord Sorn; *Peploe* v. *Peploe* 1964 S.L.T. (Notes) 44; *Cheetham* v. *Glasgow Corporation* 1972 S.L.T. (Notes) 50, 51.

[212]See para. 2.4 above. Part IV of the Children Act 1975, and the corresponding provisions in the Interpretation Act 1978, do not extend to Scotland.

[213]*McIver* v. *McIver* (1859) 21 D. 1103; *Ponder* v. *Ponder* 1932 S.C. 233, 237; *S* v. *S.* 1967 S.C. (H.L.) 46; Guardianship of Infants Act 1886, s.5; Guardianship of Infants Act 1925, s.5(4); Illegitimate Children (Scotland) Act 1930, s.2(1); Children and Young Persons (Scotland) Act 1932; Matrimonial Proceedings (Children) Act 1958, s.14(2); Guardianship Act 1973, s.11.

the care of a child to a local authority or an individual or placing a child under the supervision of a local authority[214] and orders relating to a child's education and upbringing.[215] In this report the term "custody orders" is used, in relation to Scotland, to include all the above kinds of orders except orders committing the care of a child to a local authority or placing a child under the supervision of a local authority.[216] We deal later with orders relating to the tutory or curatory of children, [217] and with orders for the delivery of a child which may be sought not only to enforce a custody order but also to enforce a right to custody recognised by the general law (e.g. the right of a parent in a question against a third party unlawfully detaining the child).[218] We are not concerned in this report with adoption orders, nor with supervision requirements made by children's hearings under the Social Work (Scotland) Act 1968.

(2) *Jurisdiction to make custody orders*

2.55 The Scottish courts have jurisdiction to make custody orders both in independent custody proceedings and in the course of matrimonial proceedings.[219] These powers are derived partly from statute[220] and partly from the common law.

2.56 We now turn to examine separately the bases of jurisdiction of the Court of Session and the sheriff court to make custody orders both at common law and under statute.

(a) Jurisdiction of the Court of Session at common law

2.57 The approach of the common law of Scotland to jurisdiction in custody differed widely from that of the English common law. Custody was regarded as a question of status and, accordingly, fell to be referred to the courts of the domicile.[221] This was usually stated as the domicile of the child's father, since the domiciles both of the child's mother and of the child followed his.[222] The rigidity of the domicile approach, however, was softened by the application of the principle that a father could not, by changing his domicile in the course of custody proceedings, deprive the court of his former domicile of a jurisdiction that rightfully belonged to it.[223] It is not entirely clear what is meant by the court of the domicile now that the child's domicile is no longer

[214]Matrimonial Proceedings (Children) Act 1958, ss.10(1) and 12(1); Guardianship Act 1973, s.11(1). It has been held to be competent to award the custody of a child to one parent and care and control to the other: *Robertson* v. *Robertson* 1981 S.L.T. (Notes) 7.

[215]Fraser, *Parent and Child* 3rd ed., (1906) pp.89–95; Conjugal Rights (Scotland) Amendment Act 1861, s.9. See also Rules of Court 1965, as amended, R. 170B(1)(a) which provides that for its purposes any reference to custody includes a reference to access, maintenance and education.

[216]See paras. 3.4–3.6 below.

[217]See paras. 2.86 and 2.87 below.

[218]See para. 2.18 below.

[219]By "matrimonial proceedings" in Scotland we mean proceedings for divorce, nullity of marriage or separation. The court can make a custody order in matrimonial proceedings even if the main action is unsuccessful provided the order is made either forthwith or within a reasonable time after the action has been dismissed, after proof on the merits has been allowed, or decree of absolvitor granted in it: Matrimonial Proceedings (Children) Act 1958, s.9(1).

[220]See the statutory provisions referred to in notes 213 to 215 above.

[221]*Radoyevitch* v. *Radoyevitch* 1930 S.C. 619, 624; *Ponder* v. *Ponder* 1932 S.C. 233, 238; *Oludimu* v. *Oludimu* 1967 S.L.T. 105, 107.

[222]*Barkworth* v. *Barkworth* 1913 S.C. 759; *Westergaard* v. *Westergaard* 1914 S.C. 977; *Ponder* v. *Ponder* 1932 S.C. 233; *Kitson* v. *Kitson* 1945 S.C. 434.

[223]*Ponder* v. *Ponder* 1932 S.C. 233, 238, *per* L.J.C. Alness; *McLean* v. *McLean* 1947 S.C. 79, 84, *per* L.J.C. Cooper; *Campbell* v. *Campbell* 1977 S.L.T. 125, *per* Lord Stott.

necessarily that of the father, but on principle it would seem to be the child's domicile which is relevant. If this is correct then the general rule is that the Court of Session has jurisdiction at common law to deal with custody if the child is domiciled in Scotland at the commencement of the proceedings.

2.58 To the general rule that jurisdiction at common law depends on domicile there are two exceptions. Even if the Court of Session is not the court of the domicile, it has power at common law to deal with questions of custody or access-

(1) to enforce the order of a court of competent jurisdiction;[224] and

(2) where there is "reason to apprehend immediate danger to the child".[225]

Although the matter is not discussed in the authorities, the test of jurisdiction in these two cases is presumably effectiveness. This will normally, in practice, depend on the presence of the child in Scotland.

2.59 The assumption that the courts of the domicile possessed pre-eminent jurisdiction in questions of custody led the court to conclude that "only very strong grounds of convenience" would justify the court of the domicile dismissing a petition for custody on the ground of *forum non conveniens*.[226] This conclusion was reached, as the case of *Babington* v. *Babington*[227] shows, even in cases where earlier proceedings had been commenced in a court outside Scotland.

(b) Statutory provisions affecting the Court of Session

2.60 The most important statutory provision affecting the jurisdiction, in the international sense, of the Court of Session to make custody orders is the Domicile and Matrimonial Proceedings Act 1973, which provides that, where the Court of Session has jurisdiction in an action for divorce, judicial separation or declarator of nullity of marriage, it also has jurisdiction to deal with applications for certain ancillary orders, including custody orders.[228] As jurisdiction to deal with the principal action depends on the domicile or habitual residence (for one year) of either party to the marriage,[229] it follows that the Court of Session may have jurisdiction under this provision to deal with the custody of a child even if the child is not domiciled (or even resident) in

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[224] *Barkworth* v. *Barkworth* 1913 S.C. 759, 760, *per* L.P. Dunedin.

[225] *Ponder* v. *Ponder* 1932 S.C. 233, 238; *Oludimu* v. *Oludimu* 1967 S.L.T. 105, 107. See also *Earl of Buchan* v. *Lady Cardross* (1848) 4 D. 1268 and *Westergaard* v. *Westergaard* 1914 S.C. 977, 981, *per* Lord Salvesen (where the test is expressed in terms of protection of the child and prevention of injury).

[226] *McLean* v. *McLean* 1947 S.C. 79, 84, *per* L.J.C. Cooper.

[227] 1955 S.C. 115.

[228] Sect. 10 and Sched. 2. Where an application for custody is made in matrimonial proceedings, the Court of Session retains power to deal with questions of custody until the child reaches 16. Procedurally, this is achieved by including in the interlocutor disposing of the action a direction reserving leave to apply to the Court until the child reaches that age: Rules of Court 1965, as amended, R.170B(8). The effect of the direction is that the action continues to be in dependence until that time: R.170B(9).

[229] Sect. 7.

Scotland. Reference has been made above[230] to the provisions in the part of the 1973 Act applying to England and Wales for the stay of proceedings for divorce, nullity or judicial separation where there are concurrent proceedings in another jurisdiction. There are corresponding provisions in the Scottish part of the Act for the sist of proceedings.[231]

2.61 The jurisdiction of the Court of Session in custody applications under the Guardianship of Children (Scotland) Acts 1886 to 1973 or the Illegitimate Children (Scotland) Act 1930 is not regulated by statute and depends on the common law principles described above.

2.62 The provisions of the Children Act 1975 relating to custodianship orders do not apply to Scotland. Instead, the Act contains provisions (not yet in force but due to come into force in 1985) relating to custody applications by people other than parents or guardians. In relation to jurisdiction it also provides that, without prejudice to any existing grounds of jurisdiction, the Court of Session or the sheriff court of the sheriffdom within which the child resides:

> "shall have jurisdiction in proceedings for custody of a child if at the time of application for such custody—
>
> (*a*) the child resides in Scotland; and
>
> (*b*) the child is domiciled in England and Wales; and
>
> (*c*) the person applying for custody is a person qualified . . . to apply in England or Wales for a custodianship order in respect of the child."[232]

2.63 The Children Act 1975 contains one other provision on jurisdiction. It directs the court dealing with an application for adoption to treat the application as one for custody in certain cases and provides that, where this is done,

> "the court shall not cease to have jurisdiction by reason only that it would not have had jurisdiction to hear an application by the applicant for custody of the child."[233]

In addition, the court has power under section 25 of the Adoption (Scotland) Act 1978 to make an interim order for custody for a probationary period in the course of the adoption proceedings:[234] jurisdiction to make such an order depends on the court having jurisdiction in the adoption proceedings themselves.[235]

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[230]Para. 2.25.

[231]Sect. 11 and Sched. 3.

[232]Sect. 54(1). This section is not yet in force but is due to come into force in 1985.

[233]Sect. 53.

[234]Other provisions in the 1978 Act affecting the custody of the child are s.18(5) (the vesting of parental rights and duties in the adoption agency following an order freeing the child for adoption) and s.49 (provisional order vesting in the applicant parental rights and duties relating to the child pending his adoption abroad). The 1978 Act, with the exception of ss.1 and 2, came into force on 1 September 1984 and consolidates Scottish legislation on adoption, including Part I of the Children Act 1975.

[235]Jurisdiction to make an adoption order is on the same basis as in England and Wales— see para. 2.32 above. The relevant provisions are ss. 13, 14, 15, 17 and 56 of the Adoption (Scotland) Act 1978.

(c) Jurisdiction of the sheriff court at common law

2.64 At common law it was assumed that custody actions were a matter, in principle at least, within the exclusive jurisdiction of the Court of Session.[236] It was conceded, however, that the sheriff court had certain limited powers at common law, notably:

(1) to regulate the interim custody of children in cases of emergency;[237]

(2) to give effect to and to enforce the *prima facie* legal title of a father to have the custody of his legitimate child[238] and the similar right of a mother to have the custody of her illegitimate child;[239] and

(3) (possibly) to adjust rights of access.[240]

The common law jurisdictional bases upon which the sheriff may exercise these powers are not wholly clear, but for all practical purposes are superseded by the present statutory rules.

(d) Statutory powers of the sheriff court

2.65 Sections 5 and 9 of the Guardianship of Infants Act 1886 empower the sheriff court *within whose jurisdiction the respondent or respondents or any of them may reside* on the application of the mother or the father[241] of any child under 16 years of age[242] to make, having regard *inter alia* to the welfare of the child, such order as it may think fit regarding the custody of such child and the right of access thereto of either parent.

2.66 The competence of the sheriff court to entertain actions for custody was enlarged by section 5 of the Sheriff Courts (Scotland) Act 1907 (as amended by the Sheriff Courts (Scotland) Act 1913) to include "actions for regulating the custody of children".[243] The suggestion that the words "for regulating" were intended to refer only to interim regulation was rejected in *Murray* v. *Forsyth*.[244] The sheriff has the right, on the application of a party or *ex proprio motu*, at any stage of the proceedings to remit the action to the Court of Session.[245] He is apparently bound to do so when a party expressly founds

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[236]Fraser, *Parent and Child*, 3rd ed., (1906) pp.94 and 162.

[237]Fraser, *Parent and Child*, 3rd ed., (1906) pp.94 and 162; *Naysmith* v. *Naysmith* 1910 2 S.L.T. 135; *Murray* v. *Forsyth* 1917 S.C. 721, 724 and 727; *Kitson* v. *Kitson* 1945 S.C. 434, 439–440, *per* L.J.C. Cooper.

[238]*Hill or Lang* v. *Lang* (1849) 21 Scot. Jur. 485; *Shannon* v. *Gowans* 1921 37 Sh.Ct.Rep.235; *Samson* v. *Samson* 1922 S.L.T. (Sh.Ct.) 34. Now both parents of a legitimate child have equal rights to custody:Guardianship Act 1973, s.10.

[239]*Brand* v. *Shaws* (1888) 15 R. 449, 453; *Murray* v. *Forsyth* 1917 S.C. 721, 724, *per* Lord Skerrington; Fraser, *Parent and Child*, 3rd ed., (1906) p.162.

[240]*Kitson* v. *Kitson* 1945 S.C. 434, 441, *per* L. J. C. Cooper.

[241]Administration of Justice Act 1928, ss.16, 20(3).

[242]Custody of Children (Scotland) Act 1939, s.1. The power was extended to cover illegitimate children by the Illegitimate Children (Scotland) Act 1930, s.2(1), now amended by the Guardianship Act 1973, Sched. 5, para. 3.

[243]The jurisdiction conferred on the sheriff court by the 1886 Act is limited to applications by parents. The 1907 Act confers a more general jurisdiction to deal with custody applications whether by a parent or by a third party.

[244]1917 S.C. 721.

[245]See Sheriff Courts (Scotland) Act 1971, s.37 as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s.16(b); Guardianship of Infants Act 1886, s.10.

upon the Custody of Children Act 1891,[246] but otherwise should not do so unless questions of special importance or difficulty arise.[247] Where the sheriff has power to make a custody order, it is thought that he may also make an order for access.[248]

2.67 The jurisdictional basis of the sheriff's competence to make custody orders under the Acts referred to above is nowhere explicitly stated. The most general provision is that in section 6 of the 1907 Act, which appears to say that *any* action competent in the sheriff court may be brought where the jurisdictional criteria set out in paragraphs (a) to (j) of that section are fulfilled. It was said, however, in *Kitson* v. *Kitson*[249] that in custody actions only paragraph (a) is relevant. This provides that the sheriff has jurisdiction:

> "Where the defender . . . resides within the jurisdiction, or having resided there for at least forty days, has ceased to reside there for less than forty days and has no known residence in Scotland."

In this context it has been held that the word "resides" is to be construed as giving effect to the common law ground of jurisdiction implying residence for 40 days before the date of citation in the action.[250] It would seem likely, though there is an absence of authority upon the point, that the term "reside" in section 9 of the 1886 Act would be given a similar construction. That section defines "the Court" for the purposes of that Act (and now of the 1925 Act) as "the Court of Session or the sheriff court within whose jurisdiction the respondent . . . may reside".

2.68 If these words and the corresponding language of section 6 of the 1907 Act were to be construed literally, the sheriff would have a wider basis of jurisdiction than the Court of Session which in principle—and apart from ancillary jurisdiction to make custody orders in the course of consistorial and adoption proceedings—is confined to cases where the child is domiciled in Scotland. It is at least arguable, however, that the words "within whose jurisdiction the respondent . . . may reside" relate merely to the allocation of cases to the appropriate sheriff court and that there is a further condition that the courts of Scotland must possess jurisdiction in the international sense in the circumstances of the case, i.e. generally that the child should be domiciled in Scotland.[251] This argument gains support from the observations of Lord Keith in *Jelfs* v. *Jelfs*[252] relating to the analogous residential basis of jurisdiction in actions of separation and aliment under sections 5(2) and 6(a) of the 1907 Act. It is true that the case of *McNeill* v. *NcNeill*[253] points in a different direction, but

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[246] *Murray* v. *Forsyth* 1917 S.C. 721; *Samson* v. *Samson* 1922 S.L.T. (Sh.Ct.) 34; *Dawkins* v. *Muir* 1923 S.L.T. (Sh.Ct.) 11. The 1891 Act deals primarily with applications for delivery, and provides that where the parent has abandoned or deserted the child the Court of Session shall refuse to make an order for delivery to the parent unless satisfied that he or she is a fit person to have custody.

[247] *Dunbar* v. *Dunbar* 1912 S.C. 19; *Lamont* v. *Lamont* 1939 S.C. 484.

[248] *Cook* v. *McGinnes* 1982 S.L.T. (Sh.Ct.) 101. See also *Ponder* v. *Ponder* 1932 S.C. 233, 237; *Murphy* v. *Murphy* 1953 Sh.Ct.Rep. 25.

[249] 1945 S.C.434, 442.

[250] *McNeill* v. *McNeill* 1960 S.C. 30.

[251] See paras. 2.57–2.58 above.

[252] 1939 S.L.T. 286, 290.

[253] 1960 S.C. 30.

the argument in that case concerned the meaning of the word "resides" and the issue in *Jelfs* v. *Jelfs* was not raised.

2.69 The jurisdiction of the sheriff court is extended by section 7 of the Maintenance Orders Act 1950. In cases where one parent resides in England or in Northern Ireland and the other parent and the child in Scotland, jurisdiction is conferred upon the sheriff court within whose territory the other parent resides, and this jurisdiction is exercisable notwithstanding that any party to the proceedings is not domiciled in that part of the United Kingdom.[254]

2.70 Section 10 of the Domicile and Matrimonial Proceedings Act 1973 confers upon the sheriff court powers similar to those conferred upon the Court of Session to entertain applications for custody orders and for the variation and recall of such orders, where the application is ancillary to an action for divorce or separation. The sheriff court has jurisdiction in an action for divorce or separation if—

"either party to the marriage in question—

(i) is domiciled in Scotland at the date when the action is begun, or

(ii) was habitually resident there throughout the period of one year ending with that date; and

either party to the marriage—

(i) was resident in the sheriffdom for a period of forty days ending with that date, or

(ii) had been resident in the sheriffdom for a period of not less than forty days ending not more than forty days before the said date, and has no known residence in Scotland at that date."[255]

2.71 The sheriff court is also empowered by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 to entertain applications for the variation and recall of certain orders made by the Court of Session in the course of consistorial actions including so far as relevant to the present discussion:

(1) orders for the custody, maintenance or education of children under section 9 of the Conjugal Rights (Scotland) Amendment Act 1861;

(2) orders for the custody, maintenance or education of children made under Part II of the Matrimonial Proceedings (Children) Act 1958;

(3) orders relating to care and custody made by virtue of Part II of the Guardianship Act 1973; and

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[254]Sect. 27(2).

[255]Domicile and Matrimonial Proceedings Act 1973, s.8(2), as amended by the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983, s.6 and Sched. 1, para.18. The only other ground of jurisdiction is under s.8(3) which gives the sheriff jurisdiction in a cross action if the original action is pending. See also Sheriff Courts (Scotland) Act 1907, Sched.1, para.129(1) (which provides for applications for variation or recall of decrees regulating custody or access to be made by minute in the original process).

(4) orders varying any such orders.[256]

2.72 The sheriff court may exercise its powers under the 1966 Act only when it has jurisdiction over any party upon whom the application has to be served on one of the grounds mentioned in paragraphs (a), (b) or (j) of section 6 of the 1907 Act.[257] The reasons for the references to paragraphs (b) and (j) of section 6 are not clear. Their inclusion is inconsistent with the view taken in *Kitson* v. *Kitson*[258] that in custody actions only paragraph (a) is relevant. In its original form section 8 of the 1966 Act raised the question whether there should not be read into it the further condition that the courts in Scotland should possess jurisdiction in the international sense in the circumstances of the case. This question has become largely academic since, under section 10(1) and (2) of the Domicile and Matrimonial Proceedings Act 1973, it now suffices that the Court of Session has jurisdiction to entertain the original action.

2.73 The provisions of the Children Act 1975 on jurisdiction in certain custody applications and on jurisdiction to make custody orders in certain adoption applications have already been referred to.[259] As most adoption applications are dealt with in the sheriff court the latter provision, in particular, is of more importance in relation to the sheriff court than in relation to the Court of Session.

(3) *Variation of Orders*

2.74 It is clear that both the Court of Session and the sheriff court have power to vary orders made in matrimonial and independent proceedings.[260] What is less clear is whether the courts would always be entitled to vary an order if the applicant was no longer able to satisfy the jurisdictional requirements on the basis of which the original order was made and no other ground of jurisdiction was available. In relation to the variation of orders made in matrimonial proceedings, section 10(1) of the Domicile and Matrimonial Proceedings Act 1973 specifically confers jurisdiction on the courts in such circumstances. There is, however, no statutory provision to this effect in relation to the variation of orders made in independent custody proceedings and, to this extent, the position in Scotland is uncertain.

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[256]1966 Act, s.8(1) and (2). Only orders "made in consistorial actions" can be varied or recalled by the sheriff under subsection (2) and orders under Part II of the Guardianship Act 1973 do not come within this category. We understand that the words "made in consistorial actions" should have been repealed when the reference to the 1973 Act was inserted in s.8(1). We therefore *recommend* their repeal in this exercise.

[257]1966 Act, s.8(6). The grounds referred to are the defender's residence (for forty days, etc.) or place of business, and prorogation.

[258]1945 S.C. 434, p.442.

[259]Paras. 2.62 and 2.63 above.

[260]The Matrimonial Proceedings (Children) Act 1958, s.14(3) confers an express power to vary orders made under it. There is no such power in the Conjugal Rights (Scotland) Amendment Act 1861 in relation to orders made in the final decree of divorce or separation and it was held incompetent to vary an award made under it unless leave to apply had been expressly reserved: *Sanderson* v. *Sanderson* 1921 S.C. 686. In practice, a direction reserving leave to apply until the child attains 16 years of age is always inserted in the interlocutor disposing of the action: see para. 2.60 above, n. 228. Express power to vary is also conferred by Guardianship of Infants Act 1886, s.5, Illegitimate Children (Scotland) Act 1930, s.2(1) (orders made in independent custody proceedings) and Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, s.8 (variation by sheriff court of certain orders made by the Court of Session).

(4) *Recognition and enforcement of custody orders*

2.75 As a corollary of the emphasis placed by Scots law on the law of the domicile in relation to jurisdiction in custody cases, external custody decrees pronounced by the courts of the domicile are entitled to recognition in Scotland.[261] This means not only that rights to custody conferred by the court of the domicile will be recognised in Scotland (even in the absence of any question of enforcement), but also that if the person holding the custody order wishes to enforce his rights in Scotland he can apply immediately for an order for delivery, just as if he held a Scottish custody order.[262]

2.76 The fact that a foreign custody order pronounced by the court of the domicile is recognised in Scotland does not, of course, mean that it has any greater effect than a Scottish custody order. Just as a Scottish custody order may be superseded by a later Scottish custody order if the court in the second set of proceedings has jurisdiction and if the welfare of the child so requires, so may a recognised foreign custody order be superseded by a later Scottish custody order if the same conditions are satisfied. A custody order, whether Scottish or foreign, "cannot in its nature be final".[263] The welfare of the child is the first and paramount consideration in any proceedings in a Scottish court relating to the custody or upbringing of a child[264] and a court whose custody jurisdiction is involved is not bound to follow blindly a previous order made by another court whether Scottish or foreign.[265] A previous order, made by a court with a recognised jurisdiction, will be treated with respect, particularly if it is recent and was arrived at after a full examination of the facts, but need not be blindly followed.[266]

2.77 The same applies to enforcement proceedings in a Scottish court. A right to custody (whether conferred by law,[267] by a Scottish custody order[268] or by a foreign custody order[269]) will not be blindly enforced (for example by the making of a delivery order or the granting of a warrant to messengers-at-arms

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[261] *Westergaard* v. *Westergaard* 1914 S.C. 977; *Radoyevitch* v. *Radoyevitch* 1930 S.C. 619; *Ponder* v. *Ponder* 1932 S.C. 233, 236; *Kitson* v. *Kitson* 1945 S.C. 434, 439; *McLean* v. *McLean* 1947 S.C. 79, 83; *Babington* v. *Babington* 1955 S.C. 115, 121.

[262] Cf. *Kelly* v. *Marks* 1974 S.L.T. 118. In practice, however, a fresh custody order would often be sought at the same time.

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

[264] Guardianship of Infants Act 1925, s.1.

[265] *McKee* v. *McKee, supra; Kelly* v. *Marks, supra.*

[266] *Campins* v. *Campins* 1979 S.L.T. (Notes) 41. For other recent cases, in some of which the court ordered the child to be returned immediately to the jurisdiction of the foreign court, see *Sargeant* v. *Sargeant* 1973 S.L.T. (Notes) 27; *Campbell* v. *Campbell* 1977 S.L.T. 125; *Lyndon* v. *Lyndon* 1978 S.L.T. (Notes) 7; *Thomson Petr.* 1980 S.L.T. (Notes) 29. In "kidnapping" cases, in particular, the court may order the child to be returned without a full proof on the question of welfare. Even in such cases, however, the court does not disregard the child's welfare and will consider any averments that it would be harmful to the child to order an immediate return: see *Sargeant* v. *Sargeant, supra.*

[267] At common law the father of a legitimate child was regarded as having a legal right to the child's custody and would often, therefore, simply seek enforcement of this right without seeking any prior custody order. See, e.g., *Ketchen* v. *Ketchen* (1870) 8 M. 952.

[268] Cf. *Fowler* v. *Fowler* (No.2) 1981 S.L.T. (Notes) 78.

[269] Cf. *Radoyevitch* v. *Radoyevitch* 1930 S.C. 619.

to search for and take possession of the child) regardless of the child's welfare.[270] The court will not, for example, grant warrants for the immediate enforcement of a right to custody where this would be prejudicial to the child's health or welfare.[271] It may be reluctant to grant such warrants if the custody order in question is under challenge or review and is shortly liable to be superseded.[272] This does not mean that the custody order, or the right to custody, is itself altered or disregarded—merely that it will not be given immediate effect.[273] Thus in *Hood* v. *Hood,*[274] the Court of Session approved of the sheriff's decision not to make a delivery order and grant warrant to officers of court to search for and seize children because it would have been "impossible to carry out this warrant consistently with the safety of the children". And in *Radoyevitch* v. *Radoyevitch*[275] the court declined to order delivery of the child to the custodier appointed by the foreign court before it was satisfied as to certain questions relating to her welfare and the arrangements for her journey abroad.

2.78 The administrative arrangements for preventing children from leaving the jurisdiction, which are slightly different from those in England and Wales, are discussed in Part VI of the report.[276]

2.79 So far as concerns the actual techniques available for the enforcement of custody orders in Scotland, three general points should be made. First, most custody orders never require enforcement. In many cases, they reflect a state of affairs acceptable to all the parties (for example, that the children of a broken marriage should stay with one or other of the parents—usually, in practice, the mother) and are made merely to regularise the position and perhaps pave the way for an award of aliment for the child. Alternatively, they may be made in circumstances where custody has been disputed, but the parties agree to abide by the court's decision. Secondly, enforcement of a custody order is an extremely serious matter which involves considerations not usually applicable in the case of enforcement of other court orders such as orders for the payment of money. Thirdly, there is a measure of flexibility in the way in which different enforcement orders can be combined. It is, for example, possible to have a custody order, followed by a delivery order, followed by a warrant to messengers-at-arms to seize the child. It is also, however, possible for a custody order to be combined with a delivery order and warrants for direct enforcement.[277] In the following paragraphs the different techniques will be considered separately but this is done purely for convenience of exposition.

(a) Delivery orders

2.80 The first stage in the enforcement of a custody order will often be to

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[270]Cf. *Ketchen* v. *Ketchen, supra; Robertson* 1911 S.C. 1319; *Brown* v. *Brown,* 1948 S.C. 5,11; *Thomson, Petr.* 1980 S.L.T. (Notes) 29.

[271]*Hood* v. *Hood* (1871) 9 M. 449, 455; *Radoyevitch* v. *Radoyevitch* 1930 S.C. 619.

[272] Cf. *Fowler* v. *Fowler* (No. 2) 1981 S.L.T. (Notes) 78.

[273]See *Radoyevitch* v. *Radoyevitch, supra* at p.626 ("the benefit of the child is relevant only to the question whether we should lend our aid by ordering delivery of the child to that [duly appointed] tutor or custodier").

[274]*Supra.*

[275]1930 S.C. 619.

[276]See paras. 6.8–6.14 below.

[277]For a recent example, see *Caldwell* v. *Caldwell* 1983 S.L.T. 610.

apply for an order ordaining the person with the child to hand over the child, at a specified time and place, to the person entitled to the custody. Unlike a custody order itself this is an order *ad factum praestandum* directed to a particular person rather than an order merely regulating rights.[278]

(b) Jurisdiction to make delivery orders

2.81 An order for delivery of a child may be sought either in proceedings to enforce a custody order made by a competent court (Scottish or otherwise) or in independent proceedings. A parent with a clear *prima facie* right to custody may, for example, seek a delivery order if his or her child is being unlawfully detained by a third party. Indeed at one time it was apparently usual in the sheriff courts to raise questions of custody, even as between parents, by means of a crave for delivery.[279] Jurisdiction to make orders for the delivery of children has not been extensively discussed in the authorities. It seems clear, however, that the Court of Session will have jurisdiction to make a delivery order where this will assist in the enforcement of a custody order of a competent court outside Scotland even if the Court of Session would not itself have jurisdiction to deal with the question of custody.[280] *A fortiori* the Court of Session would have jurisdiction to grant a delivery order to make its own custody order effective even if the child had, by the time of the enforcement proceedings, ceased to be domiciled in Scotland. So far as independent proceedings for a delivery order are concerned it is not clear whether the rules appropriate to other orders *ad factum praestandum* apply (which would reflect the technical legal position) or whether rules analogous to the rules of jurisdiction in independent custody proceedings apply (which would reflect the factual position in some cases—for example if an application for a delivery order is sought where the dispute is really about custody).[281]

(c) Interdicts

2.82 The Scottish courts also have power to grant interdicts either in independent proceedings or in the course of matrimonial or other proceedings, against, for example, removing a child from the person entitled to custody. The Court of Session has power to prohibit the removal of a child from Scotland[282] but it is thought that, because the sheriff's powers of interdict are limited to acts committed or threatened to be committed within the sheriffdom,[283] the sheriff courts do not have this power.

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[278]See *Brown* v. *Brown* 1948 S.C. 5,11; *Guthrie* v. *Guthrie* 1954 S.L.T. (Sh.Ct.) 58; *Thomson* v. *Thomson* 1979 S.L.T. (Sh.Ct.) 11.

[279]See, e.g., *Samson* v. *Samson* 1922 S.L.T. (Sh.Ct.) 34; *Brown* v. *Brown* 1948 S.C. 5. The reason for this practice, which was criticised in *Brown* and which seems to have fallen out of use, was probably historical. At one time the sheriff had no general jurisdiction to make custody orders but could grant a delivery order to enforce a parent's right to custody. The old form of crave seems to have lingered on even in cases where it was no longer appropriate.

[280]*Barkworth* v. *Barkworth* 1913 S.C. 759, 760; *Radoyevitch* v. *Radoyevitch* 1930 S.C. 619; *Ponder* v. *Ponder* 1932 S.C. 233, 238.

[281]Cf. *Samson* v. *Samson* 1922 S.L.T. (Sh. Ct.) 34. *Brown* v. *Brown* 1948 S.C. 5.

[282]A special power to grant interim interdicts of this type at the earliest stage of an action in which the court would have jurisdiction to make a custody order is conferred by the Matrimonial Proceedings (Children) Act 1958, s.13.

[283]Sheriff Courts (Scotland) Act 1907, s.6(e).

(d) Contempt of court

2.83 Failure to comply with a duly intimated delivery order, or interdict, or any other order to do or not to do something in relation to a child, or, in certain circumstances, with an undertaking given to the court to do or not to do something in relation to a child,[284] constitutes contempt of court[285] and may be punished by fine or imprisonment.[286] The use of these sanctions in custody matters is, however, extremely rare in Scotland. In most situations it is not in the interests of the child to fine or imprison the parent.

(e) Warrants to search for and take possession of the child

2.84 The Court of Session[287] and the sheriff court[288] have power to grant warrant to messengers-at-arms or sheriff officers to search for a child, enter premises by force to seek the child, and to take possession of the child and deliver him or her to the person entitled to custody. The enforcement of such warrants is a civil matter and neither procurators-fiscal nor the police have any duty to assist messengers-at-arms or sheriff officers in fulfilling their functions under such warrants, although the police may be involved if a breach of the peace is threatened.[289]

(f) Other enforcement orders

2.85 The Court of Session has on occasion ordered sequestration of the income from a trust in order to compel obedience to its orders relating to children.[290] This, however, is an unusual sanction. The courts also have power to summon those in disobedience of their orders to appear at the bar to explain their conduct.[291]

(5) *Tutory and curatory*

2.86 In Scots law the guardian of a pupil child (a boy under the age of 14, a girl under the age of 12) is known as a "tutor" and the guardian of a minor child (over those ages but under the age of 18) is known as a "curator". The functions of tutors and curators are different. The tutor is guardian of the pupil's person as well as his property and acts for the pupil in all legal transactions. The curator, on the other hand, is not guardian of the minor's person and does not act for the minor in legal transactions. Instead his function is to give or withhold consent to the minor's actings in such transactions.

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[284]Cf. *Graham* v. *Robert Younger Ltd* 1955 J.C. 28.

[285]*Leys* v. *Leys* (1886) 13 R. 1223; *Brown* v. *Brown* 1948 S.C. 5,11.

[286]The maximum fines for contempt of court are now prescribed by the Contempt of Court Act 1981, s.15. In the case of the Court of Session the maximum penalty is two years' imprisonment or a fine or both. In civil cases in the sheriff court the maximum penalty is three months' imprisonment or a fine of £500 or both.

[287]*Muir* v. *Milligan* (1868) 6 M. 1125; *Nicolson* v. *Nicolson* (1869) 7 M. 1118; *Marchetti* v. *Marchetti* (1901) 3 F. 888; *Low* 1920 S.C. 351; *Fowler* v. *Fowler* (No. 2) 1981 S.L.T. (Notes) 78.

[288]*Guthrie* v. *Guthrie* 1954 S.L.T. (Sh.Ct.) 58.

[289]*Caldwell* v. *Caldwell* 1983 S.L.T. 610. See also *Abusaif* v. *Abusaif* 1984 S.L.T. 90.

[290]*Ross* v. *Ross* (1885) 12 R. 1351; *Edgar* v. *Fisher's Trs.* (1893) 21 R. 59 and 325; sequel at (1894) 21 R. 1076.

[291]See e.g. *Leys* v. *Leys* (1886) 13 R. 1223; *Caldwell* v. *Caldwell supra.*

2.87 The Scottish Law Commission, for reasons given later,[292] wishes to take this opportunity to add an extra ground of jurisdiction (based on the habitual residence of the child) in relation to the appointment, control and removal of tutors and curators to pupils and minors.[293] The present position is unsatisfactory. So far as the Court of Session is concerned there is no statute law [294] and hardly any case law.[295] Some writers regard domicile as the primary ground of jurisdiction.[296] Others take the view that the primary ground, so far as the child's personal connection with Scotland is concerned, is residence[297] or that domicile and residence are alternative grounds of jurisdiction.[298] It is sometimes said that the presence in Scotland of property belonging to the pupil or minor gives the Court of Session jurisdiction to appoint a tutor or curator at least where there is some special factor or urgency making an appointment desirable,[299] but the cases cited in support of this proposition all appear to relate to the appointment of a curator *bonis*, factor *loco tutoris* or factor *loco absentis* to administer property in Scotland belonging to a person domiciled or resident elsewhere.[300] The appointment of a curator *bonis* or factor *loco tutoris* would normally be regarded as more appropriate where the question related not to the general guardianship of a pupil or minor but only to the administration of particular property situated in Scotland.[301] It is possible, and it is now the practice where there is a foreign guardian and the question relates only to heritable property in Scotland, to restrict the appointment to the property in Scotland.[302] So far as the sheriff court is concerned, certain powers in relation to tutory or curatory may, under the Guardianship of Children (Scotland) Acts 1886 to 1973, be exercised if "the respondent or respondents or any of them"

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[292]See para. 4.73 below.

[293]It is not proposed to bring orders relating to tutory and curatory, which would often relate to the property rather than to the person of the child, within the proposed scheme of recognition and enforcement.

[294]The Administration of Justice (Scotland) Act 1933 s.12, which deals with petitions by minors for the appointment of curators, contains rules on eligibility for appointment—the proposed curator must be resident in Scotland or must find security and prorogate the jurisdiction of the Court of Session—but not on jurisdiction to entertain the application.

[295]Most of the cases cited in the textbooks relate to the appointment of curators *bonis* or factors *loco tutoris* to which different considerations may apply. The few old cases on tutors or curators to pupils or minors often leave it unclear what the basis of jurisdiction was. In *Stuart* v. *Moore* (1861) 23 D. 902, for example, a tutor-dative was appointed to a pupil but the pupil was (probably) domiciled in Scotland, was resident sometimes in England and sometimes in Scotland, and had property in Scotland, (see pp.904–905). In *Fergusson* v. *Dormer* (1870) 8 M. 426 (an action of choosing a curator by a minor), jurisdiction was not discussed but the minor was apparently habitually resident in Scotland and may have been domiciled in Scotland.

[296]Anton, *Private International Law* (1967) p.381; Duncan and Dykes, *Principles of Civil Jurisdiction,* (1911) p.242.

[297]Gibb, *International Law of Jurisdiction* (1926) p.143.

[298]Walker, *Principles of Scottish Private Law,* 3rd ed., (1982) vol.I, p.149; McLaren, *Court of Session Practice* (1916) p.68.

[299]Anton, *op. cit.*, pp.381–2; Gibb, *loc. cit;* Walker, *loc. cit.*

[300]In *Stuart* v. *Moore* (1861) 23 D. 902, the pupil was probably domiciled in Scotland.

[301]See Fraser, *Parent and Child,* 3rd ed. (1906) p.751. The need for such an appointment in some cases arises because a foreign guardian is unable to deal with heritable property in Scotland. See *Young and Co.* v. *Thomson* (1831) 9 S. 920; *Ogilvy* v. *Ogilvy's Trs.* 1927 S.L.T. 83; *Waring* 1933 S.L.T. 190.

[302]Walker, *Judicial Factors* (1974) p.124.

reside within the sheriffdom.[303] It is not clear whether this is a mere rule for allocating jurisdiction to one sheriff court rather than another on the assumption that the Scottish courts as a whole have jurisdiction by virtue of the (somewhat uncertain) rules considered above in relation to the Court of Session, or whether it gives the sheriff jurisdiction in the international as well as the inter-local sense, in which case the sheriff would have in some circumstances a wider jurisdiction than the Court of Session. It is not clear what are the grounds of jurisdiction of the sheriff in cases where there is no respondent.[304]

C Northern Ireland

(1) *The basis of jurisdiction to make custody orders*

2.88 In Northern Ireland, the court has jurisdiction to make orders relating to the custody of children in the following proceedings:

(*a*) wardship;
(*b*) guardianship;
(*c*) divorce, nullity of marriage and judicial separation;
(*d*) financial provision under Article 29 of the Matrimonial Causes (Northern Ireland) Order 1978;
(*e*) financial provision under the Domestic Proceedings (Northern Ireland) Order 1980; and
(*f*) adoption.

2.89 As in England and Wales, the bases of jurisdiction to make a custody order differ according to the type of proceedings in which the custody of a child is an issue. In certain cases the jurisdiction of the court to make such an order depends on the ability of one or other of the parties to the proceedings to satisfy criteria specified in rules governing the internal allocation of jurisdiction between different courts of the same standing.

(a) Wardship

2.90 As in England and Wales the inherent jurisdiction of the court to make a child a ward of court derives from the prerogative power of the Crown acting in its capacity as *parens patriae*. This jurisdiction eventually became delegated to or vested in the Irish Court of Chancery, from whence it passed in 1877 to the Chancery Division of the High Court of Justice in Ireland and, in 1920, to the Chancery Division of the High Court of Justice in Northern Ireland, whence it was transferred to the Family Division of that Court.[305]

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[303]Guardianship of Infants Act 1886, s.9; Guardianship of Infants Act 1925, s.11(2); Guardianship Act 1973, s.10(3). The powers in question include the power to appoint a tutor to a child who has no parent or tutor (1925 Act, s.4(2A)); the power to appoint a tutor to act jointly with a surviving parent (1925 Act, s.4(1) and (2)); and the power to resolve disputes between joint tutors (1925 Act, s.6, 1973 Act, s.10(3)) or parental curators (1973 Act, s.10(3)).

[304]E.g. an application under s.4(2A) of the Guardianship of Infants Act 1925.

[305]Judicature (Northern Ireland) Act 1978, s.5(1)(c), and Section A (Distribution amongst Divisions of the High Court) of Part II of Order 1 of the Rules of the Supreme Court (Northern Ireland) 1980.

2.91 Where an application is made to the High Court to make a child a ward of court, the child becomes a ward on the making of such application, but ceases to be a ward after the period prescribed for the order has expired, unless a further order is made in accordance with the application.[306] As in England and Wales, the effect of wardship is that custody (in the wider common law sense) is vested in the court itself. From the moment of application the High Court has the widest possible powers to make orders by which the exercise of parental rights and duties is, as it were, delegated by the court to an individual.

2.92 The primary object of the wardship jurisdiction is to protect those who owe allegiance to the Crown and, ultimately, jurisdiction to entertain wardship applications is based on the "allegiance" of the child.[307]

(b) Guardianship of Infants Act 1886

2.93 The statutory basis of the courts' jurisdiction to make guardianship orders is considerably more limited than in England and Wales. The Guardianship of Infants Act 1886 still applies in what is substantially its original form; and there are no Northern Ireland equivalents of the Guardianship of Minors Act 1971, the Guardianship Act 1973 or the Children Act 1975. (A consequence of the latter omission is that "custodianship orders" do not form part of Northern Ireland law).

2.94 Sections 5 and 5A of the Act of 1886 give the court powers to make orders for custody and access. Applications may be made to the High Court or the county court of the district in which the respondent resides. The former jurisdiction is now vested in the Family Division.[308] As in England and Wales, it has always been assumed that the High Court exercises its jurisdiction under the Act of 1886 on the same basis as for wardship proceedings.

(c) Divorce, nullity of marriage and judicial separation

2.95 In any proceedings for divorce, nullity of marriage or judicial separation, the High Court and divorce county courts [309] have jurisdiction to make an order for the custody (including access) and education of any child of the family. In these proceedings the courts have jurisdiction to make a custody order before or on granting a decree or at any time thereafter,[310] and, in cases where the proceedings are dismissed, after the beginning of the trial or within a reasonable period after the dismissal.[311] Although there is no Northern Ireland authority on the point, the court exercises its powers to make a custody order even though the child in question is abroad. This is in accordance with the principle that the court has jurisdiction to make an ancillary order whenever it has jurisdiction in the main suit.

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[306]Judicature (Northern Ireland) Act 1978, s.28(2).

[307]See para. 2.9 above.

[308]Section A (Distribution Amongst Divisions of the High Court) of Part II of Order 1 of the Rules of the Supreme Court (Northern Ireland) 1980.

[309]Art. 48(1) of the Matrimonial Causes (Northern Ireland) Order 1978; Divorce County Courts (Northern Ireland) Order 1981.

[310]Matrimonial Causes (Northern Ireland) Order 1978, Art. 45(1)(a).

[311]*Ibid.*, Art. 45(1)(b).

2.96 Article 49(2) of the Matrimonial Causes (Northern Ireland) Order 1978 provides, as does the law of England and Wales and of Scotland,[312] that the only bases of jurisdiction in proceedings for divorce, nullity and judicial separation, including ancillary proceedings relating to custody under the Order, are the domicile or habitual residence of the husband or wife. Under this provision the High Court and divorce county courts have jurisdiction to entertain these proceedings if either of the parties to the marriage is domiciled in Northern Ireland on the date when the proceedings are begun or was habitually resident in Northern Ireland throughout the period of one year ending with that date.[313]

2.97 The Matrimonial Causes (Northern Ireland) Order 1978 also contains detailed provisions whereby a Northern Ireland court is required or enabled to stay proceedings in certain circumstances. As in England and Wales,[314] a stay in these circumstances may affect custody orders made in the proceedings. Where there are concurrent proceedings elsewhere in the British Isles, an existing custody order made in connection with the stayed proceedings ceases to have effect three months after the stay was imposed[315] unless, in cases of urgency, the court considers it necessary to make an order in connection with the stayed proceedings or to extend an existing order made in connection with those proceedings;[316] and where the court imposes a stay it has no power to make ancillary orders, except in urgent circumstances.[317] If the court in another jurisdiction in the British Isles makes an order for the custody or education of the child then any similar order of a Northern Ireland court ceases to have effect when the stay is imposed or when the order of the other court comes into effect.[318] However, the making of an ancillary order by another court in the British Isles has no effect on a previous order of a Northern Ireland court restraining a person from removing a child out of the jurisdiction or out of the custody, care or control of another person.[319]

(d) Financial provision under Article 29 of the Matrimonial Causes (Northern Ireland) Order 1978

2.98 The High Court and divorce county courts also have power under the Matrimonial Causes (Northern Ireland) Order 1978 to make orders for custody where an order for financial provision on the ground of failure to provide reasonable maintenance has been made in proceedings brought under Article 29 of that Order.[320]

2.99 The bases of jurisdiction of the High Court and divorce county courts to make a custody order in such proceedings are the domicile or habitual residence of either party to the marriage or the residence of the respondent.

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[312]See paras. 2.24 and 2.60 above.

[313]There are special provisions for nullity proceedings where either party has died (Art 49(3)(C)) and for the case when pending proceedings are followed by other proceedings in respect of the same marriage (Art. 49(6)).

[314]See para. 2.25 above.

[315]Matrimonial Causes (Northern Ireland) Order 1978, Art. 49(7) and Sched. 1, para. 11(2)(b).

[316]*Ibid.*, Sched. 1, para. 11(2)(c).

[317]*Ibid.*, Sched. 1, para. 11(2)(a) and (c).

[318]*Ibid.*, Sched. 1, para. 11(3)(a).

[319]Sched. 1, para. 11(3).

[320]Matrimonial Causes (Northern Ireland) Order 1978, Art. 45(2).

The court has jurisdiction if (i) the applicant or respondent is domiciled in Northern Ireland on the date of the application, or (ii) the applicant has been habitually resident there throughout the period of one year ending with that date; or (iii) the respondent is resident there on that date.[321]

(e) Financial provision under the Domestic Proceedings (Northern Ireland) Order 1980

2.100 Jurisdiction to hear an application for an order in domestic proceedings under the 1980 Order (which corresponds to the Domestic Proceedings and Magistrates' Courts Act 1978[322] in England and Wales) is governed by the provisions of Article 32 of that Order. Without prejudice to the general rules governing the jurisdiction exercisable by a court of summary jurisdiction in a civil matter (now set out in Article 77(3) of the Magistrates' Courts (Northern Ireland) Order 1981), Article 32(1) bases the court's jurisdiction on the fact that either the applicant or the respondent resides within the county court division which includes the petty sessions district for which the court sits.

2.101 Where the respondent is resident in England and Wales or Scotland the jurisdiction of the Northern Ireland court is not exercisable unless (in addition to the applicant's residence in Northern Ireland) the parties last ordinarily resided together as husband and wife in Northern Ireland.[323]

2.102 Apart from the provision that the jurisdiction of a court of summary jurisdiction is exercisable notwithstanding that any party to the proceedings is not domiciled in Northern Ireland,[324] Article 32 does not provide an exhaustive statement of the circumstances in which magistrates may assume jurisdiction in domestic proceedings. No provision for jurisdiction is made in the Order where the respondent is resident outside the United Kingdom.[325]

(f) Adoption

2.103 Adoption proceedings under the Adoption Act (Northern Ireland) 1967 can involve orders disposing of or affecting the custody of a child. The relevant provisions are as follows:

(*a*) the court may, on an application for an adoption order, make an interim order giving the applicant custody of the child for a period not exceeding two years;[326]

(*b*) the court may make a provisional order vesting in the applicant parental rights and duties pending the child's adoption abroad.[327]

Jurisdiction to make an adoption order is defined in some detail. The applicant, or one of the applicants if the application is by a married couple, must be (a) domiciled anywhere in the United Kingdom, the Isle of Man or the Channel

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[321]Matrimonial Causes (Northern Ireland) Order 1978, Art. 49(5).
[322]See paras. 2.28 *et seq.* above.
[323]Art. 42(2)(a).
[324]Art. 32(4).
[325]See paras. 2.30–2.31 above.
[326]Adoption Act (Northern Ireland) 1967, s.8(1).
[327]Adoption Act (Northern Ireland) 1967, s.38(1).

Islands and resident in Northern Ireland or (b) domiciled, but not ordinarily resident, in Northern Ireland,[328] or, if the application is for a "Convention adoption order" (as defined in the Adoption (Hague Convention) Act (Northern Ireland) 1969), must be a national of the United Kingdom or of a Convention country residing in Northern Ireland or be a United Kingdom national residing in a Convention country or a specified country.[329] In addition, if the application is for a Convention adoption order, the child in question must be a United Kingdom national or a national of a Convention country who resides in Northern Ireland, a specified country or a Convention country. The child must have been in the care and possession of his prospective adopters for a specified period.[330] An application for an adoption order may be made in the High Court or (except where a Convention adoption order is applied for) at the option of the applicant to any county court within the jurisdiction of which either the applicant or the child resides at the date of that application.

(2) *The basis of jurisdiction to vary custody orders*

2.104 It is clear that courts have power to vary custody orders made in the above proceedings. However, as in England and Wales,[331] it is not entirely clear whether and if so upon what basis a court would be entitled to assume jurisdiction to vary an order if the applicant was no longer able to satisfy the jurisdictional requirements on the basis of which the original order was made and no other basis of jurisdiction was appropriate, for example, because the applicant or the respondent was abroad. It would seem likely that a court would be able to vary its own order in these circumstances, but there appears to be no specific provision to this effect in relation to orders made in the course of the proceedings discussed above, save in the case of domestic proceedings in courts of summary jurisdiction. Article 26 of the Domestic Proceedings (Northern Ireland) Order 1980 declares that jurisdiction to vary a custody order is exercisable notwithstanding that the proceedings have been brought by or against a person residing outside Northern Ireland.

(3) *The enforcement of custody orders*

(a) Enforcement of custody orders made in Northern Ireland

2.105 The making of an order relating to the custody of a child does not of itself under Northern Ireland law entitle the person in whose favour the order has been made to enforce his or her legal rights. This does not mean that such an order is by itself without effect, for if it directs that the child in question shall not be removed from Northern Ireland without leave of the court (as is normally the case in custody orders made under the Matrimonial Causes (Northern Ireland) Order 1978), there may be certain practical consequences.[332]

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[328]Adoption Act (Northern Ireland) 1967, s.1(1).

[329]Adoption (Hague Convention) Act (Northern Ireland) 1969, s.1. "Specified country" is defined in s.12.

[330]Adoption Act (Northern Ireland) 1967, s.3(1).

[331]See para.2.33 above.

[332]See paras. 6.9–6.15 below.

2.106 In order to enforce a Northern Ireland custody order itself, however, further proceedings have to be taken. A person seeking to enforce such an order may apply-

(i) for an injunction or prohibitory order;

(ii) for an order for delivery of the child;

(iii) to have the person in breach of the order committed for contempt of court; or

(iv) in unusual circumstances, for *habeas corpus* or sequestration.

In addition to these methods of enforcement by legal process, certain administrative measures, designed to prevent the removal of the child from the jurisdiction of the court or to trace the whereabouts of a child, may be taken in co-operation with the police and Government departments.[333]

(i) Injunctions

2.107 The court has an inherent power, delegated by the Sovereign, as *parens patriae*, to act for the protection of children. In addition, the court has specific powers in matrimonial and wardship proceedings to grant injunctions in relation to custody orders made in those proceedings. Unless otherwise directed, any order relating to the custody or care and control of a child in matrimonial proceedings must provide for the child not to be removed out of Northern Ireland without leave of the court,[334] and it is clear that the High Court has a general power in any case where it has made a custody order to support that order as may be just and convenient by an injunction, and that the county court enjoys the same power.[335]

(ii) Order for delivery

2.108 On or after the making of a custody order by the High Court or a county court, the court may also order a person to deliver the child to the person to whom it has given custody.[336] An order to hand over the child must specify the time within which this is to be done.[337]

(iii) Committal for contempt

2.109 In Northern Ireland a person commits a contempt of court if he obstructs the court in the administration of the affairs of a child over whom it exercises a protective jurisdiction or if he disobeys an order relating to the custody of a child. The kinds of conduct which constitute contempt of court are similar to those so characterised in England and Wales.[338]

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[333]See Part VI below.

[334]Matrimonial Causes Rules (Northern Ireland) 1981, r.79(2). The court may also make such an order during the course of matrimonial proceedings: M.C.R. (Northern Ireland) 1981, r.79(1). See also powers of magistrates in Art. 38 of the Domestic Proceedings (Northern Ireland) Order 1980.

[335]County Courts (Northern Ireland) Order 1980, Art. 14(1).

[336]See also Domestic Proceedings (Northern Ireland) Order 1980, Art. 37 by which a magistrates' custody order under the Order has this effect when served on the person with actual custody.

[337]R.S.C. (Northern Ireland) 1980 Order 42, r.4(1).

[338]See para. 2.38 above.

2.110 An application for a committal order in respect of an alleged contempt in wardship proceedings must be served personally on the person sought to be committed, unless the court otherwise directs.[339] If the court is satisfied beyond all reasonable doubt that the contempt has been proved, it may make an order of committal or sequestration.[340] Where the court makes a committal order the judge will issue a warrant for the arrest of the contemnor and his committal to prison.[341] Warrants for the arrest of contemnors and their committal to prison are normally executed by an official from the Office of Care and Protection acting with the assistance of the police. An order of committal is a drastic remedy and it is only likely to be used when the contempt is of a serious nature. If the court does make a committal order, it has power to suspend it.[342]If the court declines to make a committal order it may fine the contemnor or dismiss the application and make the contemnor pay the costs.

2.111 It should also be mentioned that although the remedy of committal for contempt is available in the High Court and county court, it is not available to secure compliance with an order of a magistrates' court. A magistrates' court may, however, impose a financial penalty (not to exceed £1,000) or a period of imprisonment (not to total more than 2 months) on a person who fails to comply with an order it has made relating to the actual custody of a child.[343]

(iv) Habeas Corpus and sequestration

2.112 In theory a parent or guardian entitled to the custody of a child may apply *ex parte* in Chambers to a Judge of the Family Division for a writ of *habeas corpus ad subjiciendum* relative to the custody, care or control of the child where the child is detained from him,[344] on the basis that an unlawful detention of a child is equivalent to his unlawful imprisonment. In practice, proceedings by way of *habeas corpus* in relation to the custody of children are extremely rare.

2.113 It is also possible to enforce a custody order by means of an order of sequestration by which the High Court or county court orders the property of the contemnor to be placed in the hands of sequestrators who manage the property and who receive the rent and profits.[345] Although this remedy is rarely employed, sequestration is likely to be most useful against a contemnor who is abroad but who has property in Northern Ireland.

(b) Treatment in Northern Ireland of custody orders made elsewhere

2.114 Although various procedures exist for the enforcement in Northern Ireland of custody orders made by Northern Ireland courts, under the present

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[339]The court may dispense with personal service in cases of urgency: R.S.C. (Northern Ireland) 1980 Order 52, r.4(3).

[340]On sequestration see paras. 2.112–2.113 below.

[341]The term of the committal is now governed by statute: see s.14 of the Contempt of Court Act 1981 (as applied to Northern Ireland by s.18 of that Act) and the County Courts (Penalties for Contempt) Act 1983.

[342]R.S.C. (Northern Ireland) 1980 Order 52, r.9.

[343]Magistrates' Courts (Northern Ireland) Order 1981, Art. 112.

[344]R.S.C. (Northern Ireland) 1980 Order 54, r.1(2) and Order 1, r.12.

[345]Judgments Enforcement (Northern Ireland) Order 1981, Art. 111.

law a custody order made in another part of the United Kingdom is not automatically entitled to recognition by courts in Northern Ireland nor capable of direct enforcement by those courts. This contrasts with the recognition, throughout the United Kingdom, of a decree of divorce or judicial separation granted under the law of any part of the British Isles,[346] and with the procedure whereby maintenance orders made in one part of the United Kingdom may be registered for the purpose of enforcement in any other part of the United Kingdom.[347] Where the custody of a child is concerned, a court in Northern Ireland will not be deterred from making a contrary order in respect of a child who is already the subject of a custody order made in another jurisdiction (whether elsewhere in the United Kingdom, or other parts of the British Isles or overseas) if, having regard to the welfare of the child, the court considers it appropriate to do so.[348] If, on the other hand, the Northern Ireland court is satisfied that the welfare of a child is protected by an existing order, it will not intervene. This is particularly likely to be the course adopted where the prior order was made in another jurisdiction in the United Kingdom and the child is in Northern Ireland having been "kidnapped" by the parent or guardian.[349]

2.115 In deciding whether or not to facilitate the implementation of a foreign custody order, a Northern Ireland court takes account of two main factors. The first is that under Northern Ireland law, as under most other Western European legal systems, an order providing for the custody of a child cannot in its nature be final and is at all times subject to review by the court which made it.[350] The second is that, in any proceedings in which the custody or upbringing of a child is in question, the welfare of the child is the first and paramount consideration.[351] The weight or persuasive effect of a foreign custody order depends on the circumstances of the particular case which the court has to decide,[352] subject always to the welfare of the child being treated as paramount.

2.116 The fact that one parent has taken a child from the custody of the other, possibly in defiance of a foreign custody order, is certainly one of the circumstances the court will take into account, but, as in England and Wales, the welfare of the child concerned will always be treated as the matter of first and paramount importance.

PART III

THE GENERAL NATURE AND SCOPE OF OUR RECOMMENDATIONS

A Introduction

3.1 In this Part of the report we indicate the general nature and scope of

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[346]Recognition of Divorces and Legal Separations Act 1971, s.1, as amended by the Domicile and Matrimonial Proceedings Act 1973, s.15(2).

[347]See Part II of the Maintenance Orders Act 1950, as amended.

[348]*J* v. *C* [1970] A.C.668.

[349]See Practice Direction dated 17 September 1982 issued by the Family Division Judge with the approval of the Lord Chief Justice of Northern Ireland.

[350]*McKee* v. *McKee* [1951] A.C.352.

[351]*J* v. *C.* [1970] A.C.668.

[352]*McKee* v. *McKee* [1951] A.C.352.

our recommendations, with reference first to the custody orders in question, secondly to the jurisdiction to make such orders, and thirdly to the recognition and enforcement of such orders thoughout the United Kingdom.

B The custody orders in question

(1) *General*

3.2 In general, we intend our scheme to cover court orders which are made in civil proceedings[353] and which relate to the custody of children, including education and access. We do not include orders placing a child in the care of a public authority, or orders made in connection with adoption proceedings.

(2) *The meaning of the term "custody" in our scheme*

3.3 As we have seen,[354] the term "custody" has no precise meaning in the laws of the United Kingdom countries. For this reason, rather than referring to the concept of custody generally or attempting to provide a definition of that concept, the draft Bill appended to this report refers to the orders relating to custody which may be made. However, the fact that custody jurisdiction in England and Wales and in Northern Ireland is predominantly statutory but in Scotland is based partly on statute and partly on common law has necessitated the use of different drafting techniques. For England and Wales and Northern Ireland[355] the draft Bill deals with custody inclusively, by reference to orders made under specific powers. For Scotland the draft Bill[356] deals with custody exclusively, by reference to orders made under *any* enactment or rule of law with respect to custody, etc. *other than* care orders, adoption orders, etc.. In both cases, however, the draft Bill also makes it clear that the orders in question include orders relating to such matters as access.[357]

(3) *Orders excluded from the scheme*

(a) Orders giving responsibilities to public authorities

3.4 We consider that orders giving responsibility for children to public authorities should be excluded from our scheme. Orders of these kinds, which include care orders, place of safety orders and supervision orders or requirements, are usually made in separate care or criminal proceedings.[358] There are, however, provisions in all three parts of the United Kingdom to the general effect that a court which has jurisdiction to make a custody order may (if it appears that there are exceptional circumstances making it impracticable or

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[353]See para. 1.29 above.

[354]Paras. 2.2–2.4 and 2.53–2.54 above.

[355]See clause 1(1)(a), (c) and (d).

[356]See clause 1(1)(b).

[357]See clause 1(1). On the separate question whether an order is a custody order or a variation of a custody order, see para. 4.30 below.

[358]Under Children and Young Persons Acts 1933–1969 (England and Wales), Social Work (Scotland) Act 1968 and Criminal Procedure (Scotland) Act 1975, and Children and Young Persons Act 1968 (Northern Ireland).

undesirable for the child to be entrusted to either of the parties to the application or to any other individual) make a care order[359] or (if it is desirable that the child should be under the supervision of an individual person) make a supervision order,[360] which may be in conjunction with a custody order.

3.5 We consider that orders which confer responsibilities for children on public authorities on the ground that care or control is not being adequately provided by a parent or other individual are different in kind from custody proceedings, which normally arise from disputes between parents or other relatives as to who is to look after the child in question. Moreover, the structure of existing child care law, including the jurisdictional rules and enforcement machinery, differs substantially from the structure of the law applying in custody proceedings, and could not easily be assimilated even if that course were to prove on further examination to be desirable. It does not follow that we consider the existing situation in relation to care proceedings to be necessarily satisfactory. However, the Department of Health and Social Security has recently established a Working Party on Child Care Law in response to the Report on Children in Care from the Social Services Committee of the House of Commons.[361]

3.6 In accordance with the general principles referred to in paragraph 3.4 above we intend to exclude supervision orders from our scheme so far as concerns jurisdiction and the recognition and enforcement of orders. However, where a supervision order has been made in conjunction with a custody order and a subsequent custody order in respect of the same child has been made by a court with jurisdiction in another part of the United Kingdom, it is obviously sensible that the original supervision order, like any custody order to which it is ancillary, should cease to have effect. We make recommendations for this purpose later in the report.[362]

(b) Custody orders made in adoption proceedings

(i) General

3.7 As explained above,[363] a court to which an application for an adoption order has been made may make an order giving the child's custody to the applicants for a limited period in connection with adoption, or may vest parental rights and duties in the applicants pending the child's adoption abroad. For the sake of completeness we have had to give consideration to these orders, though in practice few[364] are made. We think that the circumstances in which these orders may be made distinguish them from custody orders made in other contexts; they are interim orders made in connection with

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[359]See, e.g., Matrimonial Causes Act 1973, s.43 (as amended) (England and Wales); Matrimonial Proceedings (Children)Act 1958, s.10 (Scotland); Matrimonial Causes (Northern Ireland) Order 1978, Art. 46. In addition, care and control (usually on an interim basis) may be given to local authorities in wardship proceedings: see, e.g., *Re E. (S.A.)* [1984] 1 W.L.R. 156.

[360]See the provisions listed in clauses 6(6), 15(4) and 23(6) of the draft Bill annexed.

[361]Second Report (1983–84) H.C. 360. See especially para. 119.

[362]See para. 4.115 below.

[363]See paras. 2.32, 2.63 and 2.103.

[364]In 1983, in England and Wales none in the High Court and less than 50 in the county courts: Judicial Statistics Annual Report (1983) (1984), Cmnd. 9376, Table 4.3.

adoption, and as a step in adoption proceedings.[365] *We accordingly recommend* that they should be excluded from the scheme proposed. It would follow that nothing in our scheme would prevent a court in any part of the United Kingdom from making a custody order in adoption proceedings if there is jurisdiction to do so under existing law; and that a custody order made in such proceedings, although it would continue to be enforceable to the extent to which it is enforceable under existing law, would not be capable of recognition and enforcement in any other part of the United Kingdom under the scheme proposed.

(ii) Saving for custodianship orders

3.8 As mentioned in paragraph 2.22 above, a custodianship order may be made on an application for adoption in England and Wales.[366] This occurs in consequence of a direction under section 37 of the Children Act 1975 that the application for adoption should be treated as if it had been made by the applicant under section 33 (i.e. for a custodianship order).[367] In such a case, the application for adoption has been effectively rejected, and accordingly a custodianship order made in these circumstances should fall within our scheme both as to jurisdiction to make the order initially and for recognition and enforcement purposes.[368] It also follows that, if the child later becomes habitually resident in another United Kingdom country, the courts of that country would be able to make a custody order modifying or completely superseding the custodianship order made in the adoption proceedings.

3.9 Since the jurisdictional rules relating to adoption proceedings are not the same as those we are recommending for the making of orders relating to custody generally (including custodianship orders), it would theoretically be possible for the court which issued a direction under section 37[369] to lack jurisdiction under our scheme to make a custodianship order under section 33.[370] It is very unlikely, however, that such a situation would arise in practice, since the child would have his home with the applicant and would therefore be habitually resident in the same place as the applicant. We do not consider that special legislative provision need to be made to cover this remote contingency.

C The bases of jurisdiction to make custody orders

(1) *Our recommended approach*

3.10 In framing jurisdictional rules for the purposes of our scheme we have set ourselves the following main objectives-

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[365]There is provision in the adoption legislation for the recovery of a child who is removed from the custody of the applicant.

[366]There is no provision for custodianship orders in Scotland or Northern Ireland, but in Scotland equivalent orders come instead under the head of custody orders: Children Act 1975, s.47.

[367]Similar provision is made for Scotland in section 53 of the 1975 Act, under which the court may direct that the application be treated as if it had been made for custody.

[368]For Scotland, this will necessitate repeal of that part of section 53 of the 1975 Act which expressly provides that the court should have jurisdiction to make a custody order on the application for adoption notwithstanding that it would not have had jurisdiction to do so if the application had been made for custody itself.

[369]Or in Scotland section 53.

[370]Or in Scotland a custody order under section 47.

(i) The rules should be uniform throughout the United Kingdom, and should be of general application and not confined to "United Kingdom cases".[371]

(ii) The rules should be designed so as to reduce the likelihood of courts in more than one United Kingdom country having concurrent jurisdiction to make custody orders.

(iii) The rules should normally result in the judicial forum being in the place with which the child has the closest long-term connections.

(iv) The rules should be clear and systematic.

3.11 Our reasons for adopting the first two objectives are as follows. Given the policy of requiring custody orders made in one part of the United Kingdom to be recognised and enforceable in another part, it is clearly desirable to ensure that throughout the United Kingdom the bases of jurisdiction to make such orders are uniform. Nevertheless, the establishment of unified rules of jurisdiction throughout the United Kingdom would not necessarily resolve the underlying problem. If, for example, it were provided that the courts of a part of the United Kingdom have jurisdiction if the parents or the child is resident there, there could still be a conflict: when proceedings were begun, the father might be resident in England, the mother in Scotland, and the child in Northern Ireland. It follows that any jurisdictional rules we devise should not only be uniform, but should so far as possible result in the courts of only one country having jurisdiction at a particular time.

3.12 As to the third objective, it seems to us important to ensure that the bases of jurisdiction point to a forum which is appropriate in the circumstances of each case: clearly a major consideration is whether the forum is the one with which the child, and preferably the other persons concerned with the child, have the most substantial connection. Not all the present jurisdictional rules are acceptable when measured by this standard.

3.13 As regards the fourth objective, it is apparent from our account of the existing law in Part II of the report that the existing bases of jurisdiction in custody matters are unsystematic, often unclear, and confusing. In some cases the jurisdiction is a creature of the common law, and is based upon concepts (such as allegiance) which are no longer appropriate for the purpose. Even where the jurisdiction is conferred by relatively recent statutes (for example, the Guardianship of Minors Act 1971 and the Domestic Proceedings and Magistrates' Courts Act 1978) these statutes made no significant change in the provisions of earlier legislation. No general revision of the jurisdictional rules has ever been undertaken.[372]

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[371]See paras. 1.12–1.13 above.

[372]The Maintenance Orders Act 1950 did revise the jurisdictional rules relating to courts of summary jurisdiction in England and Wales and in Northern Ireland, and sheriff courts in Scotland but, although it altered the law as regards jurisdiction in custody matters ancillary to maintenance proceedings, the main objective was apparently to relieve a woman whose husband was in another United Kingdom country from having to go there in order to start maintenance proceedings: see *Hansard* (H.L.), 4 April 1950, vol. 166, cols. 728–730.

3.14 The objectives we have adopted involve two specific consequences. First, the introduction of uniform bases of custody jurisdiction throughout the United Kingdom must involve the rejection of all existing grounds other than those provided for in the scheme. We deal with this point in more detail in Part IV[373] of the report. Secondly, the objectives involve the rejection of two proposals which were raised in the consultation paper,[374] namely (a) that there should be a jurisdictional system based on the identification of a "pre-eminent court" and (b) that jurisdiction should be capable of being conferred by agreement of the parties. We deal with these two proposals in the paragraphs which follow.

(2) *Two proposals rejected*

(a) A "pre-eminent court" jurisdiction

3.15 In our consultation paper[375] we raised the question whether, rather than by altering the established bases of jurisdiction of the courts of the United Kingdom, the problem of conflicts of jurisdiction could largely be met if courts, while remaining entitled to make custody orders on the various existing bases, were bound in the event of a conflict of jurisdiction to defer to a particular court. This "pre-eminent court" would be determined by rules of priority applying throughout the United Kingdom.

3.16 The general view expressed on consultation was that this approach should not be adopted. We agree, for the following principal reasons:

(*a*) it is better that the law should prevent conflicts of jurisdiction rather than offer a cure after a conflict of jurisdiction has arisen; and

(*b*) the retention of an assemblage of jurisdictional rules provides a parent or other adult with the opportunity of seeking a fresh hearing in another jurisdiction.

We do not, therefore, recommend the retention of the existing bases of jurisdiction and the resolution of conflicts between courts by giving priority to one of them.

(b) Jurisdiction by consent

3.17 The Hodson Committee[376] considered, but rejected, a proposal that—

> ". . . the parties concerned should be at liberty to confer jurisdiction by consent on the courts of any country in which the child is not at the time ordinarily resident."[377]

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[373]See paras. 4.36–4.57, 4.66–4.70, 4.74–4.83.
[374](1976) Working Paper No. 68/Memorandum No. 23, paras. 2.12–2.16 and 3.79–3.87.
[375](1976) Working Paper No. 68/Memorandum No. 23, paras. 2.12–2.16.
[376]See para. 1.8 above.
[377](1959) Cmnd. 842, para 52.

We invited views on this question in our consultation paper,[378] which stated the arguments put for and against a consent jurisdiction in custody matters. The main argument in favour of such a jurisdiction was that the parties would be able to proceed in a forum convenient to *both* of them and that this would save time and expense. The arguments against a consent jurisdiction were stated as follows—

(*a*) Societies, through their legal systems, take a special interest in family matters and, to ensure that this interest is respected, do not normally permit the parties to choose freely where such matters will be decided.[379]

(*b*) This approach may be adopted by other legal systems and it is open to question whether a consent jurisdiction would be recognised abroad.

(*c*) The range of persons with a legitimate interest in the custody of children may extend beyond their parents and may include other relatives, and even local authorities. It would not always be easy to ensure that all appropriate consents had been obtained.

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

3.18 The majority of those who commented considered that the arguments against the adoption of a consent jurisdiction were more persuasive than those in its favour. We are also influenced by the facts that a consent jurisdiction would not necessarily take account of the child's interests, that a party might be subjected to emotional or financial pressure to accept the jurisdiction of a particular court, and that there must be few cases where the parties could agree on jurisdiction but not about the merits. For these reasons we do not recommend that a consent jurisdiction should be introduced in matters relating to the custody of children.

D Recognition and enforcement of custody orders

3.19 As we have pointed out,[380] there is no provision for the reciprocal recognition and enforcement of custody orders within the constituent parts of the United Kingdom. Our recommendations on these matters are contained in Part V of the report. In framing these recommendations our main objectives have been effectiveness and simplicity. In broad terms, our proposals are that the custody orders of the courts of each country should be recognised in the other countries but should only be enforceable if centrally registered in the courts of the receiving country and should only be enforced through the process of the receiving country.

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[378](1976) Working Paper No. 68/Memorandum No. 23, para. 3.87.

[379]Under the law applicable throughout the United Kingdom, for example, the courts cannot assume jurisdiction in proceedings for divorce, judicial separation or nullity of marriage on the basis of the parties' consent. See Domicile and Matrimonial Proceedings Act 1973, ss.5, 7 and 8 and Matrimonial Causes (Northern Ireland) Order 1978, Art. 49.

[380]See para. 1.7 above.

PART IV

BASES OF CUSTODY JURISDICTION

A Introduction

4.1 In place of the present multiplicity of jurisdictional rules applicable in the three parts of the United Kingdom, we propose a new scheme consisting of uniform bases of jurisdiction and rules governing the priority and interrelationship of those bases.

4.2 We propose that in the three parts of the United Kingdom the jurisdiction of courts to make custody orders should be founded upon one of the following bases:

1. jurisdiction in divorce, nullity and judicial separation;
2. habitual residence of the child;
3. emergency; and
4. physical presence of the child.

4.3 These proposed bases of jurisdiction would not of themselves remove the possibility of jurisdictional conflicts, for a basis might exist in more than one United Kingdom country: for example, a child's parents might be involved in divorce proceedings in England and Wales and the child himself might be habitually resident in Scotland and physically present in Northern Ireland. If conflicts are to be avoided, it will be necessary to know in which country the courts are to exercise custody jurisdiction. Our scheme includes provisions for determining the priority of the bases of jurisdiction. Broadly speaking, we propose that, subject to emergencies, jurisdiction in divorce, nullity of marriage or judicial separation should have priority over the other bases and that the basis of habitual residence should have priority over the basis of physical presence. In the example given, therefore, the court entitled to exercise custody jurisdiction would be the divorce court in England and Wales; in the absence of divorce proceedings the court entitled would be the court of habitual residence in Scotland; and in the absence of divorce proceedings and habitual residence in the United Kingdom the court entitled would be the court of physical presence in Northern Ireland. If, however, in addition to the child's presence in Northern Ireland an emergency existed, the Northern Ireland courts would be entitled to exercise jurisdiction despite the existence of jurisdictional bases in both England and Wales and Scotland.

4.4 Cases might arise in which it would be inappropriate for jurisdiction to be exercised on a basis which under our scheme would ordinarily have priority over another basis. The scheme accordingly provides machinery by which jurisdiction may pass from the courts of one United Kingdom country to the courts of another.

4.5 The courts in all three United Kingdom countries have power to vary their custody orders and to revoke or recall them.[381] Our scheme takes account

[381] See paras. 2.33, 2.74 and 2.104 above.

of these powers and makes specific provision regarding their exercise where the courts in another United Kingdom country have acquired jurisdiction to make a fresh custody order.

B Recommended bases of jurisdiction

(1) *Jurisdiction in proceedings for divorce, nullity and judicial separation (the "divorce basis")*

4.6 In the three parts of the United Kingdom, jurisdiction in relation to divorce, nullity or judicial separation includes the jurisdiction to determine issues as to the custody of or access to children of the family. The grounds on which courts in the United Kingdom may assume jurisdiction in divorce, nullity or judicial separation were laid down in the Domicile and Matrimonial Proceedings Act 1973, and are the same (subject to some variations in terminology) in all three United Kingdom countries.[382] These grounds are, briefly, that at the commencement of the proceedings one of the parties to the marriage must (a) be domiciled in the United Kingdom country concerned or (b) have been habitually resident in that country throughout the previous year. The Act also makes provision for avoiding conflicts by a system of mandatory or discretionary suspension of proceedings in one United Kingdom country if there are concurrent proceedings in another United Kingdom country or elsewhere. Consequently, conflicts of jurisdiction relating to dissolution of marriage rarely arise, and if they do they are resolvable by the procedure laid down in the 1973 Act.

4.7 In our consultation paper,[383] we proposed that, where a United Kingdom court has jurisdiction in proceedings for divorce, nullity or judicial separation, it should continue to have jurisdiction to make custody orders in the course of those proceedings. This proposal was generally approved, and we consider that it should be adopted. The proposal is based on two main considerations. First, we think it is in the interests of the child's welfare and generally to the advantage of all concerned that a court which is dissolving or annulling a marriage or effecting a judicial separation should be able to deal with the affairs of the family as a whole. Secondly, to hold separate proceedings in every case in which jurisdiction to make a custody order would exist in a part of the United Kingdom other than that in which the divorce court is situated would often cause substantial inconvenience and expense for the parties and impose heavy extra burdens on the courts and on the funds available for legal aid.

4.8 The practical application of this general principle raises a problem as to when, for the purpose of custody jurisdiction, proceedings for divorce, nullity or judicial separation should be regarded as coming to an end. The effect of existing law in all three United Kingdom countries is that once the court is duly seised of the matrimonial dispute, it *retains*[384] jurisdiction to deal with

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[382]See paras. 2.24, 2.60 and 2.96. In Northern Ireland the 1973 Act has been superseded by the Matrimonial Causes (Northern Ireland) Order 1978 but without any change of substance.

[383](1976) Working Paper No. 68/Memorandum No. 23, para. 2.20(i).

[384]For the special position where the matrimonial proceedings are dismissed, see para 4.98 below.

questions relating to custody of and access to the children. This jurisdiction is retained however long ago the divorce was granted, however distant the connection of the child with the country in which the divorce took place, and however close and long-standing the child's connection with some other part of the United Kingdom. The question we have to answer is whether, for the purposes of our scheme, the jurisdiction of the divorce court to make custody orders should continue so long as the child is within the appropriate age limit, i.e. 18 in England and Wales and Northern Ireland and 16 in Scotland.

4.9 We have reached the conclusion that a court dealing with divorce, nullity or judicial separation proceedings should remain entitled to exercise custody jurisdiction until the child attains the appropriate age, even where the child or his parents are or have become habitually resident elsewhere in the United Kingdom. Our main reason for reaching this conclusion is the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child's welfare or against those of the parents.

4.10 Nevertheless, we recognise that in some cases it will be advantageous for issues as to custody and access to be determined by a court in a United Kingdom country other than that in which the proceedings for dissolution of the marriage are brought, and we make recommendations for this purpose later in this Part of the report.[385]

4.11 We therefore *recommend* as follows—

> Where a court in the United Kingdom has jurisdiction in proceedings for divorce, nullity of marriage or judicial separation, that court should continue to have jurisdiction to make custody orders in the course of those proceedings.[386]

(2) *Habitual residence of the child (the "habitual residence basis")*

4.12 In our consultation paper we examined the present tests of jurisdiction based on nationality or allegiance, domicile, "home" and physical presence. We considered that none of these grounds was suitable for adoption as a general test for assuming jurisdiction in custody proceedings. We concluded that the appropriate general test must be one based on residence and, in particular, the residence of the child.[387]

4.13 Our conclusion in favour of a residence-based test was widely accepted on consultation and we adhere to it. The main problem debated was, rather, which residence test was most appropriate. A body of opinion was in favour of adopting the concept of "ordinary residence" either in addition to or in substitution for the concept of "habitual residence". In part, the reluctance

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[385]See para. 4.97 below.

[386]In relation to Scotland, we are also proposing a consequential amendment to s.9 of the Conjugal Rights (Scotland) Amendment Act 1861 which will confer a statutory power on the court to make orders after final decree of divorce or separation instead of the court's having to rely on the direction inserted in the interlocutor reserving leave to apply. See draft Bill, clause 42(1) and Sched. 1, para. 1. See also para. 2.74 above, n.260.

[387](1976) Working Paper No. 68/Memorandum No. 23, paras. 3.40–3.59, 3.78.

to rely on habitual residence alone was based on the possibility then existing that "habitual residence" would not find favour in the international context. This has not proved to be the case; indeed the contrary is true.[388] Other arguments advanced were that the term "habitual residence" had not been clearly defined and that the term "ordinary residence" had been widely used in the past.

4.14 The term "ordinary residence" has been retained in relatively recent legislation relating to family matters, namely the Domestic Proceedings and Magistrates' Courts Act 1978.[389] This Act, however, incorporates previous legislation, including the relevant jurisdictional criteria. The Act was based on a Bill annexed to the Law Commission's Report on Matrimonial Proceedings in Magistrates' Courts,[390] which did not review possible alternatives to the existing jurisdictional rules.

4.15 We remain of the view that the child's *habitual residence* should be adopted as the normal test of jurisdiction in custody proceedings other than those ancillary to proceedings for divorce, nullity or judicial separation. Recent case law[391] suggests that there is no substantial difference between "ordinary" and "habitual" residence. However "ordinary residence" frequently occurs in tax and immigration statutes, and we think that its use in the wholly different context of family law is a potential source of confusion.[392] As a general test of jurisdiction, habitual residence points better than the tests of nationality and domicile to the forum with which the child and, in the majority of cases, the other persons concerned have the closest long-term connections.[393] It is not unfamiliar to the legal systems of the United Kingdom. Indeed it has now become a standard connecting factor in family law matters and is used as such in most statutes.[394] Although the meaning of the term is not defined in those statutes, it has not given rise to difficulty.[395] Habitual residence, moreover, is a criterion of judisdiction which is likely to be recognised abroad. It has been widely used in international conventions including the Council of Europe Convention and the Hague Convention.[396] Neither of these Conventions seeks to establish common grounds for the assumption of jurisdiction, but both may be said indirectly to import a jurisdictional criterion.

4.16 We propose that, in accordance with the general rule applying to jurisdictional tests, the child's habitual residence should be determined as at the date of the commencement of proceedings.[397] If, however, the habitual residence has been changed in contravention of a United Kingdom court order

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[388]See para. 4.15 below.

[389]Sect. 30(1). See para. 2.29 above.

[390](1976) Law Com. No. 77. See para. 2.29 above.

[391]See *R.* v. *Barnet L.B.C. Ex parte Shah* [1983] 2 A.C. 309, 340, 342; *Kapur* v. *Kapur, The Times*, 28 April 1984.

[392] Similar reasoning is deployed in para. 11 of the Seventh Report of the Private International Law Committee (1963) Cmd. 1955.

[393]See para. 3.10 above.

[394]See, for example, Recognition of Divorces and Legal Separations Act 1971, s.3(1)(a), Domicile and Matrimonial Proceedings Act 1973, ss.5–8 and Children Act 1975, s.24.

[395]See *Cruse* v. *Chittum* [1974] 2 All E.R. 940.

[396]See paras. 1.16–1.18 above.

[397]For the detailed provisions required, see para. 4.27 below.

or without the agreement of every person having a legal right to determine the child's residence, the United Kingdom court which but for the change would have had jurisdiction on the basis of habitual residence should, we think, retain that jurisdiction if proceedings are commenced within one year of the change. These proposals should help to prevent the evasion of jurisdiction by the removal or retention of the child.

4.17 It will, of course, be necessary for a court, when invited to assume jurisdiction on the ground of habitual residence, to determine as a question of fact whether the child is habitually resident in the United Kingdom country concerned. We do not think, however, that under our proposals such cases will ordinarily give rise to difficulty or to conflict between courts in different United Kingdom countries.

4.18 *Our recommendations* on habitual residence as a basis of custody jurisdiction are, therefore, as follows—

(1) The primary basis of jurisdiction to make custody orders in proceedings other than for divorce, nullity or judicial separation should be the habitual residence of the child within the United Kingdom country concerned on the date of the commencement of proceedings in that country.

(2) Where the habitual residence of a child in a United Kingdom country has been changed by the child or by someone else,

(*a*) in contravention of an order made by a United Kingdom court, or

(*b*) without the consent of the person or persons having a legal right to fix the child's residence,

then the United Kingdom court which would have had jurisdiction on the habitual residence basis should retain jurisdiction on that basis in proceedings brought within one year from the date of the change of residence.

(3) *Emergency jurisdiction (the "emergency basis")*

4.19 In our consultation paper[398] we provisionally proposed that courts should retain a power to intervene immediately where this was necessary for the *protection* of the child, even if the only jurisdictional ground for such intervention was the child's physical presence. Our provisional proposal was coupled with a further proposal that such an emergency order should be liable to be superseded at any time by the courts of the country in which the child is habitually resident or by a court in which proceedings for divorce, nullity or judicial separation of the parents are continuing. These proposals received general support during our consultations, and we adhere to them. Where a child is in immediate danger, his protection must take precedence over procedural considerations. Moreover, the existence of such a danger would normally become known in the place where the child is, and the evidence supporting its existence would normally first become available there. It would

[398](1976) Working Paper No. 68/Memorandum No. 23, para. 3.95.

remain open to the court with primary jurisdiction to come to a different conclusion at a later stage and after a fuller investigation but, as we recognised in our consultation paper,[399] this does not affect the need for swift action on an emergency basis.

4.20 In England and Wales and in Northern Ireland, the existing jurisdiction to deal with emergency cases of this kind is exercised by the High Court in wardship.[400] We do not propose any change in this respect. In Scotland both the Court of Session and the sheriff court exercise an emergency jurisdiction.[401] Again, we do not propose any change apart from a statutory re-statement and (in relation to the sheriff court) a clarification of the basis of this jurisdiction.

4.21 A common way of dealing with cases where a child is thought to need protection is to invoke the jurisdiction in the Children and Young Persons Acts or the Social Work (Scotland) Act 1968 to make a place of safety order, or to place the child in the care of a local authority; but, as we have explained,[402] "care" jurisdiction is different in kind from custody jurisdiction, and is not necessarily appropriate where the issue arises between the parents.

4.22 *We accordingly recommend* that there should be a basis of jurisdiction to make custody orders in proceedings other than for divorce, nullity or judicial separation where at the appropriate date[403] a child is physically present in the United Kingdom country concerned and the immediate intervention of a court of that country is necessary for the protection of that child; and that, for this purpose,

(1) in England and Wales and in Northern Ireland the High Court, and in Scotland the Court of Session, should retain the emergency jurisdiction to intervene which they possess under the existing law;

(2) in Scotland, it should be made clear that the sheriff court has a similar jurisdiction.

(4) *Physical presence of the child (the "residual presence basis")*

4.23 In our consultation paper[404] we excluded physical presence as a *general* ground of jurisdiction in custody cases, mainly because it would not necessarily point to a court with which the child or any of the litigants are likely to have long-term connections and because it would tend to encourage rather than prevent the abduction of children and consequent conflicts of jurisdiction. Those views were supported by the consultees who offered comments on the matter, and we see no reason to depart from them.

4.24 It is a different question whether the physical presence of the child should be a basis of jurisdiction in cases in which the other bases would be

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[399] *Ibid.*, paras. 3.92–3.94.

[400] See paras. 2.7–2.9 and 2.90–2.92 above. Under s.38 of the Matrimonial and Family Proceedings Act 1984 proceedings in England and Wales under a wardship order will be transferable to the county court.

[401] See paras. 2.58 and 2.64 above.

[402] See para. 3.5 above.

[403] For the detailed provisions required, see paras. 4.27–4.28 below.

[404] (1976) Working Paper No. 68/Memorandum No. 23, paras. 3.58–3.59.

inapplicable. We have already identified one of those special cases, namely where it is necessary for the court to act in an emergency and to make such immediate order as may be necessary for the protection of the child.[405] It was, however, suggested to us on consultation that there was another special situation where the physical presence of the child should found jurisdiction, namely where no other basis of jurisdiction was available in any other part of the United Kingdom. English consultees, in particular, suggested that it would sometimes be impossible, or at least unduly harsh, to require the plaintiff (or pursuer) in such a case to invoke the jurisdiction of the courts of the foreign habitual residence of the child.

4.25 Examples of such cases were given to us. Although in some of them it appeared to us that, under our proposals, United Kingdom courts would possess jurisdiction either on the basis of the child's habitual residence or on the basis that an order should be made for the immediate protection of the child, it seemed that there might be some cases where neither the "habitual residence" nor the "emergency" test could suitably be invoked. Such cases include the following—

(a) the child is taken from the parent entitled to custody in a foreign country and brought to a United Kingdom country. In such a case the child might not be habitually resident anywhere in the United Kingdom. In this situation, it seems reasonable that the parent so entitled should be able to apply to the courts of any United Kingdom country where the child is for the time being present for the return of the child, since otherwise he might be deprived of any effective remedy;[406]

(b) the child, though present in the United Kingdom, is habitually resident in a country which does not accept habitual residence as a ground for jurisdiction, and is not prepared to assume jurisdiction on any other ground. In such a case a United Kingdom court may be the only possible forum;

(c) the child, though present in the United Kingdom, is habitually resident in a country which applies criteria for the determination of custody issues which are contrary to United Kingdom public policy, for example which automatically grants sole custody to the father irrespective of what the child's welfare requires. If, in such a case, a foreign order were in fact contrary to the child's welfare as perceived by a United Kingdom court, that court would refuse to enforce it; but it should be possible, in that event, for the court to make a custody order on the basis of the child's physical presence.

4.26 In order to cover cases of this kind *we recommend* that there should be a basis of jurisdiction to make custody orders in proceedings other than for divorce, nullity or judicial separation if at the date of the commencement of the proceedings[407] the child is physically present in the United Kingdom country concerned and not habitually resident in any part of the United Kingdom.

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[405]See para. 4.19 above.

[406]This is the type of case mentioned by Pearson L.J. in *Re P. (G.E.)* [1965] Ch. 568. See para. 2.9 above.

[407]For the detailed provisions required, see paras. 4.27–4.28 below.

C Commencement and duration of jurisdiction

(1) *Commencement of jurisdiction*

4.27 It is for the most part inherent in our recommended bases of custody jurisdiction that the jurisdictional criteria should be satisfied at the date of the commencement of proceedings. Since the "divorce basis" is itself defined in terms of the existence of divorce, etc. proceedings, custody jurisdiction on that basis would arise when those proceedings were begun. Custody jurisdiction on the other recommended bases would usually arise when an application for a custody order was made. However, in England and Wales and in Northern Ireland there are cases in which the proceedings in which a custody order is made may be commenced by an application for some other remedy and in which no actual application for custody may be clearly identifiable.[408] In these kinds of case although the custody jurisdiction is not the subject of the initial application, it is nevertheless invoked indirectly when the application for the other relief is made, and in practice the interval between the application and the making of the custody order is unlikely to be significantly longer than it is in cases where the custody order is directly applied for. Apart from wardship, therefore, in these cases custody jurisdiction for England and Wales and Northern Ireland under our scheme would arise at the commencement of the proceedings in which the custody order falls to be made. In Scotland custody orders are made only in pursuance of an application. For Scotland, therefore, our scheme provides for the jurisdictional criteria in independent custody proceedings to be satisfied on the date of the application: in case unforeseen problems arise in determining what is to be regarded as an application in certain cases, we *recommend* that there should, in Scotland, be a power to make rules of court to resolve any doubts on this point.

4.28 In the case of wardship proceedings, custody orders (i.e. orders for care and control) are usually applied for, but where the court makes such an order of its own motion we do not think it would be safe to provide that its jurisdiction to do so arises when the wardship proceedings themselves are begun. This could result in an interval during which the child's connection with the country concerned had for a substantial period been severed. In wardship proceedings, therefore, we *recommend* that the jurisdiction of the court to make a custody order of its own motion should arise on the date on which the order itself falls to be made.

(2) *Duration of jurisdiction*

4.29 It is implicit in our recommendations for jurisdiction to arise at the commencement of proceedings that a custody order should be capable of being made notwithstanding that the basis of jurisdiction[409] no longer exists. If, for example, a child were habitually resident in Scotland at the commencement of

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[408]For example, custody orders under the Domestic Proceedings and Magistrates' Courts Act 1978 are invariably made pursuant to applications for financial provision under that Act: see para. 2.28 above.

[409]In the case of the divorce basis this means the basis of divorce jurisdiction, not the basis of custody jurisdiction in divorce, etc. proceedings.

proceedings and ceased to be so before the hearing or before a cross-application were made, the Scottish court would still have jurisdiction to make a custody order. Any other rule would be an open invitation to forum-shopping and the abduction of children from one country to another.

4.30 On the same principles we think that once a court has made a custody order any power which it has to vary that order should remain exercisable notwithstanding that the original basis of jurisdiction to make a custody order no longer exists. We think that this is probably in accordance with the present law in all three United Kingdom countries, though the matter is not wholly free from doubt.[410] What may give rise to greater doubt are questions as to whether a particular order is an original order or variation. The annexed draft Bill contains provisions designed to resolve such questions.[411]

4.31 It is a different question whether a power to vary should be exercisable when a fresh basis of jurisdiction exists in another United Kingdom country. We deal with this point in our treatment of conflicts of jurisdiction at paragraphs 4.112 to 4.114 below.

D The impact of our recommendations upon the existing law

4.32 We now turn to consider the impact of our recommendations on jurisdiction upon the existing law. As we have seen,[412] the basis of the existing jurisdiction to make custody orders differs according to the type of proceedings in which the custody of a child is in issue. In some cases (for example, the wardship jurisdiction of the High Court, and divorce jurisdiction in all parts of the United Kingdom) the jurisdictional rules may be said to have an international basis, that is to say they determine the circumstances in which courts in a particular country possess jurisdiction. In other cases there are rules which are international only in the sense that they allocate jurisdiction between different countries of the United Kingdom. In yet other cases the rules appear to be primarily concerned with the internal allocation of proceedings as between individual courts. Finally, it is in some circumstances unclear whether there is any rule at all or, if there is a rule, whether it is international or internal in its nature.

4.33 In addition to these complications, the existing rules are lacking in coherence and consistency. Jurisdiction may depend upon one or more of several tests, for example the presence, residence or domicile of one or other of the parties or of the child concerned. Jurisdiction in England and Wales and in Northern Ireland may also depend upon the procedural issue as to whether or where process can be served upon the respondent.[413]

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[410]See paras. 2.33, 2.74 and 2.104 above.

[411]See clauses 1(2) and 41(5) (England and Wales and Northern Ireland) and 1(1) (b) and 15(3) (Scotland) and the explanatory notes on them. Differences between the law of England and Wales and of Northern Ireland on the one hand and of Scotland on the other have brought about different treatments of variations in the draft Bill, but the result in terms of policy is the same for all three parts of the United Kingdom.

[412]Paras. 2.5–2.32, 2.55–2.73 and 2.88–2.103 above.

[413]See paras. 4.58–4.61 and 4.84–4.88 below. In Scotland in custody matters service is irrelevant to the question of jurisdiction.

4.34 Our proposals are designed to replace the complications of the existing provisions with a scheme in which the bases of custody jurisdiction will be comprehensively stated and in which the distinction between the bases of jurisdiction and the internal allocation of proceedings will be clearly drawn. The new jurisdictional rules which we are proposing are designed to have effect on an international basis in the sense we have indicated. They are also intended in that sense to be exhaustive, so that the jurisdiction to make custody orders would have to be founded upon one or other of the four bases we have proposed. The internal allocation of proceedings, however, would be affected by the new jurisdictional rules, and we shall make recommendations[414] and suggestions with a view not only to eliminating any sources of conflict between the international rules of jurisdiction and the internal rules of allocation, but also to rationalising the internal systems of allocation, which are at present in many respects as urgently in need of reform as the international rules of jurisdiction and which are in some cases indistinguishable from those rules.

4.35 It follows from what we have said that the changes in the existing law necessitated by our recommendations would be for two main purposes: first, to bring about the result that the jurisdiction to make custody orders is founded and exercisable upon one or more of our four proposed bases, namely divorce, habitual residence, emergency and residual presence, and secondly, to remove any conflicts between our recommendations and the existing rules governing the internal allocation of proceedings.

(1) *England and Wales*

(a) Impact on the existing bases of jurisdiction

4.36 As a result of our proposals there would be some circumstances in which the courts will acquire custody jurisdiction which they do not now possess and some in which they will lose custody jurisdiction which they do now possess. We examine these consequences below under separate heads.

(i) The divorce basis

4.37 Our proposed divorce basis[415] is no different from the existing basis of jurisdiction to make custody orders in divorce, nullity or judicial separation proceedings. Our other proposed bases (habitual residence, emergency, and residual presence), as we have indicated,[416] would have no relevance for the purpose of determining whether the jurisdiction to make custody orders in divorce, etc. proceedings is exercisable.

(ii) The habitual residence and residual presence bases

4.38 We have recommended[417] bases of jurisdiction where the child is habitually resident in the country concerned or where he is present in the country concerned but not habitually resident in any part of the United Kingdom. The impact of these proposed bases of jurisdiction upon the existing jurisdictions will be considerable, as we explain below.

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[414]See paras. 4.62 *et seq.* 4.68 *et seq.*, and 4.89 *et seq.* below.
[415]See paras. 4.6–4.11 above.
[416]See para. 4.9 above.
[417]See paras. 4.18 and 4.26 above.

4.39 In England and Wales the habitual residence of the child is not at present a basis of jurisdiction at all, and where the presence of the child is a basis the fact that the child is habitually resident somewhere in the United Kingdom is immaterial. As a result, under our proposals the existing jurisdiction would be in some respects enlarged and in others restricted. The habitual residence basis would enlarge it to the extent that the courts would acquire jurisdiction where a child who is habitually resident in England and Wales happens to be in some other country. On the other hand both the habitual residence basis and the residual presence basis would of their nature restrict the existing jurisdictions by imposing new requirements. It is convenient to consider these matters under two headings, covering proceedings in which custody is the main issue ("independent custody proceedings") and those in which the issue of custody is combined with the issue of maintenance or other financial provision ("combined proceedings").

Independent custody proceedings

4.40 Proceedings in England and Wales in which custody of the child is the main issue comprise various proceedings in wardship, under the Guardianship of Minors Acts, and for custodianship under the Children Act 1975. We have referred to the relevant jurisdictional provisions in Part II of the report.[418]

Wardship proceedings

4.41 The response to the provisional proposals in our consultation paper for common jurisdictional rules in "United Kingdom cases" (i.e. where the child is habitually resident in some part of the United Kingdom) led us to review the existing law.[419] As a result, we have had to consider the effect of our proposed bases of jurisdiction on the existing grounds of jurisdiction to make a custody order with respect to a child who is habitually resident outside the United Kingdom. The High Court has jurisdiction in wardship not only where the child is resident or present in England and Wales but also where he is a British subject or can be said to owe "allegiance" to the Crown.[420] Our proposed bases of jurisdiction would have the effect of excluding nationality and allegiance and might therefore appear to restrict the power of the High Court to make custody orders[421] in wardship proceedings. In the following paragraphs we consider the implications of this exclusion.

4.42 Nationality is a ground of jurisdiction in some European countries, including Austria, Belgium, France, the Federal Republic of Germany, Italy, the Netherlands and Switzerland, and in England and Wales the High Court has jurisdiction to make a custody order where the child is a British subject even though he is not resident or present here.[422] This basis of jurisdiction might therefore appear to be useful where the court of the country in which the

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[418]See paras. 2.7–2.22 above.

[419]See paras. 1.12–1.13 above.

[420]See paras. 2.9 and 2.12 above.

[421]Our proposals would not affect the basis of jurisdiction in wardship in so far as that jurisdiction is exercised (e.g. in orders as to property or maintenance) *otherwise* than for the purpose of making a custody order. See paras. 1.24–1.27 above.

[422]See paras. 2.9 and 2.12 above.

child is resident or present either declines to assume jurisdiction over a British child[423] or where it lacks the power to do so.

4.43 Although "British nationality" is still a possible basis of custody jurisdiction under English law,[424] the concept has undergone profound modifications since 1854 when it was asserted in bold terms.[425] The British Nationality Acts 1948 and 1981 made successive and significant changes in the concept of British nationality. Under the 1981 Act there are three separated categories of citizenship: British citizenship, British Dependent Territories citizenship and British Overseas citizenship. It has been suggested[426] that it seems unlikely that an English court would exercise jurisdiction based on nationality over a child who is not a "British citizen" in the first of the three categories. Furthermore, even where the child is a British citizen, it would seem that the circumstances of the case would have to be very special before jurisdiction was exercised on this basis.[427]

4.44 When this matter was considered in our consultation paper, we had little hesitation in rejecting nationality as a criterion of jurisdiction in custody cases.[428] First, we were of the view that it did not necessarily point to a forum which was fair and convenient to the parties or one with which the child had subsisting practical, as opposed to legal, connections. Secondly, we considered that it did not necessarily point to a forum which could effectively enforce its order, and that it did not eliminate the risk of conflicts of jurisdiction between different parts of the United Kingdom.[429]

4.45 *A fortiori,* we thought,[430] the less easily definable concept of allegiance to the Crown[431] in the absence of nationality was also unsuitable as a basis of jurisdiction in custody cases.

4.46 For the reasons given in the consultation paper, we regard both nationality and allegiance as unsatisfactory bases of jurisdiction in custody cases. Moreover we know of no case reported in this century in which the court has made a custody order unequivocally on one or both of those bases alone; and it has been made clear[432] in recent times that it would be most unlikely to do so, for there would almost certainly be difficulties of enforcement and there would be a high risk of a conflict between an order of the High Court and the order of a court of the country in which the child was in fact present or resident. Although considerations of comity tend to ensure that such conflicts do not

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[423]See *Re Willoughby* (1885) 30 Ch. D. 324.

[424]*Re P. (G.E.)* [1965] Ch. 568, 582, 587, 592.

[425]*Hope* v. *Hope* (1854) 4 De G.M. & G. 328, 345–346. In *Re P. (G.E.) supra,* the Court of Appeal declined to express views on the concept of nationality as a basis of jurisdiction in wardship in the context of the then applicable British Nationality Act 1948 under which British nationality was expressed in terms of citizenship of the United Kingdom and Colonies and of Commonwealth Countries: [1965] Ch. 568, 587, 592.

[426]Dicey and Morris, *The Conflict of Laws,* 10th ed. (1980), p.427, first complete paragraph as amended by the Third Cumulative Supplement (1984), p.53.

[427]*Re P. (G.E.)* [1965] Ch. 568, 587–588. See para. 4.41 above.

[428](1976) Working Paper No. 68/Memorandum No. 23, para. 3.42.

[429]*Ibid.*

[430](1976) Working Paper No. 68/Memorandum No. 23, para. 3.43.

[431]See para. 2.9 above.

[432]*Re P. (G.E.)* [1965] Ch. 568, 587–588.

now in practice occur within the United Kingdom,[433] it does not seem to us tolerable that a scheme of uniform jurisdiction such as we propose should retain a basis which is available in England and Wales and in Northern Ireland but not in Scotland.[434] Moreover, since neither allegiance nor nationality belongs to any part of the United Kingdom in distinction from the whole, neither would be a workable basis within a scheme designed to allocate jurisdiction among the three countries concerned, because the courts of all three countries would have the same jurisdiction.

4.47 One effect of our general jurisdictional proposals would be to remove jurisdiction from the High Court to make a custody order in wardship proceedings in respect of a British child who is neither habitually resident nor present in England and Wales. For the reasons we have already given, we do not believe that a child in this type of case has a sufficient connection with England and Wales on which to found the custody jurisdiction.

Proceedings under the Guardianship of Minors Acts

4.48 Jurisdiction in these proceedings is exercisable by the High Court and by county courts and magistrates' courts. In the High Court the jurisdiction appears to be exercisable on the same basis as wardship, which we have discussed at paragraphs 4.41–4.47 above. In the county courts[435] and the magistrates' courts[436] the jurisdiction is exercisable in the district or commission area in which one or other of the parties *or* the child resides, subject to certain additional limitations where there is a Scottish or Northern Ireland element. Since our proposed jurisdictional bases, in so far a they affect these proceedings, will be the habitual residence or (in limited circumstances) the presence of the child, we see no need to complicate matters by retaining as international jurisdictional requirements any rules relating to the residence or presence of the parties to the proceedings. These rules have no place in our jurisdictional scheme. They fall to be considered only for the purpose of the internal allocation of proceedings between the courts, and we make recommendations about them in paragraphs 4.62–4.65 below. Jurisdiction under the Acts is also in part dependent upon service of process, on which we make recommendations in paragraphs 4.58–4.61 below.

Custodianship proceedings

4.49 Our proposed bases would supersede the current jurisdictional basis (under the Children Act 1975)[437] of the child's presence in England and Wales. If the child was habitually resident in England and Wales, jurisdiction would be exercisable regardless of his presence, and if he was present but not habitually resident in England and Wales jurisdiction would be exercisable (apart from emergencies) only if he was not habitually resident in any other part of the

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[433]See e.g. *Re. G. (J.D.M.)* [1969] 1 W.L.R. 1001; *Re. S. (M.)* [1971] Ch. 621.

[434]Cf. *Hoy* v. *Hoy* 1968 S.C. 179, where the child was present in Scotland and the High Court's order was disregarded.

[435]See paras. 2.13–2.14 above.

[436]See paras. 2.15–2.17 above.

[437]See paras. 2.18–2.22 above. The provisions of Part II of the 1975 Act are planned to be brought into force in the Spring of 1985.

United Kingdom. As regards applications for access, our proposed bases would supersede the existing rules under which jurisdiction may be founded upon a variety of bases. These rules fall to be considered in connection with the internal allocation of proceedings, which we discuss at paragraphs 4.62–4.65 below. So far as concerns custodianship orders made in adoption proceedings, we have concluded, for the reasons given above,[438] that there could conceivably be situations in which the court would have jurisdiction in adoption but no jurisdiction under our scheme to make a custodianship order. That particular situation could not arise under our scheme where the question of making a custodianship order arises in proceedings under the Guardianship of Minors Acts, for our scheme applies to custody orders made in those proceedings as well as to custodianship orders.

4.50 We do not think that our proposals would in practice make any significant difference to the custodianship jurisdiction. Although that jurisdiction is largely founded on the child's presence it can only be exercised where the child has had his home with the applicant for some period.[439] In the great majority of cases therefore the child will in fact be habitually resident in England and Wales. If he is habitually resident here, we think that on general principles it is right that the court should have jurisdiction to make a custodianship order whether or not he happens to be physically present. If on the other hand he is physically present in England and Wales but not habitually resident here we think that the court should not have jurisdiction to make a custodianship order if the child is habitually resident in some other part of the United Kingdom: in that case jurisdiction in matters of custody should be exercisable in that other part. Nevertheless we intend our scheme to preserve the presence jurisdiction in cases where the child is habitually resident outside the United Kingdom, and we see no reason to make an exception in this respect for custodianship orders.

Combined proceedings

4.51 Jurisdiction to entertain proceedings for maintenance or other financial provision for children falls outside the scope of this report. Nevertheless, it presents problems which cannot be ignored. It has hitherto been considered desirable that if questions of maintenance and custody are both disputed they should be determined at the same time by the same court. For this reason various statutory provisions conferring powers on courts in the United Kingdom deal with both custody and maintenance proceedings, and combined proceedings for custody and maintenance are common in practice.

4.52 We are not primarily concerned in this report with the bases of jurisdiction on which proceedings for maintenance or other financial provision are founded. However, it follows from our proposals for new jurisdictional bases in custody cases that in combined proceedings for custody and maintenance at least one of these bases would have to be present in order to found a custody order. We believe that this is the right result: in our view exceptions to

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[438]See paras. 3.8–3.9.

[439]There are various periods according to the qualifications of the applicant, ranging from 3 months to 3 years. See Children Act 1975, s.33(3).

the general principle that custody jurisdiction should be based upon a sufficient connection of the child with the country concerned should be kept to the minimum. Moreover, the existing jurisdictional rules affecting combined proceedings are so diverse and so widely drawn that to retain these rules would greatly increase the possibility of concurrent proceedings and conflicting decisions. Accordingly we think it is right that in combined proceedings the bases of jurisdiction to make custody orders would be the habitual residence basis and the residual presence basis, as they would be in relation to independent custody proceedings.

4.53 This consequence will involve some modifications of the existing law. Combined proceedings fall into two categories: (a) certain proceedings under the Guardianship of Minors Act 1971 and the Children Act 1975[440] where the jurisdiction to award financial provision depends upon the making of a custody order, and (b) proceedings for financial provision[441] in matrimonial cases, where the jurisdiction to make a custody order depends upon a financial order having been made or in some cases applied for.

4.54 So far as the first category is concerned our proposed bases of custody jurisdiction would affect the financial jurisdiction because the financial jurisdiction is exercisable if and only if a custody order has been made. We see no objection to that. In these cases the financial jurisdiction is exercised for the benefit of the child, and it seems to us entirely appropriate that this jurisdiction should be linked with the jurisdiction to award custody, as it is at present.

4.55 As for the second category, we make no proposals to alter the existing bases of jurisdiction in proceedings for financial provision in matrimonial cases and since, in addition, our proposed bases of custody jurisdiction would apply for the purpose of custody orders in these proceedings, there would under our proposals be a severance of the financial and the custody jurisdiction, with the result that in some cases proceedings could not be combined. The kind of case in which this might happen would arise where the parents were habitually resident in England and the child was habitually resident in Scotland living with a relative. We do not think that in such a case the existence of proceedings for financial provision (as opposed to divorce proceedings) between the parents in England should be regarded as of sufficient significance to affect the jurisdiction of the Scottish courts to make a custody order on the basis of the child's habitual residence.

(iii) The emergency basis

4.56 As we have indicated,[442] our recommendation for an emergency basis of jurisdiction is a recommendation to retain the existing jurisdiction of the High Court to intervene immediately for the protection of a child where the child is physically present (in England and Wales). It is also by implication a recommendation to abolish any other existing basis of emergency jurisdiction (such as allegiance or nationality) which does not constitute a basis of jurisdiction under our scheme.

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[440]Guardianship of Minors Act 1971, ss.9 and 10; Children Act 1975, s.34.

[441]Under Matrimonial Causes Act 1973, ss.27 and 42(2), and Domestic Proceedings and Magistrates' Courts Act 1978, ss.2, 6 and 7 and ss.8 and 19. See paras. 2.26–2.31 above.

[442]See paras. 4.19 and 4.22 above.

4.57 We do not think our recommendation would in practice have any adverse effect upon the existing jurisdiction in cases of emergency. We have already given our reasons for proposing the abandonment of allegiance and nationality as bases of jurisdiction to make custody orders in wardship cases,[443] and for the abandonment of various other bases such as the child's domicile or the domicile or residence of the parties. The fact that some emergency may arise affecting the child does not, in our view, justify the retention of any of those bases in competition with the new bases which we are proposing. Our main reasons for this view are as follows. First, it is rarely if ever that courts in any part of the United Kingdom seek to intervene for the child's protection as a matter of emergency where he is not present in that part. Secondly, it is only in rare cases that the intervention of courts in any part of the United Kingdom could have any immediate effect where the child was not physically present in that part, and then only by contempt or sequestration proceedings. Thirdly, if there are any such cases, the great majority would be sufficiently covered by the making of orders on the divorce basis or the habitual residence basis that we have proposed. In other words, we do not think that an emergency jurisdiction is required for the case where the child is neither present nor habitually resident in a part of the United Kingdom, nor the child of a marriage the subject of divorce, etc. proceedings in any part of the United Kingdom. The kind of case excluded by our proposal would be where a British child was in one of the Gulf States and not habitually resident in any part of the United Kingdom and his parents were not parties to divorce, etc. proceedings in any part of the United Kingdom. In that kind of case we do not think that the intervention of a court in any part of the United Kingdom would ever be likely to be appropriate, whether in cases of emergency or not.

(b) Impact on the exercise of jurisdiction: rules relating to service of process

4.58 Our proposed bases of jurisdiction would also have a considerable impact upon the existing rules relating to service of process. It is a general principle of English common law that jurisdiction cannot be assumed unless the defendant is served within England and Wales or submits to the court's jurisdiction.[444] However, although service of process remains a basic requirement, service within England and Wales is no longer invariably necessary. The present position is as follows:—

(i) in divorce and other matrimonial proceedings in the High Court or the county court process may be served out of England and Wales as of right;[445]

(ii) in independent custody proceedings there is no specific provision[446]

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[443]See paras. 4.41–4.47 above.

[444]See e.g. *John Russell & Co., Ltd.* v. *Cayzer, Irvine & Co., Ltd.* [1916] 2 A.C. 298, 302.

[445]M.C.R. 1977, r.117.

[446]In the High Court and the county court, however, R.S.C., O.11, rr.1. and 9(1) (see also O.90, rr.3(1) and 5) and C.C.R. O.8, r.2 respectively provide for service out of England and Wales in certain circumstances, some of which may sometimes be applicable in particular custody proceedings, e.g. where "relief is sought against a person domiciled or ordinarily resident within the jurisdiction" (R.S.C., O.11, r.1(1)(a)). There are also provisions under which originating process may be issued *ex parte* or with the child as defendant (R.S.C., O.90, rr.3(2) and 6(1)) and for substituted service (R.S.C., O.65, r.4; C.C.R., O.7, r.8) and (in the High Court) for dispensing with service in guardianship proceedings (R.S.C., O.90, r.6(2)). In the magistrates' courts, section 46(2) of the Children Act 1975 qualifies the need for service where proceedings are brought under Part II of that Act against a person residing outside England and Wales.

for service out of England and Wales except where it can be effected in Scotland or Northern Ireland;[447]

(iii) in combined proceedings for financial provision and custody in the magistrates' courts under the Domestic Proceedings and Magistrates' Courts Act 1978 there is no provision for service out of England and Wales except where it can be effected in Scotland or Northern Ireland[447] or in a State which has acceded to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[448]

4.59 The rules just mentioned are inconsistent with our proposed bases of jurisdiction to the extent that the rules do not permit service out of the jurisdiction, for our bases (apart from the divorce basis) are related to the situation of the child rather than to the situation of the parties. There would be little purpose in introducing a basis of jurisdiction related to the child which could be thwarted by the departure of the parties from England and Wales. The right principle, in our view, is that jurisdiction should determine the question of service rather than service the question of jurisdiction. This principle is already implemented in rule 117 of the Matrimonial Causes Rules 1977, under which service of process in divorce and kindred proceedings is as of right. Jurisdiction in such proceedings is based upon domicile or habitual residence rather than presence, with the result that the basis may exist where the parties are outside England and Wales. Similar considerations would apply to our proposed bases of jurisdiction, none of which depends upon the residence or presence of the parties in any part of the United Kingdom.

4.60 We therefore conclude that fresh rules relating to service of process in independent custody proceedings will be necessary and that rule 117 of the Matrimonial Causes Rules 1977 would be a relevant precedent. It seems that the rule-making powers[449] are wide enough for the purposes of proceedings in the High Court and county courts: as we have seen,[450] the powers have already been exercised to provide for service abroad in some circumstances. In the magistrates' courts, however, we doubt whether the existing rule-making powers[451] could properly be exercised to allow for service abroad, for there is judicial authority[452] to the effect that the common law principle (referred to in

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[447]Maintenance Orders Act 1950, s.15. This provision (which applies to guardianship proceedings, custodianship proceedings, and proceedings in the magistrates' courts for financial provision under the Domestic Proceedings and Magistrates' Courts Act 1978) enables process to be served on a respondent in Scotland or Northern Ireland by a special procedure prescribed in the section.

[448]Civil Jurisdiction and Judgments Act 1982, s.48(3), which enables rules to be made for maintenance proceedings authorising service in Contracting States of process issued in magistrates' courts. The Contracting States are Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Denmark, the Republic of Ireland and the United Kingdom (*ibid.*, s.1(3)). The relevant provisions of the Act are not yet in force.

[449]Supreme Court Act 1981, s.84; Matrimonial Causes Act 1973, s.50; County Courts Act 1984, s.75. Under s.40 of the Matrimonial and Family Proceedings Act 1984 these powers in relation to family proceedings in the High Court and the county courts are exercisable by a single authority (the Lord Chancellor and four or more specified members of the judiciary and the legal professions) in place of the three committees constituted under those Acts.

[450]See n.446 above.

[451]Magistrates' Courts Act 1980, ss.144 and 145.

[452]*Berkley* v. *Thompson* (1884) 10 App. Cas.45, 49; *Forsyth* v. *Forsyth* [1948] P.125, 136. See paras. 2.14 and 2.17 above.

paragraph 4.58 above) requiring service within the jurisdiction remains applicable to proceedings in the magistrates' courts in the absence of any statutory provision to the contrary.[453] *We therefore recommend* that that principle should be clearly excluded in relation to independent custody proceedings in the magistrates' courts, so as to enable the rule-making powers to be exercised to permit service of process outside England and Wales.

4.61 We make no specific proposals regarding the service of process in combined proceedings for financial provision and custody under the Domestic Proceedings and Magistrates' Courts Act 1978. We have noted[454] that there is provision for process to be served in these proceedings, in Scotland and Northern Ireland, by means of a special procedure. We have also noted[455] that provision has been made by the Civil Jurisdiction and Judgments Act 1982 for process in "maintenance proceedings" in the magistrates' courts to be served in certain European countries. We would hope that where process could be served in a European country under the 1982 Act in maintenance proceedings the service would be effective as regards any application for custody in those proceedings; but whether or not that would be so, we hope that the authorities concerned will consider extending and rationalising the rules for service abroad in combined proceedings in the magistrates' courts for financial provision and custody.

(c) Impact on the internal allocation of proceedings

4.62 As we have seen,[456] existing enactments in England and Wales contain numerous provisions relating to the allocation of custody proceedings both as between different courts in each country and as between different countries of the United Kingdom. Moreover, some of these provisions might appear to perform the additional function of creating specific bases of international jurisdiction. For example, in relation to county court proceedings section 15 of the Guardianship of Minors Act 1971 gives jurisdiction in proceedings under the Act to the county court of the district in which the respondent or the applicant, or the child to whom the application relates, resides. This is certainly a rule of internal allocation. It might also be thought to provide a basis of international jurisdiction, though this is unclear.[457]

4.63 Our proposals would have two effects on the internal rules of allocation. First, by creating new bases of jurisdiction they would supersede any existing internal rule in so far as it could be held to provide a different basis. For example, the fact that a county court of the district where the applicant resides has jurisdiction would not give it international jurisdiction, for the applicant's residence is not a basis of jurisdiction under our proposals. The second effect is that the rules of internal allocation would have to be changed to take account of our proposed new bases. For example, if in a particular case the English courts were to have jurisdiction, as we propose, on the basis of the child's habitual

[453]For an example of such a statutory provision, see Civil Jurisdiction and Judgments Act 1982, s.48(3), referred to in n.448 above.

[454]See n.447 above.

[455]See n.448 above.

[456]See Part II above.

[457]See para. 2.14 above, where it is suggested that a respondent's presence or residence within the jurisdiction may be necessary.

residence in England and Wales, a rule which allocated the proceedings only to the district where one or other of the parties resides would not cover the case in which the parties resided outside England and Wales. Again, if jurisdiction were assumed on the residual presence basis it would seem right that the rules of internal allocation should permit proceedings in the county courts and magistrates' courts to be entertained in the district or area where the child is.

4.64 So far as England and Wales is concerned, we do not intend to make specific proposals for internal allocation, which we regard as essentially an administrative matter. We also think it unnecessary that any legislation to implement our recommendations should provide any fixed basis of internal allocation. In our view these matters should be dealt with by rules of court[458] (as they already are to some extent for many proceedings in the county courts).[459] *We therefore recommend* that the existing statutory provisions relating to the internal allocation of custody proceedings should be discarded. In particular, the provisions of section 15 of the Guardianship Act 1971 and section 100 of the Children Act 1975, by which the jurisdiction in matters covered by our proposals is allocated between particular county courts and between particular magistrates' courts, should be replaced by provisions enabling proceedings to be allocated by appropriate rules of court. The content of these rules, like the rules relating to service of process,[460] would be a matter for consideration by the rule-making authorities.

4.65 Where under our proposals custody orders and orders for financial provision could be made in combined proceedings,[461] the rules of internal allocation should clearly be those applicable to the primary proceedings. Where the custody proceedings are primary, allocation would be determined by rules of court as proposed above. In the case of proceedings for financial provision in matrimonial cases, where applications for custody are ancillary, allocation would continue to be determined by the existing provisions.[462]

(2) *Scotland*

4.66 In the following paragraphs we consider the impact of our proposals on Scottish law and we recommend certain further specific changes in the jurisdiction of the Scottish courts.

(a) Impact on the Court of Session's custody jurisdiction

4.67 Our proposals will mean no essential change in the rule that if the Court has jurisdiction in an action of divorce, nullity of marriage or judicial

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[458]Under County Courts Act 1984, s.75 and Magistrates' Courts Act 1980, ss.144 and 145, and in particular s.145(1)(g).

[459]See e.g. C.C.R., O.4.

[460]See para. 4.58 above.

[461]See paras. 4.51–4.55 above.

[462]Jurisdiction under Matrimonial Causes Act 1973, ss.27 and 42(2) is exercisable by the High Court or by any divorce county court: Matrimonial Causes Act 1973, s.52(1) and M.C.R. 1977, r.98(2). Proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978 must normally be brought before a court within the commission area where the applicant or respondent resides: *ibid.*, s.30. See paras. 2.26–2.31 above.

separation it also has jurisdiction to make custody orders in that action.[463] Nor will our proposals affect the Court's emergency jurisdiction, except that this will be set out in statutory form. The main changes resulting from our proposals will be (a) that the Court of Session's jurisdiction in independent custody petitions will be based on the habitual residence, rather than the domicile, of the child and (b) that the Court will acquire a new residual jurisdiction based on the presence of the child in Scotland provided that the child is not habitually resident anywhere in the United Kingdom. The new general rules would supersede the special *ad hoc* rules in sections 53(1) and 54(1) of the Children Act 1975.

(b) Impact on the sheriff court's custody jurisdiction

4.68 The existing law on the jurisdiction of the sheriff court in custody proceedings is in such an unsatisfactory state[464] that the Scottish Law Commission has taken the view that the opportunity presented by this report should be used to recommend a complete replacement of the existing rules by a new set of rules applying both to jurisdiction in the international sense and to the internal allocation of jurisdiction to one sheriff court rather than another. To this end the Commission carried out a supplementary consultation in February 1983, the results of which suggested that the proposed new rules were likely to be acceptable to the judiciary and legal profession in Scotland. The rules which accordingly, are recommended in this report for the custody jurisdiction of the sheriff courts in Scotland are based on the general rules recommended for all United Kingdom courts with additions to deal with questions of internal allocation of cases. They are as follows:

(1) the sheriff will have jurisdiction to deal with an application for a custody order in an action for divorce or separation if he has jurisdiction in the action for divorce or separation itself;

(2) the sheriff will have jurisdiction to deal with an independent application for custody if, on the date of the application, the child is habitually resident in the sheriffdom;[465]

(3) the sheriff will have an emergency jurisdiction to deal with an application for a custody order if the child is present in the sheriffdom on the date of the application and the sheriff considers that an immediate order is necessary for the protection of the child;

(4) the sheriff will have a residual jurisdiction, based on presence, to deal

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[463]For a minor change in the circumstances in which the Court can make custody orders on *dismissing* an action of divorce, nullity or separation, see. para. 4.98 below.

[464]See paras. 2.64–2.73 above.

[465]See draft Bill, clause 10(b). In its supplementary consultation paper the Scottish Law Commission had provisionally suggested an alternative ground of jurisdiction where the child was habitually resident in Scotland and either the pursuer or defender in the application was habitually resident in the sheriffdom. On re-consideration, the Commission has concluded that, in the context of this ground of jurisdiction, to include a reference to the habitual residence of parties other than the child cannot be justified on principle and would be liable to lead to unfortunate results in practice. A grandparent in the north of Scotland might, for example, raise an action in his or her sheriff court although the more appropriate court might be in the south of Scotland where the child and other interested parties are all habitually resident.

with an application for a custody order if, on the date of the application, (a) the child is present in Scotland, (b) the child is not habitually resident in any part of the United Kingdom and (c) either the pursuer or the defender in the application is habitually resident in the sheriffdom.

4.69 The first of the above rules (divorce and separation) represents no change in the existing law.[466] The second (habitual residence) would supersede, in relation to custody jurisdiction, the confused and overlapping rules of the common law, of section 9 of the Guardianship of Infants Act 1886, of section 6 of the Sheriff Courts (Scotland) Act 1907 (as amended in 1913), of section 7 of the Maintenance Orders Act 1950 and of sections 53(1) and 54 of the Children Act 1975.[467] The third new rule (emergency jurisdiction) would set what is thought to be the existing emergency jurisdiction of the sheriff on a secure statutory basis. The fourth new rule (residual presence jurisdiction) would give the sheriff a new jurisdiction. It will be noted that this residual presence jurisdiction is available only where the child, if present in Scotland, is not habitually resident anywhere in the United Kingdom. In this respect it resembles the new presence jurisdiction to be conferred on the Court of Session. In order to tie the jurisdiction to a particular sheriffdom with which the parties have some solid connection, the sheriff's residual presence jurisdiction will, however, be subject to the additional requirement that either the pursuer or the defender must be habitually resident in the sheriffdom.[468]

4.70 The rules recommended for the sheriff court will allocate jurisdiction to one sheriffdom rather than another. One commentator on the supplementary consultation paper urged that they should go further and allocate jurisdiction to one sheriff court district rather than another. The Scottish Law Commission can see distinct advantages in this approach. It is not the one generally adopted hitherto, however, and it raises issues which go far beyond the question of custody jurisdiction. For these reasons the standard approach based on the sheriffdom has been used for present purposes.

(c) Rules of Service

4.71 Our proposals will not have any impact upon the existing rules relating to service of the summons, petition or initial writ in matrimonial and independent custody proceedings as service in Scotland is not necessary to found

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[466]Divorce jurisdiction was conferred on the sheriff courts in May 1984 under the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983.

[467]See paras. 2.64–2.73 above.

[468]In its supplementary consultation paper, the Scottish Law Commission had provisionally suggested that the additional requirement should be *residence* of the pursuer or defender in the sheriffdom. This was to correspond to the existing rules allocating jurisdiction among the lower English courts. These rules will not necessarily remain the same under our new proposals and the Scottish Law Commission has concluded that it would be more consistent with the rest of the jurisdictional scheme if the requirement were to be *habitual residence* of one of the parties to the application.

jurisdiction. Adequate provision is made by Rules of Court[469] and by the Sheriff Court Ordinary Cause Rules[470] for service outwith Scotland and, accordingly, no amendment is required.

(d) Jurisdiction relating to delivery orders

4.72 In so far as delivery orders are sought to enforce a right to custody (whether conferred by law or derived from a custody order made in, or entitled to recognition in, Scotland) against a person with no right to custody (for example, a third party unlawfully detaining the child) we see no reason to restrict, or interfere with, the existing jurisdiction of the courts. Applications of this sort may be required in a wide variety of circumstances (some of which might be covered by *habeas corpus* proceedings in England and Wales) and it would, in our view, be dangerous to limit the courts' jurisdiction. There is admittedly some uncertainty in the present law as to the basis of that jurisdiction but it is arguable on principle that, as the order sought is one *ad factum praestandum,* the court has jurisdiction to order delivery to take place if the child is, or is likely to be, within its territory. The considerations are different where a delivery order is sought, not to enforce a right to custody against a person with no such right, but as a substitute for a custody order in a dispute between parents. As we have seen,[471] it was at one time quite common for delivery orders of this type to be sought in the sheriff courts. The practice appears to have fallen out of use but there can be no guarantee that it will not be resorted to again. It would be unfortunate if, by the simple device of seeking a delivery order instead of a custody order, a parent could circumvent the rules of the proposed uniform scheme on jurisdiction. This problem is only likely to arise in a question between parents and the remedy for it is, in our view, to make it clear that, in a question between parents, the court will have jurisdiction to make a delivery order only if (a) the order is sought to enforce the right of a parent entitled to custody[472] against a parent not so entitled or (b) the court would have jurisdiction to make a custody order under the rules recommended in this report. *We so recommend.*

(e) Jurisdiction relating to tutory and curatory

4.73 In its report on *Illegitimacy* the Scottish Law Commission has recommended a set of general rules on the powers of the courts to make orders

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[469]Where the defender's address (in Scotland or elsewhere) is known, service in consistorial actions is executed personally, or at the defender's dwellinghouse or by post: Rules of Court 1965, as amended, R.159(1). Where the address is unknown, service is edictal at the office of the Extractor of the Court of Session: R.159(2). R.75, as applied by R.195(b)(ii) to service of petitions (in independent proceedings), provides for edictal service on persons outwith Scotland. In cases where the defender has a known residence or place of business, postal service must also be executed on his solicitor in Scotland, or on the defender at his residence or place of business: R.75(c).

[470]Act of Sederunt (Ordinary Cause Rules, Sheriff Court) 1983: Rule 12 makes general provision for personal or postal service on persons resident abroad. Edictal service is no longer competent in the sheriff court. Where the person's address is unknown, service is effected by citation in a newspaper circulating in the area of his last known address: Rule11. This method of citation is not applicable to actions of divorce or of separation and aliment, for which special provision is made by Rule 11A (inserted by Act of Sederunt (Consistorial Causes) 1984).

[471]Para. 2.81 above.

[472]E.g. as a result of a court order or as a result of the rule that the unmarried mother of a child has a right to custody as against the father.

relating to "parental rights" and has recommended that this term should be defined as "tutory, curatory, custody, access and any right or authority relating to the welfare or upbringing of the child conferred on a parent by the common law".[473] It is desirable that the rules on jurisdiction to make different forms of order relating to parental rights should not be too different. Otherwise there would be unnecessary restraints on the types of order which could be sought or awarded in proceedings relating to the same child. The Scottish Law Commission therefore consider that, without prejudice to any existing jurisdiction to make orders relating to tutory or curatory,[474] a court in Scotland should have such jurisdiction (a) if the order is sought in matrimonial proceedings or (b) if the child is habitually resident in Scotland or the sheriffdom, as the case may be, at the time of commencement of the proceedings. As the Commission has, in its *Illegitimacy* report, already recommended an amendment to give the courts jurisdiction to make orders relating to tutory or curatory in matrimonial proceedings,[475] it is only the habitual residence ground which need be dealt with in the present report. To make this a statutory ground of jurisdiction (in addition to any other ground which exists at common law) would provide a clear answer to jurisdictional problems in the vast majority of independent applications and would enable a court to deal with both custody and tutory or curatory where this was appropriate. It would not seem to be necessary in the case of tutory and curatory to have secondary statutory rules of jurisdiction based on emergency or mere presence. Emergencies relating to the child's person would normally be dealt with either by a place of safety warrant[476] or by a custody order.[477] They would not normally be dealt with by the appointment of a tutor and, indeed, it would seem to be inappropriate to deal with them by appointing a tutor to a child habitually resident outside Scotland. Any need for protection of the child's property in Scotland, or for the appointment of someone to act in relation to the administration or realisation of the child's property in Scotland, would normally be met, if the child were habitually resident outside Scotland, by the appointment of a curator *bonis* or factor *loco tutoris*. In relation to such appointments the presence of property in Scotland suffices to found jurisdiction. In some cases the common law rules on jurisdiction to appoint tutors or curators might also be relied on. *We therefore recommend:*

> In Scotland, the Court of Session should have jurisdiction to entertain an application relating to the tutory or curatory of a pupil or minor if, on the date of the application, the pupil or minor is habitually resident in Scotland. The sheriff court should have jurisdiction to entertain such an application if, on the date of the application, the pupil or minor is habitually resident in the sheriffdom.

These rules should be in addition to, and without prejudice to, the common law rules on jurisdiction to deal with applications relating to tutory or curatory.

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[473]Scot. Law Com. No. 82 (1984) para. 9.13.

[474]As these matters have not been the subject of consultation the Commission does not think it right to recommend any *restriction* of jurisdiction.

[475]See Scot. Law Com. No. 82 (1984) para. 9.14.

[476]Under the Social Work (Scotland) Act 1968, s.37 or the Criminal Procedure (Scotland) Act 1975, ss.14, 296(3) or 323.

[477]This will be defined in Scotland so as to include an order relating to custody, care and control, access, education or upbringing. See clause 1(1) (b) of the draft Bill appended to the report.

(3) ***Northern Ireland***

(a) Impact on the existing bases of jurisdiction

(i) The divorce basis

4.74 Our proposed divorce basis [478] is no different from the existing basis of jurisdiction to make custody orders in divorce, legal separation or nullity proceedings in Northern Ireland. Our other proposed bases (habitual residence, emergency and residual presence) would have no relevance for the purpose of determining whether the jurisdiction to make custody orders in divorce, etc. proceedings is exercisable.

(ii) The habitual residence and residual presence bases

4.75 Our report recommends[479] bases of jurisdiction where the child is habitually resident in the country concerned or where he is present in the country concerned but not habitually resident in any part of the United Kingdom. Implementation of these recommendations would have a considerable impact on existing bases of jurisdiction in Northern Ireland.

4.76 At present in Northern Ireland the habitual residence of the child is not a basis of jurisdiction at all, and where the presence of the child gives jurisdiction the fact that he is habitually resident elsewhere in the United Kingdom is immaterial. Our proposals would, therefore, both enlarge and restrict existing bases of jurisdiction in Northern Ireland. The habitual residence basis would enlarge it to the extent that the courts would acquire jurisdiction where a child who is habitually resident in Northern Ireland happens to be in some other country. On the other hand, both the habitual residence basis and the residual presence basis would of their very nature restrict the existing jurisdiction by imposing new requirements. As with England and Wales, it may be helpful to consider these matters under two headings, covering proceedings in which custody is the main issue ("independent custody proceedings") and proceedings in which custody is combined with maintenance or other financial provision ("combined proceedings").

Independent custody proceedings

4.77 Proceedings in Northern Ireland in which custody of the child is the main issue are wardship proceedings and proceedings under the Guardianship of Infants Act 1886. The relevant jurisdictional provisions are described in Part II of this report.[480]

Wardship proceedings

4.78 Under existing law, the High Court has jurisdiction in wardship and (it is thought) under the Guardianship of Infants Act 1886 not only where the child is resident or present in Northern Ireland but also where he is a British

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[478]See paras. 4.6–4.11 above.
[479]See paras. 4.12–4.18 and 4.23–4.26 above.
[480]See paras. 2.90–2.94 above.

subject or can be said to owe "allegiance" to the Crown. The proposed new bases of jurisdiction would have the effect of excluding nationality and allegiance and might therefore appear to restrict the power of the High Court to make custody orders in wardship and guardianship proceedings. But for reasons discussed earlier in the report,[481] we consider the exclusion of nationality and allegiance as alternative bases of jurisdiction to be a necessary and, to some extent, desirable consequence of our general jurisdictional proposals.

Proceedings under the Guardianship of Infants Act 1886[482]

4.79 Jurisdiction in these proceedings is exercisable by the High Court and the county court. In the High Court the jurisdiction appears to be exercisable on the same basis as wardship, which we have discussed at paragraphs 2.90–2.92 above. In the county court the jurisdiction is exercisable in the district in which the respondent or respondents or any of them resides. Since our proposed jurisdictional bases in so far as they affect these proceedings would be the habitual residence or (in limited circumstances) the presence of the child, we see no need to complicate Northern Ireland law by retaining as international jurisdictional requirements any rules relating to the residence or presence of the parties to the proceedings. As in England and Wales, such rules should be regarded as relevant only for the internal allocation of proceedings between the courts, which we discuss at paragraphs 4.89 and 4.90 below.

Combined proceedings

4.80 Various statutory provisions conferring powers on the Northern Ireland courts deal with both custody and maintenance proceedings, and combined proceedings for custody and maintenance are common in practice.

4.81 As already explained,[483] it follows from our proposals for new jurisdictional bases in custody cases that in combined proceedings for custody and maintenance one or more of these bases would have to be present to ground a custody order: but the existing jurisdictional rules affecting combined proceedings are so diverse and so widely drawn that to retain them would greatly increase the possibility of concurrent proceedings and conflicting decisions. Accordingly, we think it is right that in combined proceedings the bases of jurisdiction to make custody orders would be the habitual residence and presence bases already proposed in relation to independent custody proceedings.

4.82 This consequence would involve some modification of the law governing proceedings for financial provision[484] in matrimonial cases, where the jurisdiction to make a custody order depends upon a financial order having been made or in some cases applied for. Since our proposed bases of custody jurisdiction would also apply for the purpose of custody orders in these

[481]See paras. 4.41–4.47 above.
[482]See paras. 2.93 and 2.94 above.
[483]See para. 4.52 above.
[484]Under the Matrimonial Causes (Northern Ireland) Order 1978, Arts. 29 and 45(2) and the Domestic Proceedings (Northern Ireland) Order 1980, Arts. 4, 8, 9 and 10.

proceedings, there would be a severance of the financial and the custody jurisdiction, with the result that in some cases proceedings could not be combined.

(iii) The emergency basis

4.83 As in England and Wales, our proposal for an emergency basis of jurisdiction is a proposal to retain the existing jurisdiction of the High Court to intervene immediately for the protection of a child who is physically present in the country concerned.

(b) Impact on the exercise of jurisdiction: rules relating to service of process

4.84 There are both general and specific rules of Northern Ireland law which regulate the service of process in the kind of proceedings with which this report is concerned.

4.85 Northern Ireland operates on the common law principle that jurisdiction cannot be assumed unless the defendant is served within Northern Ireland or submits to the court's jurisdiction. However, although service of process remains a basic requirement, service within Northern Ireland is no longer invariably necessary. The present position is as follows:

(i) in divorce and other matrimonial proceedings in the High Court or the county court process may be served out of Northern Ireland as of right;[485]

(ii) in independent custody proceedings there is no specific provision[486] for service out of Northern Ireland except where it can be effected in England and Wales or Scotland;[487]

(iii) in combined proceedings for financial provision and custody in the magistrates' courts under the Domestic Proceedings (Northern Ireland) Order 1980 there is no provision for service out of Northern Ireland except where it can be effected in England and Wales or Scotland or in a State which has acceded to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[488]

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[485]Matrimonial Causes Rules (Northern Ireland) 1981, r.94.

[486]In the High Court and the county court, however, R.S.C. (Northern Ireland) 1980, Order 11, rr.1 and 9(1) (see also Order 90, rr.3(1) and 6) and C.C.R. (Northern Ireland) 1981, Order 6A, r.2) respectively provide for service out of Northern Ireland in certain circumstances, some of which may sometimes be applicable in particular custody proceedings, e.g. where "relief is sought against a person domiciled or ordinarily resident within the jurisdiction" (R.S.C., O.11, r.1(c)). There are also provisions under which originating process may be issued *ex parte* or with the child as defendant (R.S.C., O. 65, r.4; C.C.R., O.6, r.9) and (in the High Court) for dispensing with service in guardianship proceedings (R.S.C., O.90, r.7(2)).

[487]Maintenance Orders Act 1950, s.15. This provision (which applies to guardianship proceedings and proceedings in magistrates' courts for financial provision under the Domestic Proceedings (Northern Ireland) Order 1980) enables process to be served on a respondent in England and Wales or Scotland by a special procedure prescribed in the section.

[488]Civil Jurisdiction and Judgments Act 1982, s.48(3), which enables rules to be made for maintenance proceedings authorising service in Contracting States of process issued in magistrates' courts. The provision is not yet in force.

4.86 The rules just mentioned are inconsistent with our proposed bases of jurisdiction in so far as the rules do not permit service out of the jurisdiction, for our bases (apart from the divorce basis) are related to the situation of the child rather than to the situation of the parties. As already suggested,[489] our view is that the right principle is that jurisdiction should determine the question of service rather than service the question of jurisdiction. This principle is already implemented in rule 94 of the Matrimonial Causes Rules (Northern Ireland) 1981, under which service of process in divorce and similar proceedings is as of right.

4.87 We therefore conclude that fresh rules relating to service of process in independent custody proceedings in Northern Ireland will be necessary and that rule 94 of the Matrimonial Causes Rules (Northern Ireland) 1981 would be a relevant precedent. The existing rule-making powers are probably wide enough for the purpose of proceedings in the High Court and county court, which alone have jurisdiction in independent custody proceedings.

4.88 We make no specific proposals regarding the service of process in combined proceedings for financial provision and custody under the Domestic Proceedings (Northern Ireland) Order 1980, since custody orders in those proceedings are ancillary to orders for financial provision and financial provision is outside our terms of reference. We have noted[490] that there is provision for process to be served in these proceedings, both in relation to financial provision and in relation to custody, in England and Wales and Scotland, by means of a special procedure. We have also noted[491] that provision has been made for process in "maintenance proceedings" in the magistrates' courts to be served in certain European countries, under the Civil Jurisdiction and Judgments Act 1982. As we have already indicated,[492] we would hope that where process could be served in a European country under the 1982 Act in maintenance proceedings the service would be effective as regards any application for custody in those proceedings; but whether or not that would be so, we hope that the authorities concerned will consider extending and rationalising the rules for service abroad in combined proceedings in the magistrates' courts for financial provision and custody.

(c) Impact on the internal allocation of proceedings

4.89 As for England and Wales, *we recommend* that the internal allocation of proceedings in Northern Ireland should be brought into line with our proposed new bases of jurisdiction by rules of court and that existing statutory provisions should, where necessary, be repealed or amended accordingly.

4.90 Where under our proposals custody orders and orders for financial provision could be made in combined proceedings[493] the rules of internal allocation should clearly be those applicable to the primary proceedings. Where the custody proceedings are primary, allocation would be determined by rules of court as proposed above. In the case of proceedings for financial

[489]See para. 4.59 above.
[490]See n.487 above.
[491]See n.488 above.
[492]See para. 4.61.
[493]See paras. 4.80–4.82 above.

provision in matrimonial cases, where applications for custody are ancillary, allocation would continue to be determined by the existing provisions.[494]

E. The working of the jurisdictional scheme

4.91 Having stated our proposed bases of jurisdiction and the consequences for the existing law, we must now consider the interrelationship of these bases both in its international aspects (that is, as between the constituent countries of the United Kingdom and as between those countries and countries outside the United Kingdom) and in its internal aspects (that is within each of the constituent countries).

4.92 Our four proposed bases may be summarised as follows:—

(1) The "divorce basis", where there are proceedings for divorce, nullity or judicial separation in the country concerned.

(2) The "habitual residence basis", where the child is habitually resident in the country concerned.

(3) The "emergency basis", where the child is in the country concerned and the immediate intervention of the court is required for the child's protection.

(4) The "residual presence basis", where the child is in the country concerned and not habitually resident in any United Kingdom country.

These bases to some extent overlap each other, both in the internal and in the international sense. For example, a child may be both present and habitually resident in a country and there may be divorce proceedings between his parents in that country, so that bases (1), (2) and (3) above would all be potentially available.[495] Again, a child may be habitually resident in one United Kingdom country and his parents may be getting divorced in another. Clearly for the purpose of our jurisdictional scheme we need to resolve the international overlap first: we need to decide in which of the three countries jurisdiction is exercisable before it can be decided which courts of that country are to exercise it.

(1) *International interrelationship of the bases of jurisdiction*

4.93 Assuming circumstances in which one or more of our proposed bases of jurisdiction exists, we need to consider three situations:

(*a*) where jurisdiction has not yet been invoked;
(*b*) where jurisdiction has been invoked but not yet exercised;
(*c*) where jurisdiction has been exercised.

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[494]Jurisdiction under Matrimonial Causes (Northern Ireland) Order 1978, Arts. 29 and 45(2) is exercisable by the High Court or by any divorce county court: Matrimonial Causes (Northern Ireland) Order 1978, Art. 48(1) and Divorce County Courts Order (Northern Ireland) 1981. Proceedings under the Domestic Proceedings (Northern Ireland) Order 1980 must be brought before a court for a petty sessions district in the county court division within which either the applicant or the respondent resides: *ibid.*, Art. 32(1).

[495]There would be no overlap between the habitual residence basis and the residual presence basis, for these by definition are mutually exclusive.

(a) Where jurisdiction has not yet been invoked

4.94 If within the United Kingdom a basis of jurisdiction were available in only one country (for example, where a child is both habitually resident and present in one country and there are no divorce proceedings in the United Kingdom), clearly there could be no conflicts between the courts of different United Kingdom countries involving the assumption of jurisdiction. Again, if only one basis of jurisdiction were to exist within the United Kingdom, the possibility of a conflict would be very remote. The reason for this is that the child could not be present and probably[496] would not be habitually resident in more than one country at any given moment and, although it might happen that divorce, etc. proceedings were brought in more than one United Kingdom country, there are already elaborate statutory provisions[497] designed to resolve such conflicts.

4.95 If, on the other hand, in a particular case separate bases of jurisdiction were to exist in more than one United Kingdom country, there would be potential conflicts. For example, a child might be habitually resident in England and his parents might be getting divorced in Scotland; or he might be habitually resident in Northern Ireland and temporarily staying with a relative in Scotland. What should the prevailing basis of jurisdiction be in such cases? No conflict would arise between the habitual residence basis and the residual presence basis in the second example just given, for the conflict is already resolved in the terms of the residual presence basis itself, which would apply only where the child is not habitually resident anywhere in the United Kingdom. There are, however, potential conflicts between the divorce basis on the one hand and the habitual residence or residual presence basis on the other, and between the emergency basis and the other bases. Accordingly, we consider how such conflicts should be resolved, with reference first to the divorce basis and secondly to the emergency basis.

(i) The divorce basis

4.96 *We recommend* that the divorce basis should have primacy over the habitual residence and residual presence bases, for the reasons for which we have already proposed[498] that the divorce basis itself should form part of our scheme, namely that in dissolving a marriage the court should be enabled to deal with the affairs of a family as a whole and that the separation of custody proceedings from divorce proceedings would cause substantial inconvenience and expense for the parties and impose considerable extra burdens upon the courts and public funds.

4.97 On this reasoning we might have been led to propose that, wherever divorce proceedings were continuing in the United Kingdom, custody jurisdiction could never be invoked in another United Kingdom country on the basis of habitual residence or residual presence. However, we do not think the rule

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[496]See however Dicey and Morris, *The Conflict of Laws*, 10th ed. (1980), p.145, suggesting that habitual residence in two or more places is possible.

[497]Domicile and Matrimonial Proceedings Act 1973, Scheds. 1 (England and Wales) and 3 (Scotland) and Matrimonial Causes (Northern Ireland) Order 1978, Sched. 1.

[498]See para. 4.7 above.

should be so inflexible. We have already indicated[499] that in some cases it may be advantageous for custody issues to be determined by the courts of a country other than that in which divorce proceedings are taking place. This might happen, for instance, where a divorce had been granted in England five years ago and the child and his parents had since that time been habitually resident in Scotland or in Northern Ireland or even outside the United Kingdom. In these circumstances the connection not only of the child but also of the parents with England might be so remote as to make it undesirable that the English court should, merely because it continued to have jurisdiction to make a custody order, actually exercise that jurisdiction. In the original divorce proceedings there might not have been any application for a custody order. *We therefore recommend* that in divorce, etc. proceedings, whether or not an application for a custody order has been made in those proceedings, the court should be empowered to waive its jurisdiction to make a custody order where it considers that the matter could more appropriately be determined elsewhere,[500] and that in such a case jurisdiction should become exercisable on the basis of habitual residence or residual presence where such a basis is available. *We also recommend* that the court should have power to revoke or recall such a waiver and thus to cause the divorce basis to be available again.

4.98 There are two further modifications we propose regarding the assumption of custody jurisdiction on the divorce basis. First, the courts of all three countries in the United Kingdom have power to make a custody order on or "within a reasonable period after" the dismissal of the divorce, etc. proceedings.[501] The limitation in terms of a "reasonable period" is imprecise, and would lead to uncertainty as to when that period had expired and the court was accordingly no longer able to make a custody order. Moreover, divorce, etc. proceedings do not continue after dismissal; if the divorce court could nevertheless make a custody order within a reasonable period after dismissal, there would be a potential area of conflict between the jurisdiction of that court and the jurisdiction of another United Kingdom court invoked on the basis of habitual residence or presence. In order to reduce this area, *we recommend* that the power should be restricted to orders applied for on or before dismissal. If no such application were made, the court would have no power to make a custody order: any such order would have to be made on whatever basis was available. We think this is the right result, for after dismissal of the proceedings the parties would be in no different position from any other married couple seeking to resolve a custody dispute in independent custody proceedings. Secondly, if under our proposals[502] the court in divorce, etc. proceedings were to forgo the exercise of its custody jurisdiction it might well be unable to

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[499]See para. 4.10 above.

[500]The Scottish Law Commission takes the view that the *only* purpose for which a waiver should be used by a Scottish court in these circumstances is to enable independent custody proceedings to be taken before another court in the United Kingdom. The Scottish clause implementing this recommendation is therefore limited to waiver of jurisdiction in favour of another court in Scotland or a court in England and Wales or Northern Ireland—see draft Bill, clause 13(6).

[501]Matrimonial Causes Act 1973, s.42(1)(b) (England and Wales); Matrimonial Proceedings (Children) Act 1958, s.9(1) (Scotland); Matrimonial Causes (Northern Ireland) Order 1978, Art. 45(1)(b).

[502]See para. 4.97 above.

comply with the statutory requirement[503] to satisfy itself as to the arrangements for the children, since it would effectively have remitted the issue to another court. *We therefore recommend* that this requirement should be disapplied in these circumstances.

(ii) The emergency basis

4.99 Our recommendation for an emergency basis[504] is designed for the protection of children in cases of emergency. For that reason we do not think that the ability to invoke the jurisdiction of the courts on this basis should ever be excluded by reason of the fact that some other basis of jurisdiction may be available. Cases do occur in which a child is removed by a parent in circumstances of some risk; and although these cases can often be dealt with under public law by the making of place of safety orders and the like[505] or may constitute offences under the Child Abduction Act 1984[506] we think they should also remain capable of being dealt with under private law by the making of custody orders which can be rapidly enforced. *We therefore recommend* that, where a child is present in a United Kingdom country, the power of the appropriate courts of that country to intervene immediately for the child's protection and to make custody orders should be exercisable regardless of whether or not some other basis of jurisdiction is available in another United Kingdom country.

4.100 Our recommendations in paragraphs 4.96 to 4.99 above may be summarised as follows: jurisdiction may in principle be invoked on any of the four proposed bases which is available, but if the divorce basis is available, jurisdiction (unless precluded by the court itself) should only be invoked on that basis, and if the emergency presence basis is available jurisdiction may always be invoked on that basis.

(b) Where jurisdiction has been invoked but not yet exercised

4.101 If jurisdiction on one of our four proposed bases were invoked, there would be a source of potential conflict if a basis also became available in another United Kingdom country. In what circumstances should jurisdiction on the original basis be retained, or be relinquished in favour of the other basis? Two situations may be distinguished. First, the original basis may remain available and may have priority under our scheme over the subsequent basis. Secondly, either the original basis may have lapsed or the subsequent basis may have priority over it under our scheme. We consider these situations in turn.

(i) Where the original basis remains and has priority over a subsequent basis

4.102 Under our scheme of priorities[507] this situation should normally create no difficulties, for jurisdiction could not be invoked on the subsequent basis. For example, if custody jurisdiction were invoked in England on the

[503]Matrimonial Causes Act 1978, s.41 (England and Wales); Matrimonial Proceedings (Children) Act 1958, s.8 (Scotland); Matrimonial Causes (Northern Ireland) Order 1978, Art. 44.
[504]See paras. 4.19–4.22 above.
[505]See para. 4.21 above.
[506]See paras. 6.31–6.34 below.
[507]See para. 4.100 above.

divorce basis and the child subsequently become habitually resident in Scotland, jurisdiction could not be invoked on the habitual residence basis except where under our proposals[508] the divorce court had forgone the exercise of its own jurisdiction. Nevertheless there might well be circumstances in which it would cease to be appropriate for jurisdiction on the original basis to be retained. We have already suggested[509] circumstances in which it might be inappropriate for the divorce court to assume jurisdiction to make a custody order. The same considerations apply where the jurisdiction has been invoked and the question arises whether it should be exercised.

4.103 *We therefore recommend* that, wherever jurisdiction under our proposals has been invoked in one United Kingdom country and it is appropriate that jurisdiction should be exercised in another country, the original court should be empowered to stay or sist proceedings, and that when such a stay or sist is imposed jurisdiction should be exercisable on any other available basis previously precluded.[510] It might however happen that after jurisdiction had been relinquished by these means the fresh jurisdiction was not invoked at all or the proceedings were delayed, whether or not for tactical reasons. To guard against these possibilities *we recommend* that the court which imposes a stay or sist should be empowered[511] to lift it and to resume jurisdiction if the fresh jurisdiction is not in fact invoked or if, after it was invoked, the proceedings have been unreasonably delayed or have themselves been stayed or sisted or concluded.

(ii) Where the original basis does not have priority over a subsequent basis

4.104 Under our proposals this situation could arise in several permutations of bases.[512] It would even arise where the original basis was the emergency basis, for jurisdiction on that basis would always be capable of being superseded if another basis were or became available.[513] There are two types of case to be considered. First, the basis itself might cease to exist in the United Kingdom (or part of it), as for example where the child was habitually resident in England and then moved permanently to France (or Scotland). Secondly, the subsequent basis might appear entitled to priority, as for example where the child was habitually resident in Scotland and a parent subsequently began divorce proceedings in England.

4.105 In regard to the first type of case mentioned above, we have already made it clear that if a custody order is to be made on one of our recommended bases of jurisdiction that basis must exist at the commencement of the relevant proceedings.[514] The divorce basis would usually continue to exist thereafter; if

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[508]See para. 4.97 above.

[509]See para. 4.97 above.

[510]The only bases which can be precluded are the habitual residence and ordinary presence bases. See para. 4.99 above.

[511]In Scotland these powers are implicit in the procedures for sist, and accordingly no express provision in the annexed draft Bill is required.

[512]See para. 4.100 above.

[513]See para. 4.19 above.

[514]See para. 4.27 above.

it did not, it would be impossible to invoke the custody jurisdiction,[515] because the basis is itself defined in terms of the continuance of the divorce, etc. proceedings; custody jurisdiction could not be exercised if there were no proceedings in which to exercise it. So far as other bases are concerned, however, our recommendations do not involve any general principle that jurisdiction is no longer exercisable when the basis on which it was invoked no longer exists.[516] The fact that some other basis is available should not in our view affect this principle, for jurisdiction on that other basis might not be invoked at all and even if it were there would be no certainty that a custody order would be made.

4.106 Nevertheless where the original basis has been removed it is particularly likely to be appropriate for jurisdiction to be exercised by another court, and our recommendations for empowering the original court to stay or sist its proceedings[517] would be very relevant in this context. In any event there would be nothing to prevent the jurisdiction of the other court being invoked with a view to superseding the jurisdiction of the original court.

4.107 The second type of case mentioned in paragraph 4.104 above is where a subsequent basis may seem to deserve priority over the original basis. We think this type of case should in general be governed by principles similar to those applicable to the first type. It differs from the first in that it does not depend upon the removal of the original basis. We have already concluded that removal of the original basis should not affect the continuance of jurisdiction on that basis. *A fortiori* continuance should not usually be affected where the original basis remains. *We do however recommend* that the custody jurisdiction of a court which has granted a decree of judicial separation should be excluded if divorce or nullity proceedings in respect of the same marriage are continuing in another part of the United Kingdom.[518]

4.108 It might be argued that the original court should always relinquish its jurisdiction when proceedings were begun on a subsequent prevailing basis, and that in such a case the power to stay or sist should be mandatory rather than discretionary. We raised this question in our consultation paper,[519] and the view expressed by the majority of those who responded on the point was that the power should be discretionary. It was felt that the potential situations were likely to be various and complex and that the court should be in a position to deal with the unexpected. We share this view. We therefore conclude that the powers to stay or sist should be discretionary and that the discretion should be exercisable not only by a court the basis of whose jurisdiction has priority under our scheme but also by a court whose original basis of jurisdiction has either been lost or lacks priority under our scheme over a subsequent basis.

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[515]It could however be *exercised* when the proceedings were dismissed, if custody had already been applied for. See para. 4.98 above.

[516]See para. 4.29 above.

[517]See para. 4.103 above.

[518]In such a case we think it is clear that the jurisdiction of the second court is to be preferred. Where however there are concurrent *divorce* proceedings we think that the question of custody jurisdiction should be resolved by use of the provisions in the Domicile and Matrimonial Proceedings Act 1973 (see paras. 2.25 and 4.6 above), or in the draft Bill, for staying or sisting proceedings.

[519](1976) Working Paper No. 68/Memorandum No. 23, paras. 5.9–5.13.

(c) Where jurisdiction has been exercised

4.109 Suppose now that a custody order has been made on one of our proposed bases and that another basis is available. To some extent the proposals we have already made would enable this situation to be dealt with. In particular, jurisdiction could be assumed on a subsequent basis either if it was a prevailing basis or if the original court had exercised its power to waive jurisdiction or to stay or sist proceedings in relation to the order.

4.110 There are, however, several important questions which arise under our scheme when a custody order has been made in one United Kingdom country and a basis of custody jurisdiction is subsequently available in another.

4.111 The first question is whether the second court should assume jurisdiction at all (particularly where the second application is made shortly after the original order), since the matter may have been satisfactorily disposed of. Judicial doubts[520] have in the past been expressed about the freedom of the courts to disclaim jurisdiction in custody cases, and although these doubts have not prevented the development of a co-operative attitude in recent years[521] we think the matter should be placed beyond doubt. *We therefore recommend* that in any case in which it is sought to invoke the custody jurisdiction of the courts of a United Kingdom country those courts should be empowered to decline jurisdiction if the matter has already been determined outside that country.

4.112 The second question concerns the power to vary orders. We have indicated[522] that this power should be exercisable notwithstanding that the original basis of jurisdiction to make the order no longer exists. Should it however be exercisable where a new basis of jurisdiction exists in another United Kingdom country? We would draw a distinction here between the divorce basis and the other bases.

4.113 In general, the power to vary custody orders made in divorce, etc. proceedings would not be affected by the existence of another basis of jurisdiction, for under our recommendations the divorce basis would have primacy and normally the power to vary an order made on that basis would in practice only be exercisable where the basis remained in existence.[523] We do however make two special *recommendations*. First, where a custody order has been made in divorce proceedings which have been dismissed, the power to vary should not be exercisable if proceedings for divorce, nullity or judicial separation affecting the same child are continuing in another United Kingdom country. Secondly, the power to vary a custody order made in judicial separation proceedings should not be exercisable after the decree in such circumstances. In both these cases we think it would always be inappropriate for the original court to vary the order, because the original divorce basis would have been replaced by a fresh divorce basis having primacy both under our scheme and within the area of divorce jurisdiction. This would not be so in the rare cases where there are

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[520]See *Re X.'s Settlement* [1945] Ch. 44, 47; *Babington* v. *Babington* 1955 S.C. 115, 121.
[521]See Part I, n.5.
[522]See para. 4.30 above.
[523]See para. 4.105 above.

concurrent divorce proceedings in different parts of the United Kingdom. In these cases the issue of primacy is determined by the rules relating to divorce jurisdiction (see paragraph 4.6 above), and we think that those rules should govern the power to vary custody orders as well as the power to make them.

4.114 In the case of the other bases of custody jurisdiction we also think that in general the power to vary custody orders should remain exercisable despite the existence of another basis. However, under our recommendations the divorce basis is to have primacy over the other bases, and once jurisdiction is exercisable on the divorce basis we think that the exercise of a power to vary an order made on some other basis would be inappropriate. *We therefore recommend* that the power to vary a custody order not made on the divorce basis should not be exercisable if custody jurisdiction is exercisable in another United Kingdom country on the divorce basis itself.

4.115 The last question concerns the case where a custody order has been made in a United Kingdom country in accordance with our scheme and a subsequent custody order has been made on another basis in another United Kingdom country. The court which made the subsequent order obviously could not revoke the previous order made by the court of another country, but we have no doubt that the later order should supersede the earlier, at least in so far as they deal with the same matters, and *we so recommend.* In consequence of this recommendation *we also recommend* that the power to vary the superseded order should cease to be exercisable in regard to the matters superseded, and any supervision order[524] which is dependent upon that custody order should cease to have effect.

(2) *International interrelationships generally*

4.116 We refer above[525] to the interrelationship of our proposed bases of jurisdiction as between United Kingdom countries and other countries. In the preceding discussion we have mentioned various situations in which the jurisdiction of courts outside the United Kingdom is relevant. It will, however, be clear from what we have said that, if jurisdiction were assumed by a court outside the United Kingdom, that would not prevent the assumption of jurisdiction by a court within the United Kingdom on one of our proposed bases, except in so far as our courts would be permitted[526] to decline jurisdiction when it is being exercised by a foreign court or to relinquish jurisdiction in favour of a foreign court. We are aware that under the Hague and Council of Europe Conventions[527] the concept of habitual residence plays an important part. It is not however in the strict sense a basis of jurisdiction under those conventions, and our discussion of the relationship between these conventions and our proposals is primarily relevant to recognition and enforcement (which we deal with in Part V) rather than to jurisdiction.

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[524]Supervision orders which are made in connection with custody jurisdiction provide for the child to be under the supervision of a welfare officer or local authority. See para. 3.6 above.

[525]Para. 4.93.

[526]See e.g. paras. 4.109 and 4.111 above.

[527]See paras. 1.16 to 1.18 and 4.15 above.

(3) *Internal interrelationships of the bases of jurisdiction*

4.117 The bases of jurisdiction which we have proposed would, as we have seen,[528] be incorporated into the law of each of the three United Kingdom countries and would result in certain changes to the existing law. The courts of the three countries could not assume jurisdiction in custody matters on any other basis, and the international interrelationship of the bases would be determined in accordance with our scheme. However, to the extent that the bases were only available within a single constituent country, their interrelationship would remain a matter for the internal law of that country. In England and Wales and Northern Ireland this means that the existing law would apply. In Scotland, however, the rules in the draft Bill appended to this report are so framed as to apply the principles of our scheme to internal conflicts as well as to international conflicts. This point may be illustrated by an example. If divorce proceedings had begun in Scotland or Northern Ireland, the magistrates' courts in England could not assume jurisdiction on the basis of the child's habitual residence in England, for the divorce basis would prevail under our scheme. If, however, the divorce proceedings had begun in England, it would remain possible, in accordance with English law,[529] for the magistrates in exceptional circumstances to make a custody order on the basis of the child's habitual residence which would have effect until it was superseded by a custody order made in the divorce proceedings. The position in Scotland would, however, be different. If divorce proceedings had begun in one Scottish court, no other Scottish court could assume jurisdiction to make a custody order on the basis of the child's habitual residence.[530]

(4) *Statements in connection with custody proceedings*

4.118 Our recommendations concerning the interrelationship of the bases of jurisdiction are largely concerned with the need to avoid concurrent proceedings and conflicting orders. These difficulties, however, cannot be effectively avoided in practice if the court does not have the necessary information before it. How can a court in one country know that proceedings on the same matter are continuing in another country or that an order on the same matter has been made in another country? To some extent it may be assumed that this knowledge will be acquired in the course of the proceedings either from the parties themselves or their advisers or by whatever exchange of information between the courts could be devised through judicial practice and procedure. Nevertheless we think that no one should be entitled to bring concurrent proceedings in a United Kingdom country without informing the court that he is doing so. *We therefore recommend* that the parties to custody proceedings should be required to give particulars of other proceedings (whether in the United Kingdom or elsewhere and whether continuing or not) known to them which relate to the child concerned. This requirement should be laid down in the primary legislation but its details should be a matter for appropriate procedural rules.

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[528] See para. 4.34 above.
[529] See for instance *Kaye* v. *Kaye* [1965] P.100, 105–106; *Lanitis* v. *Lanitis* [1970] 1 W.L.R. 503
[530] See draft Bill, clause 11(1).

PART V

RECOGNITION AND ENFORCEMENT OF CUSTODY ORDERS

A Introduction

5.1 In Part I of this report[531] we drew attention to the two central problems arising from the existence in the United Kingdom of three legal systems, namely (a) the diversity and multiplicity of the present jurisdictional rules for the making of custody orders and (b) the limited recognition and enforceability of such orders. The first problem should be minimised by the adoption of uniform jurisdictional rules by all three jurisdictions, as we recommend in Part IV. In this part of the report we make recommendations for overcoming the limitations on the recognition and enforceability of custody orders.

5.2 The custody orders which fall within our jurisdictional scheme include both (i) orders made by the High Court in England and Wales and in Northern Ireland and the Court of Session in Scotland and (ii) orders made by county courts and magistrates' courts in England and Wales and in Northern Ireland and sheriff courts in Scotland. We have concluded that, given the jurisdictional bases which we have recommended, there is no reason for excluding the custody orders of any court in the United Kingdom from recognition and enforceability throughout the United Kingdom. We have also concluded, however—for reasons which we develop later[532]—that the enforcement in one part of the United Kingdom of custody orders made in another part should be in the hands of the appropriate court of the country where the order falls to be enforced, and that that court in England and Wales and in Northern Ireland should be the High Court and in Scotland should be the Court of Session.

B Recognition of custody orders made in another United Kingdom country

(1) *Scots law*

5.3 Existing Scots law is that custody orders made by a court outside Scotland will be recognised if pronounced by the court of the domicile.[533] That court is regarded as having pre-eminent jurisdiction and as being the only court competent to pronounce a judgment *in rem* on the question of custody, although the courts of the child's residence may be regarded as having a subsidiary "protective" jurisdiction.[534] Recognition may be important in so far as third persons are affected by the order, and also means that a Scottish court may make orders for the enforcement of a recognised foreign order without itself making a custody order.[535]

5.4 Where, however, the question of enforcement arises in Scotland the court treats the child's welfare as the first and paramount consideration. A

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[531]See paras. 1.4–1.7 above.

[532]See paras. 5.20 and 5.22 below.

[533]*Westergaard* v. *Westergaard* 1914 S.C. 977; *Radoyevitch* v. *Radoyevitch* 1930 S.C. 619; *Kelly* v. *Marks* 1974 S.L.T. 118; *Campbell* v. *Campbell* 1977 S.L.T. 125. See para. 2.75 above.

[534]*Babington* v. *Babington* 1955 S.C.115; *Kelly* v. *Marks* 1974 S.L.T. 118.

[535]Thus, in *Kelly* v. *Marks* above, since a Dutch order was held to be entitled to recognition, the court confined itself to making a delivery order.

custody order made by a court of competent jurisdiction outside Scotland will be given "the fullest respect and consideration" but will not be "blindly enforced"[536] and will not prevent the Scottish court from making its own decision on custody if it has jurisdiction to do so.[537]

(2) *English and Northern Ireland law*

5.5 There is no provision in English or Northern Ireland law for the "recognition" of custody orders made outside England and Wales or, as the case may be, Northern Ireland.[538] If, in a particular case, an English court decides that a custody order made by a foreign court merits implementation, it normally makes its own orders for the purpose.[539]

5.6 It does not follow, however, that a custody order made outside England and Wales or, as the case may be, Northern Ireland, is without effect in those countries. Although there is little authority on the point, there are *dicta* that the power and control of Scottish or foreign guardians appointed by proper and competent tribunals will be respected, and that if those guardians think, in the honest exercise of their discretion, that it would be for the advantage and interest of their wards to remove them abroad, the court will permit them to do so.[540] We have little doubt that in practice a third person, such as an English headmaster, would be held to have acted properly if he acted on the assumption that a custody order made by a court in another part of the United Kingdom was effective in England and Wales, although there appears to be no clear judicial authority on the point.

(3) *Proposals in our consultation paper*

5.7 In our consultation paper we observed[541] that the broad principle that a custody order made by any United Kingdom court should be recognised as *prima facie* valid in all parts of the United Kingdom was inherent in our proposals. We thought that the order should be recognised as binding by the parties to the original proceedings, wherever they might be; that it should be recognised as authorising certain kinds of administrative action throughout the United Kingdom; and that its existence should be a ground for a court in another part of the United Kingdom to decline jurisdiction in an appropriate case. We did not, however, think it practicable to propose automatic enforcement of a recognised order;[542] recognition, we suggested, does not necessarily imply enforceability, although it is a condition of enforceability.[543]

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[536]*Campins* v. *Campins* 1979 S.L.T. (Notes) 41, 42, *per* Lord Cameron.

[537]*Campins* v. *Campins*, above. Cf. *Radoyevitch* v. *Radoyevitch* 1930 S.C. 619, 626.

[538]See paras. 2.44 *et seq.*, 2.114 *et seq.*, above.

[539]See, e.g., *Re H.* [1966] 1 W.L.R. 381, in which the Court of Appeal, after deciding that the decision of a New York court should be upheld, ordered the children in question to be delivered to the father, who was to be at liberty to convey them to New York.

[540]See *Nugent* v. *Vetzera* (1866) L.R. 2 Eq. 704; *Stuart* v. *Bute* (1861) 9 H.L.C. 440. See also para. 2.45, n.183 above.

[541](1976) Working Paper No. 68/Memorandum No. 23, para. 4.12.

[542]*Ibid.*, para. 4.13.

[543]*Ibid.*, and see para. 5.10 below.

(4) *Our present views*

(a) Custody orders should be recognised throughout the United Kingdom

5.8 Although in the response to the consultation paper there was little detailed comment on these references to "recognition", no one dissented from the approach outlined in paragraph 5.7 above. Furthermore, the specific suggestion was made that something similar to the Scottish concept of recognition should apply throughout the United Kingdom, at least in respect of orders made in a United Kingdom country.

5.9 We see advantages resulting from the introduction of a statutory provision for the recognition throughout the United Kingdom of all custody orders made by courts with jurisdiction under our recommendations-

(i) It would clarify existing law in England and Wales and in Northern Ireland, particularly as regards the position of third parties. Not only judges, but also social workers, school teachers, solicitors, court officers and others might require to know whether or not a custody order confers any rights within the part of the United Kingdom in which they operate. In particular, the provision would help to protect those who act on the basis of an order made in another United Kingdom country by a court with jurisdiction under our scheme.

(ii) It would reduce the likelihood of legal proceedings being brought in one part of the United Kingdom merely to safeguard rights conferred by court orders made in another part. Although we have no information indicating how often this occurs, the uncertainty of the existing law does constitute something of an inducement to such litigation.

(iii) It would make explicit what is implicit in some of our other recommendations. It was suggested in the consultation paper[544] as a general principle (and not dissented from on consultation), that a prohibition imposed by a court on the removal of a child from one part of the United Kingdom should have effect in the other parts to prohibit the taking of the child out of the United Kingdom altogether. Moreover, we accept that a custody order made by a court with jurisdiction under our proposals should supersede an earlier order, even if the orders were made in different parts of the United Kingdom. For reasons explained elsewhere in this report,[545] it is necessary in any case to provide specifically for these matters, and this has been done in the annexed draft Bill.[546] The inclusion of such provisions does however of itself imply some degree of recognition, and the express inclusion of the concept in the Bill may be thought to help in the comprehension of these provisions.

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[544]See paras. 4.12, 6.19 and 6.50(2).

[545]See paras. 4.115 above and 6.17 below.

[546]I.e. in clauses 35 and 36, (removal from the United Kingdom) and in clauses 6(1), 15(1) and 23(1) (supersession of an earlier order by a later one).

(b) Recognition should not of itself imply enforceability

5.10 We do not, however, consider that recognition of a custody order made in one part of the United Kingdom should of itself enable a person entitled under the order to demand, in another part, the assistance of court officers or other public officials in its enforcement (except in relation to the prevention of the removal of a child to a place outside the United Kingdom[547]); nor do we consider that recognition should extend to those parts of custody orders, or to subsequent ancillary orders, which form part of the enforcement process, such as orders to hand over a child at a particular time and place, or authorising the use of force to seize a child. In reaching this conclusion, we accept that there are arguments the other way, and that there are precedents in other fields for orders relating to enforcement to be implemented in parts of the United Kingdom other than those in which they were made.[548] However, we remain of the view expressed in the consultation paper[549] that "the relative independence of the legal systems of the United Kingdom does not make it practicable to envisage a scheme for the automatic enforcement in one part of the United Kingdom of custody orders emanating from another part". The officers of law in each part require the express authority of their own courts before taking action which might in the end involve the use of force. The effect of recognition of a custody order would be to authorise, but not to require, compliance with the order. Hence, anyone who handed over the child to the person entitled to custody under the order would be protected. If, however, the child was not handed over and enforcement proceedings became necessary, these would have to be brought in the part of the United Kingdom in which enforcement was sought.

(c) Special considerations relating to Scotland

5.11 Scots law differs from the law of England and Wales and Northern Ireland in that the common law provides for the recognition of a custody order made outside Scotland if the child is domiciled in the country in which it was made.[550] One effect of our recommendations for the express statutory recognition of United Kingdom custody orders will be that orders made in England and Wales and Northern Ireland will no longer be subject to recognition in accordance with the Scots common law.

5.12 Our recommendations as to the recognition of United Kingdom custody orders will not affect the Scottish common law principle in its application to custody orders made outside the United Kingdom. We propose to preserve that principle. However, both to reduce the potential for conflicts and because, in the context of custody, the concept of domicile is now largely superseded in the international field by the concept of habitual residence,[551] the

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[547] See paras. 6.4–6.7, 6.16 and 6.17 below.

[548] E.g. warrants in criminal proceedings, or for the recovery of children removed in defiance of a care order.

[549] (1976) Working Paper No. 68/Memorandum No. 23, para. 4.13.

[550] See para. 5.3 above.

[551] See para. 4.15 above.

Scottish rule should be amended so as to relate to the child's habitual residence instead of the child's domicile. If this amendment were not made, the rule could produce anomalous results. For example, under our recommendations an English court could make a custody order on the basis of the child's habitual residence in England. The child might, however, be domiciled in France by reason of the father's domicile there. Subsequently, but while the child was still habitually resident in England, a French court might make a conflicting order. Under the existing rule that order would require to be recognised in Scotland as superseding the English order even though under our scheme no custody order made in a United Kingdom country would be recognised on the basis of domicile.

5.13 The preservation of the principles of Scots law relating to the recognition of orders made outside the United Kingdom, even when such orders are recognised on the basis of habitual residence instead of domicile, would have certain necessary consequences—

(1) A Scottish custody order might still be superseded in Scotland by a later order made in a foreign country in which the child was habitually resident. It must follow that such a superseded Scottish order should not be recognised in other parts of the United Kingdom.

(2) A custody order made in England and Wales or Northern Ireland would still cease to be recognised in Scotland by reason of the making of a later custody order in a country outside the United Kingdom in which the child was habitually resident, although the original order would remain in force in England and Wales or Northern Ireland.

5.14 The first of these consequences is primarily of concern to Scotland, and does not represent any substantial change in the existing situation. The second consequence affects England and Wales and Northern Ireland, and is an exception to the general principle underlying our proposals that an order made by a United Kingdom court with jurisdiction should have effect throughout the United Kingdom unless and until it is revoked or varied or superseded by an order made in another part of the United Kingdom. However, it must be remembered that under existing Scots law an English or Northern Ireland custody order relating to a child domiciled abroad could be superseded in Scotland by a later order made by a court in the country of the child's domicile. Moreover, if either or both of the international Conventions to which we have referred [552] are ratified by the United Kingdom, it will follow as a necessary consequence that an order made in a United Kingdom country in relation to a child who is habitually resident abroad will be superseded by a later order made in the country of the child's habitual residence, if that is a country which has adhered to the relevant Convention.[553] To this extent, therefore, the provisions of Scots law relating to recognition of foreign orders may be regarded as an anticipation of the position which is likely to be achieved in the event of the United Kingdom adhering to the international Conventions.

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[552]Paras. 1.16 to 1.18 above.

[553]There are provisions in both Conventions which allow the courts of the State which is asked to enforce the order to refuse to do so on certain specified grounds, but these would only be likely to apply in very few cases.

5.15 *We therefore recommend* as follows:

(1) a custody order (excluding any enforcement provisions) made in one United Kingdom country should, if it is still in force and the child is under 16, be recognised in any other United Kingdom country as having the same effect as if made by the High Court or the Court of Session as appropriate;

(2) in Scotland, the rule whereby orders made outside the United Kingdom may be recognised should be preserved, but should be amended so as to relate to orders based on the child's habitual residence instead of orders based on the child's domicile.

C Enforcement of custody orders made in another United Kingdom country

5.16 As we mentioned at paragraph 5.10 above, we do not consider that recognition should of itself confer a right to demand enforcement by court officers or other officials of the country in which compliance with a custody order is sought. We therefore now turn to the question how an order entitled to recognition should be enforced. In England and Wales and in Northern Ireland, there is no existing law on this matter; there is no procedure for the enforcement of an order made in another jurisdiction and consequently fresh custody proceedings have to be begun. Although there is provision in Scots law for recognition and enforcement of foreign custody orders (including English and Northern Ireland orders) where the order was made on the basis of the child's domicile, we think that, in relation to orders made by courts in the United Kingdom, this should be superseded by the reciprocal procedure which we recommend for United Kingdom orders generally.

(1) The basic principles of an enforcement system

5.17 The enforcement in each part of the United Kingdom of custody orders made under our jurisdictional scheme in another part should in our view be governed by the following principles:

(*a*) an appropriate court, subject to safeguards, should enforce the order as if it were its own;

(*b*) enforcement, including the making of delivery orders and orders or warrants authorising court officers and others to take action, should be under the direct control of the appropriate court;

(*c*) the appropriate court in England and Wales and in Northern Ireland should be the High Court, and in Scotland should be the Court of Session.

We discuss these principles below.

(a) The appropriate court, subject to safeguards, should enforce the order as its own

5.18 A person entitled under the terms of a custody order made in a United Kingdom country by a court with jurisdiction under our scheme should be able to apply to a court in any other United Kingdom country for such further orders

or warrants as may be required to enforce the custody order in that country. The enforcing court should have jurisdiction to grant such orders or warrants even if—as would normally be the case—it would not itself have jurisdiction to make a custody order.[554] The further orders or warrants which could be applied for would include orders for the delivery of the child, injunctions or interdicts, and orders or warrants authorising court officers to search for and recover the child, i.e. any steps relating to enforcement which that court could authorise in relation to its own orders.

5.19 It is inherent in our scheme that an objector in a United Kingdom country in which enforcement is sought should not be able in that country to reopen issues as to the merits which were considered or ought to have been raised before the court which made the order. If this were permitted, it would stultify the whole purpose of the scheme. We hope that the effect of our proposals generally will be to lessen the risk of children being taken from one part of the United Kingdom to another for the purpose of reopening such issues. It must however be open to an objector to show that the order which it is sought to enforce no longer has effect (for example because it has been superseded by a later order) or that there are grounds for seeking reconsideration of the order either in the part of the United Kingdom in which it was made or, if jurisdiction has now passed to the courts of another part of the United Kingdom, by those courts. We deal with these matters in more detail in paragraphs 5.31 to 5.37 below.

(b) Enforcement should be under the direct control of the appropriate court in the country where it takes place

5.20 In the enforcement process of civil proceedings the officers of law in each part of the United Kingdom require the express authority of their own courts before taking action which may in the end involve the use of force. It was pointed out in the consultation paper that, because of the relative independence of the legal systems of the United Kingdom, it was not practicable to envisage a scheme for the automatic *enforcement* in one part of the United Kingdom of custody orders emanating from another part.[555] There was no dissent from this proposition on consultation, and we adhere to it. Accordingly, orders or warrants authorising the use of force in relation to custody orders should be effective only if issued by the courts of the country where the force is to be used, and a similar principle should apply to orders for the actual handing over or delivery of a child and orders enjoining or interdicting some action or course of action in relation to a child.[556] It follows that, under the proposals here made, a person could not, for example, be imprisoned in England on the ground of his failure to comply in England with a custody order of a Scottish court or a Scottish order or warrant for the enforcement of a custody order. In such a case, committal to prison by an English court would follow only on disobedience of an English court order made as a part of the process of enforcement of the recognised Scottish or Northern Ireland order.

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[554]A typical case would be where a custody order was made in divorce proceedings in England, the child was in Scotland and there were no circumstances justifying the exercise of emergency jurisdiction in Scotland.

[555](1976) Working Paper No. 68/Memorandum No. 23, para. 4.13.

[556]We provide below (para. 6.17) for an exception as regards attempted removal from the United Kingdom.

5.21 It may be thought by some that acceptance of the impracticability of proposing any scheme for the direct and mutual enforcement in one part of the United Kingdom of custody orders and related enforcement orders emanating from another part is too cautious. Why, for example, should a Scottish court not be able to authorise and instruct direct enforcement of its custody orders by court officers in England and Wales? There is an apparent simplicity in this approach which is attractive at first sight. In the example given, however, it is the English court which is likely to be in the best position to control and supervise the use of force by officers answerable to it and to respond to special circumstances which may first come to light as the result of enforcement measures being initiated. Moreover, a scheme whereby the courts of one United Kingdom country could authorise and instruct direct enforcement measures by court officers in another would have implications for enforcement principles and procedures going far beyond custody orders. We would not rule out the possibility of such a scheme at some stage in the future (although we believe that it would not be so simple to devise as might appear at first sight). The results of our consultation, however, suggest that it would not be generally acceptable at the present time.

(c) Enforcement should be the responsibility of the supreme courts[557]

5.22 Our reasons for confining enforcement of custody orders from other parts of the United Kingdom to the supreme courts are as follows. First, the jurisdiction of the supreme court extends throughout the whole of the part of the United Kingdom in which it sits. Secondly, if orders from other parts of the United Kingdom could be enforced by the lower courts it would be necessary to provide rules to determine which lower court should have jurisdiction: this would not be impossible[558] but it could lead to considerable difficulties and complexities. Thirdly, if there were one central register for each country, it would be easier for the court officers concerned to develop an efficient procedure for handling orders and to gain familiarity with the form of orders made in other parts of the United Kingdom and with the procedures followed by the courts in those parts.

(2) *Procedure for enforcement*

(a) Registration

5.23 In our consultation paper we provisionally proposed that the procedure for enforcement should include a system whereby orders made in one part of the United Kingdom would be registered in the supreme court of the part of the United Kingdom in which compliance with the order was sought.[559] This proposal was agreed by all English consultees, but some Scottish consultees expressed a preference for leaving enforcement procedures to be determined in each part of the United Kingdom separately without any pro-

[557]By the "supreme courts", we mean the High Court in England and Wales and in Northern Ireland and the Court of Session in Scotland.

[558]The basic rule might be, for example, that any court within whose jurisdiction the child was for the time being present would have power to make enforcement orders.

[559](1976) Working Paper No. 68/Memorandum No.23, para. 4.5.

vision for registration. We gave serious consideration to the possibility of a system whereby a custody order made in one part of the United Kingdom could be used, without any need for prior registration, as the basis for an application to a court in another part for orders for enforcement, just as if the order had already been made by that court. Such a system would be sufficient to ensure that enforcement measures were under the control of the local court. We can, however, see certain advantages in a registration system in that it would avoid questions as to the authenticity of orders and would, if the register were properly updated to take account of variations and cancellations of orders, reduce the likelihood of out-of-date orders or superseded orders being presented for enforcement. It is also possible that, by serving as an indication that the enforcement process had been set in motion, registration would sometimes bring about compliance with the order and would thus avoid further and more costly steps in the proceedings. For these reasons *we recommend* that a custody order made in one part of the United Kingdom and recognised in another part should be enforceable in that other part if, but only if, registered there.[560]

5.24 The registration system we have in mind would resemble that embodied in the Maintenance Orders Act 1950 for the enforcement throughout the United Kingdom of maintenance orders made in a United Kingdom country, although it would differ in some respects (notably, in providing for registration of all orders in the supreme court of the part of the United Kingdom in which enforcement is sought, irrespective of the level of the court in which the order was made).

5.25 For the reasons explained in paragraph 1.22 above, we have decided that our proposals on recognition and enforcement should apply only to persons under 16. It follows that an order should not be registered if it is in respect of a child who has attained the age of 16, and that a registered order should cease to have effect in the registering country on the attainment by the child of that age.

5.26 The procedure we envisage for registration would be as follows. The person on whom rights are conferred by a custody order ("the applicant") and who wishes to have the order enforced in a United Kingdom country other than that in which it was made would apply to the court which made it for the order to be transmitted to and registered in the supreme court of that other country. The detailed manner of application and the information and documents to accompany it would be prescribed by rules of court. We visualise however that the application would be accompanied by a statement signed by the applicant, stating that to the best of his or her knowledge and belief the order is still in force and is not superseded by a later order. The court which made the order[561] would then arrange for the application and accompanying documents, together with a duly authenticated copy of the order and particulars of any variations, to be sent to the supreme court of the country in which enforcement is sought

[560]Some members of the Scottish Law Commission, while not dissenting from this recommendation, consider that the case for a registration requirement is not particularly strong and that a system which dispensed with the need for registration would be a feasible alternative.

[561]The question whether an appellate court would itself send the papers should, we think, be a matter for rules of court.

("the registering court"), which would register it. (The order sent for registration would of course sometimes include enforcement or other provisions which would not be recognised for the purpose of our scheme[562] and would not themselves be susceptible of enforcement by the registering court.) When the order had been registered, the applicant would apply to the registering court for its enforcement. For enforcement purposes, the registering court would act upon the principles outlined in paragraphs 5.16 to 5.21 above, but would follow the procedures (for example for the giving of notice) prescribed by its own internal laws and rules.

5.27 It will also be necessary to provide specifically for the variation and revocation or recall of registered orders. Where the court which made the order has varied or revoked or recalled it, that court should notify the registering court. Particulars of any variation would then be registered, and if the order had been revoked or recalled the registration would be cancelled. Where however the registered order ceased to have effect in whole or in part for some other reason—for example because a later order has been made by a court with jurisdiction under our scheme—the decision whether and to what extent to cancel the registration would rest with the registering court. It should be able to do this either of its own motion or on the application of any person appearing to have an interest.

5.28 The registration system we propose would have several advantages over a system in which the applicant for enforcement was responsible for lodging the custody order in the supreme court of another part of the United Kingdom. For example, the process of enforcement would be begun "at home" (by an application for registration); the responsibility of transmitting the order would be that of the court which made it and not that of the applicant; the applicant would be spared the expense of employing solicitors to carry out the registration in the other jurisdiction; and the order when registered would be updated by amendment or cancellation by the court concerned, without the applicant necessarily having to take further steps in this respect.

(b) Enforcement following registration

5.29 It follows from the principles we have stated above[563] that a registered order should be enforced by the registering court (i.e. the High Court in England and Wales or in Northern Ireland and the Court of Session in Scotland) as if it had been made by that court and as if that court had had jurisdiction to make it, and that the procedure to be applied, including the issue of orders or warrants or the imposition of penalties for contempt where necessary, should be that of the registering court. It would be necessary for the person seeking enforcement to apply to the registering court to set the process in train. For this purpose and thereafter, the procedure, including the giving of notice to other interested persons, would be regulated by rules of court. In some cases, notice of the registration might of itself secure compliance with the order. Where it did not, we envisage that, if the person who applied for registration did so because he wished to recover the child from the person who

[562]See para. 5.10 above.
[563]Paras. 5.16–5.22.

has actual possession, he would follow up the registration with a request to the registering court for an order requiring the person who has the child to deliver him to the applicant at a particular time and place (a "delivery order"). If the breach complained of was of a different nature, for example refusal of reasonable access, the registering court would no doubt start by making an order requiring compliance.

5.30 We also consider that when an application for enforcement is made the registering court should have power to give interim directions. One obvious possibility is to order that the child is not to be removed from the United Kingdom pending further order, since such a removal might well render the whole proceedings nugatory; or to make ancillary orders with the same objective, for example to order the surrender of a passport; or to make some interim provision for the child's education, for going on holiday with a school party, or for similar matters. The objective should be to secure the welfare of the child and to prevent changes in circumstances which might prejudice the outcome of the application. It follows that the interim directions should only operate until the determination of the application for enforcement.

(c) Objections to enforcement

5.31 We think that it is desirable for the legislation implementing our proposals to specify the grounds on which objections to enforcement of a registered order could be made and the action which the registering court should take on receipt of those objections. We envisage that the objections would be lodged when the first steps towards enforcement were taken.

5.32 One ground of objection might be that the registered order had ceased to have effect in the part of the United Kingdom in which it was made, for example because it had been superseded by a later order. This situation[564] would occur if, for example, the registered order had been based on the child's habitual residence in the United Kingdom country concerned, but an order was subsequently made by a court in another United Kingdom country which had acquired jurisdiction either because the child's habitual residence had changed or because proceedings between the parents for divorce, nullity or judicial separation had begun in that court. In such circumstances, the registering court, if satisfied that the order had ceased to have effect,[565] should dismiss the proceedings for enforcement and cancel the registration of the first order.

5.33 Another ground of objection might be that the court which made the original order did not have jurisdiction to make it. We consider that the decision whether or not this was so should be a matter for the courts of the

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[564]Special situations could arise as a result of the Scots law concerning recognition of foreign custody orders (see paras. 5.11–5.15 above). There could, for example, be an objection to a Scottish order registered in England and Wales or in Northern Ireland, on the ground that it had been superseded in Scotland by an order made outside the United Kingdom by the court of habitual residence. There could also be an objection on the same ground to an English or Northern Ireland order registered in Scotland, though in such a case the order would not be superseded in England and Wales or in Northern Ireland.

[565]Or that the registered order had ceased to have effect in Scotland in the circumstances given at the end of n.564 above.

country where the order was made. Accordingly, we think that the registering court should be enabled to stay or sist the enforcement proceedings to enable the objector to take proceedings in the other United Kingdom country, either by application to the court which made the order or by appeal from that court's decision.

5.34 A third possibility is that the objector might contend, and have a *prima facie* case for contending, that the order should now be varied or be revoked or recalled by the court which made it, for example, because of a change of circumstances since it was made. Here again, we do not consider that the registering court should itself investigate the matter. We think it should be enabled to grant a stay or sist to enable the objector to apply to the court which made the order for its variation or revocation.

5.35 A fourth possibility is that a different United Kingdom country now has jurisdiction to make a custody order, and the objector says that he intends to apply in that country for a fresh order but has not yet done so—or that he has so applied but no decision has yet been given. Here again we think that the registering court should be enabled to stay or sist the proceedings until the outcome of the application is known. It may also be appropriate in certain circumstances for the registering court to stay or sist proceedings pending the outcome of a custody application to a foreign court. This is most likely to arise in relation to enforcement of an English or Northern Ireland order in Scotland because of the possibility that an order made by the foreign court would be recognised in Scotland as superseding the registered order.

5.36 It would be necessary in the interests of the original applicant for the registering court to retain some control over objections, so as to prevent the machinery being exploited to delay a decision. The registering court would, on ordinary principles, be able to refuse a stay or sist and thus to dismiss an objection and proceed with enforcement. It should also, we think, have power to remove a stay or sist if the objector delays unreasonably in prosecuting the other proceedings by reason of which the stay or sist was imposed or if the objector is unsuccessful and the order as registered is confirmed.

5.37 Finally, although the registering court would not be concerned with the merits of the original order, cases might conceivably arise in which it would need to exercise its residual discretion to postpone enforcement, where, for example, the child is undergoing medical treatment or is taking an important school examination. Such cases would be rare, and when the exercise of its residual discretion was invoked, the registering court would need to be vigilant that the application was not made merely for delaying purposes. Nevertheless, we think that the discretion should be available to the registering court as it is for the enforcement of its own orders, to enable it to cope with exceptional cases, the precise nature of which is unpredictable.

(d) Recommendations relating to enforcement

5.38 *We therefore recommend* as follows—

(1) A custody order made under the scheme and recognised in another United Kingdom country should be enforceable in that other United Kingdom country if, and only if, registered there.

(2) A custody order should not be registered in respect of a child who has attained the age of 16, and registration should cease to have effect on the attainment by the child of that age.

(3) Anyone with rights under a custody order made under the scheme should be entitled to apply to the court which made it for it to be registered in another United Kingdom country, and on such application that court should cause the order to be transmitted to the supreme court of the country where it is to be registered.

(4) Where a court varies or revokes or recalls a registered custody order it should arrange for the registering court to amend or cancel the registration; and where a registered order ceases to have effect (wholly or partly), amendment or cancellation should be a matter for the registering court.

(5) A registered custody order should be enforceable by the registering court as if it were its own order, and in accordance with its own procedure; but the registering court should have power

(*a*) on the making of the application for enforcement, to give interim directions;

(*b*) to stay or sist enforcement proceedings where any person with an interest intends to apply for its variation or revocation or for a fresh order, and in appropriate circumstances to remove the stay or sist;

(*c*) to dismiss the application where it is satisfied that the order has ceased to have effect;

(*d*) to exercise its residual discretion to postpone enforcement.

PART VI

ADMINISTRATIVE AND PROCEDURAL PROBLEMS

A Introduction

6.1 Under the recommendations made in Part V of this report a custody order made in one part of the United Kingdom will be enforceable in another part, once the order has been registered in the supreme court of the country where enforcement is sought. The order will thereby be converted, in effect, into a local decree and will become enforceable by such methods of enforcement as are available in the supreme court of that part of the United Kingdom.

6.2 However, schemes for enforcement will only be of practical value if the facilities available for enforcement are effective. Accordingly, in our consultation paper, we made a series of provisional proposals[566] relating to the administrative problems involved in the enforcement of United Kingdom custody orders. We classified these problems in relation to (a) the prevention of the child's removal from United Kingdom countries; (b) tracing the child; and (c) enforcement of the order. In this part of the report we discuss these problems and make certain recommendations and suggestions for tackling them.

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[566](1976) Working Paper No. 68/Memorandum No. 23, para. 6.50.

6.3 As in the consultation paper,[567] we have not found it possible to draw a rigid line of separation between questions which are purely administrative and questions relating to the powers of the courts to ensure that custody orders are obeyed. Moreover, although this report is concerned primarily with the reform of the rules relating to the jurisdiction of courts in the United Kingdom to make custody orders and with the provision of a uniform scheme for the recognition and enforcement of those orders throughout the United Kingdom, the problems under review in this Part are to some extent domestic; they are as much concerned with, for example, the effectiveness of an English custody order in England as with its effectiveness in Scotland.

B Preventing removal of a child from the jurisdiction in breach of a court order

(1) *Existing powers of the court*

(a) England and Wales

6.4 In England and Wales the courts often include a provision in a custody order that the child should not be removed out of the jurisdiction without the leave of the court[568] except on such terms as may be specified in the order. Where the High Court or a divorce county court makes an order relating to the custody or care and control of a child in matrimonial proceedings, that order includes such a provision unless the court otherwise directs.[569] In the case of wardship proceedings, a ward may not be removed out of the jurisdiction without leave, even in the absence of a specific prohibitory order.[570]

6.5 The power to restrict removal of the child from the jurisdiction may also be exercised before the court actually makes an order for custody or care and control. The High Court and county courts have wide powers for this purpose,[571] and in divorce proceedings either party may apply *ex parte,* at any time after the filing of the petition, for an order prohibiting the removal of the child out of the jurisdiction without leave of the court.[572]

(b) Scotland

6.6 The Court of Session has power at any time after the commencement of custody proceedings to grant an interdict, or interim interdict, prohibiting the removal of the child from Scotland[573] and it may have power at common law to grant such interdicts in other circumstances. It is thought that the sheriff courts do not have such a power.[574] However, if custody proceedings have been raised

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[567]*Ibid.*, para. 6.5.

[568]For specific statutory powers, see para. 2.36 above and n.155 to that para.

[569]M.C.R. 1977, r.94(2).

[570]See paras. 6.24–6.30 below, where this point is discussed in detail.

[571]See para. 2.36 above.

[572]M.C.R. 1977, r.94(1).

[573]Matrimonial Proceedings (Children) Act 1958, s.13 (interim interdict). See also Burn Murdoch, *Interdict,* pp. 390–1; *Nicolson* v. *Nicolson* (1869) 7 M.1118; *Marchetti* v. *Marchetti* (1901) 3 F. 888; *Robertson* v. *Robertson* 1911 S.C. 1319.

[574]The sheriff has jurisdiction to grant interdict against an alleged wrong being committed or threatened to be committed within his sheriffdom (Sheriff Courts (Scotland) Act 1907 s.6(e)) but not, it would seem, elsewhere.

in a sheriff court an application can be made to the *Court of Session* for an interim interdict prohibiting the removal of the child from Scotland.[575] The number of custody applications dealt with by the sheriff courts is considerable and is likely to increase greatly as a result of the conferring of divorce jurisdiction on the sheriffs as from May 1984.

(c) Northern Ireland

6.7 The powers of the Northern Ireland courts[576] are similar to those of the English courts.[577] In wardship and other proceedings in the High Court involving the custody of a child, it is invariably ordered that the child shall not be removed out of the jurisdiction without the approval of the court. In wardship proceedings, however, as in England and Wales, the restriction on removal takes effect even in the absence of a specific prohibition.[578]

(2) Existing administrative arrangements for preventing children from leaving the jurisdiction

(a) England and Wales

6.8 In England and Wales administrative arrangements exist which are designed to prevent so far as practicable the removal of children abroad contrary to a court order. These arrangements may be available when a child is:

(*a*) a ward of court; or

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

(*c*) the subject of an injunction restraining one or more named persons from taking the child out of the jurisdiction; or

(*d*) the subject of an order in divorce, etc. proceedings prohibiting the child's removal out of the jurisdiction without leave of the court.[579]

(i) Passports

Caveat against issue of passport

6.9 Passport facilities in respect of a child are granted in England on the consent of either parent unless a caveat (which must usually be supported by a court order) has been accepted by the Passport Office. However, if one of the orders listed in paragraph 6.8 above is in force, then any interested party may give written notice to the Passport Office that a passport should not, without

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[575]Matrimonial Proceedings (Children) Act 1958, s.13.

[576]See para. 2.107 above.

[577]See paras 2.36 and 6.4–6.5 above.

[578]See paras. 6.24–6.30 below, where the point is discussed in detail.

[579]See *Practice Direction (Taking Child out of Jurisdiction)* [1963] 1 W.L.R. 947; *Practice Direction (Child: Preventing Removal Abroad)* [1973] 1 W.L.R. 1014; *Practice Direction (Ward: Removal from Jurisdiction)* [1977] 1 W.L.R. 1018: reproduced in *Rayden on Divorce*, 14th ed. (1983), pp.3906–7, 3949–50.

leave of the court, be issued in respect of the child. Subject to the surrender of passports, referred to in paragraph 6.10 below, there is no practical way in which passports already issued may be withdrawn and large numbers of children now have passports or are included in the passport of one or both parents. Furthermore, the system of caveats cannot be applied in practice to British visitors' passports (which are issued by post offices) or to foreign passports.[580]

Surrender of passport

6.10 The High Court may order the surrender of a British passport. A recent Practice Direction provides that:

> "In matrimonial, wardship and guardianship cases the court may grant an injunction restraining the removal of a child from the court's jurisdiction . . .
>
> In cases in which the child holds, or the threat [of removal of the child from the jurisdiction] comes from the holder of, a British passport the court sometimes orders the surrender of any passport issued to, or which contains particulars of, that child.
>
> Unless the Passport Office is aware that the court has ordered a British passport to be surrendered, there may be nothing to prevent a replacement passport from being issued. Accordingly, in such cases, the court will in future notify the Passport Office in every case in which the surrender of a passport has been ordered."[581]

(ii) The Home Office "stop list" procedure

6.11 Whether or not a current passport for a child already exists, in appropriate cases the Home Office is prepared, on request, to lend its assistance in order to prevent the unauthorised removal of a child from England and Wales contrary to one of the court orders listed in paragraph 6.8 above. Requests for action are normally made by solicitors.[582] The scope of this procedure is explained as follows:

> "The assistance of the Home Office should not be invoked as a precautionary measure but only when absolutely necessary, i.e. only when it is known that there is a real risk of the infant being removed from the jurisdiction . .
>
> When a name has been entered on the Home Office list, the measure[s] taken by the Home Office are more likely to prove successful if the solicitors will communicate with the Home Office as soon as they receive any definite indication as to when, from which port, and for what destination the infant is likely to be removed. There is no point in notifying the Home Office of a general suspicion that the infant is likely to be removed soon, or in requesting that all major ports should be alerted.

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[580]For a discussion of current practice, see *Hansard* (H.C.), 22 December 1983, vol. 51, cols. 614–620.

[581]*Practice Direction (Minor: Passport)* [1983] 1 W.L.R. 558.

[582]Solicitors who wish to take advantage of this procedure must produce to the Home Office a copy of the injunction or order or, in cases of urgency in wardship proceedings, after the commencement of the proceedings but before an order for wardship is made, a letter to the Home Office signed by the appropriate Registrar.

The Home Office does what it can to ensure that the orders of the courts are not evaded but their measures can be evaded."[583]

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

6.13 It is obvious that there are practical limitations on the efficacy of the assistance which the Passport Office and the Home Office are able to provide. For example, the child may be taken out of the jurisdiction to Scotland, Northern Ireland, the Channel Islands, the Isle of Man or the Republic of Ireland, for which journeys passports are not needed and to which territories journeys may be made without passing through any control. Moreover, the immense increase in the number of passengers passing through the ports[584] has added to the difficulties of identifying children who are the subject of precautions. This identification can be carried out effectively only by comprehensive reference to the index. But the immigration officer must clear outgoing passengers quickly if unacceptable delays to ships and aircraft are to be avoided. There is accordingly a conflict between the need for speedy clearance and that of identifying children being unlawfully removed from the jurisdiction and their escorts, and we understand that in practice the Home Office exercises its discretion in deciding whether intervention is appropriate.

(b) Scotland

6.14 The Home Office's "stop list" procedure does not extend to Scotland[585] although it is understood that the matter is under consideration. The caveat system described in paragraph 6.9 above applies also to the issue of passports in Scotland and notices preventing issue may be given in respect of custody orders made by the Court of Session or sheriff court and in respect of orders interdicting removal of the child from the jurisdiction. There is no authority or practice note on the power of Scottish courts to order the surrender of a passport in order to prevent the removal of a child from the United Kingdom in contravention of a court order but, on general principles, there would seem to be no reason why a court should not make an award (for

[583] *Practice Direction (Taking Child out of Jurisdiction)* [1963] 1W.L.R. 947. The Home Office has informed us that at present precautions at the ports are instituted in about 400 cases a year. In about 10 cases a year only is an actual attempt at removal made and over half these attempts are frustrated.

[584] In 1952, when the stop list procedure was introduced, the number of passengers leaving the United Kingdom was 3.3 million. In 1983 the number was 36 million.

[585] There have, however, been recommendations for its extension to Scotland: see the Report of the Royal Commission on Marriage and Divorce (1956), Cmnd. 9678, para. 424, and the Hodson Report (1959), Cmnd. 842, para. 56.

example of interim custody or access) conditional on the surrender of a passport, and it is thought that this has occasionally been done.

(c) Northern Ireland

6.15 The Home Office's "stop list" procedure does not extend to orders made by courts in Northern Ireland. Passport facilities on applications emanating from Northern Ireland are granted on the consent of either parent, unless a caveat has been accepted, and the caveat system described in paragraph 6.9 above applies. There is no specific authority on the power of the court to order a passport to be surrendered.

(3) *Recommended improvements to the powers and arrangements for preventing children from leaving the jurisdiction*

6.16 There are four main areas to be examined in considering possible improvements to the system within the United Kingdom for the prevention of the unauthorised removal of children from the jurisdiction. First, the scope of any judicial prohibition on removal; second, the stop list procedure and passport controls; third, the powers actually to prevent the child's removal; and fourth, the automatic effect of a wardship application in prohibiting removal of a child within the United Kingdom.

(a) Scope of judicial prohibition on removal

6.17 Courts in each part of the United Kingdom may, as we have seen,[586] order that a child be not removed from that part. What happens, however, if the child is removed from one part of the United Kingdom to another? A prohibition on removal from Scotland is of no effect in England to prevent the child being put on a plane at Heathrow Airport. Our scheme for the mutual recognition of custody orders throughout the United Kingdom and, on registration, for their mutual enforcement, could easily be evaded unless a prohibition on removal of the child from the jurisdiction could be given effect throughout the United Kingdom. For this purpose *we recommend* two changes in the present law: first, that all courts in each part of the United Kingdom which have power to order that the child should not be taken from that part should be empowered to order that the child should not be taken from the United Kingdom as a whole or from any specified part or parts; and second, that any such order should have effect in each other part of the United Kingdom as if made by the supreme court[587] in that part. So, if a Scottish court order were to prohibit the removal of a child from Scotland (or the United Kingdom) the order would be as effective in England and Wales as a High Court order in prohibiting the removal of the child to any country other than Scotland (or Scotland or Northern Ireland). Again, if a Scottish court order were to prohibit removal of the child from Great Britain, the order would have the effect in England and Wales of a High Court order prohibiting the child's removal either to a foreign country or to Northern Ireland.

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[586]Paras. 6.4–6.7 above.

[587]I.e. the High Court in England and Wales and in Northern Ireland and the Court of Session in Scotland.

6.18 We also think it desirable that *all* courts with custody jurisdiction under our scheme should have the preventive powers the extension of which we have recommended in paragraph 6.17 above. In England and Wales and in Northern Ireland they already have these powers, but in Scotland the powers are confined to the Court of Session.[588] We can see no justification for not giving sheriff courts the same powers to prohibit removal of a child as are possessed by the Court of Session, and *we so recommend.*

(b) The stop list and passport control systems

(i) England and Wales

6.19 The present procedures, outlined in paragraphs 6.8 to 6.13 above, for notifying the ports of children likely to be taken out of the jurisdiction in defiance of a prohibition to that effect, and for denying them a passport, apply to orders of the High Court, county courts and magistrates' courts. Under our recommendations in paragraphs 6.17 and 6.18, above prohibitory orders of the Scottish and Northern Ireland courts would be treated as High Court orders, and it would follow that for the purpose of enforcement in England and Wales the procedures should apply to those orders too.

(ii) Scotland and Northern Ireland

6.20 The Home Office's stop list arrangements for notifying the ports of children at risk from unauthorised removal from the jurisdiction do not extend to Scotland and Northern Ireland. In our consultation paper[589] we expressed the view that such extension seemed desirable and our proposal that the stop list should be so extended was welcomed on consultation. Such an extension will require consultation between the appropriate authorities in both Scotland and Northern Ireland but *we recommend* that consideration now be given to the extension of the stop list arrangements to both jurisdictions, to cover all orders made by courts in the United Kingdom prohibiting the removal of a child from the United Kingdom or a part of it.

(iii) Generally

6.21 As regards the stop list system itself, in our consultation paper we expressed the view [590] that improvements could not be devised without involving the travelling public in unacceptable delays and that the system cannot in practice apply to journeys within the United Kingdom or between the United Kingdom and the Republic of Ireland. On consultation, no one dissented from this view. The extension of the system to cover Scottish and Northern Ireland orders must inevitably tend towards the lengthening of the stop list, and there is some danger that the longer the list becomes, the less effective it will be. However, we understand that the operation of the system is now being reconsidered in the light of the Child Abduction Act 1984 (discussed in paragraphs 6.31 to 6.34 below), and we hope that this will increase the effectiveness of the

[588]See paras. 6.4–6.7 above.
[589](1976) Working Paper No. 68/Memorandum No. 23, para. 6.19.
[590]*Ibid.*, para. 6.16. See also para. 6.13 above.

system by enabling the ports to be alerted *before* the making of a court order in circumstances in which new criminal offences are created by the Act. We also hope that the opportunity will be taken to issue a new and comprehensive Practice Direction (superseding the existing directions cited in note 579 above).

(iv) Surrender of passports

6.22 It seems to us that the power to order the surrender of a child's passport is a valuable weapon for enforcing a prohibition against removal of the child from the United Kingdom. Although the power is exercised by the High Court in England and Wales, the existence and extent of the power in other courts in the United Kingdom is uncertain.[591] In our view the power should be conferred on all courts which have jurisdiction under our scheme. *We therefore recommend* that where an order prohibiting the removal of a child from the United Kingdom or part of it is in force the court which made the order (or a court which under our recommendations is treated as having made it[592]) should be expressly empowered to order the surrender of a United Kingdom passport issued to the child or containing particulars of the child.[593]

(c) Powers to prevent removal of a child

6.23 We indicated in paragraph 6.12 above that, in England and Wales, the police will as a last resort give practical effect to the stop list system by using such force as is necessary to prevent embarkation. In our consultation paper, as a corollary of our proposal that the stop list procedure be extended throughout the United Kingdom and of our general scheme for the enforceability of custody orders throughout the United Kingdom, we suggested that the powers of the police and immigration officers be placed on a clearer footing. This suggestion was welcomed on consultation. It does, however, depend on the extension of the stop list procedure throughout the United Kingdom, as discussed in paragraph 6.21 above, and in the case of Scotland raises wider issues than those with which this report is concerned as to the duties of the police in Scotland with regard to the enforcement of civil court orders.[594] So far as the position in England and Wales is concerned, the view has been taken for many years that defiance of an English order prohibiting removal of a child from the jurisdiction (which under our scheme will include the order of a court in another part of the United Kingdom) is sufficient justification for immigration officers and the police to take action. Their position will, indeed, be strengthened as a result of the criminal offences created by the Child Abduction Act 1984, which we discuss briefly in paragraphs 6.31 to 6.34 below.

(d) Automatic effect of wardship application on prohibiting removal

6.24 We have already noted[595] that it is a well-established rule of law in England and Wales and in Northern Ireland that, subject to the intervention of the court, an application to have a child made a ward of court has the automatic

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[591]See paras. 6.10 and 6.14 above.

[592]See para. 6.17 above.

[593]The adult whose passport contains particulars of the child may need the passport to travel abroad, for perfectly legitimate reasons, without the child. We are informed, however, that it is a simple matter to have the particulars of the child deleted.

[594]*Caldwell* v. *Caldwell* 1983 S.L.T. 610.

[595]See paras. 1.26, 2.8, 2.34 and 2.91 above.

effect of temporarily making him a ward, with the result that removal of the child from the jurisdiction is a contempt of court. In addition to the contempt sanctions available to the court the prohibition against removal can be immediately enforced at the ports by the police and the immigration service, under the "stop list" procedure described above.[596]

6.25 This rule has long been regarded as an integral part of the wardship jurisdiction, which exists for the protection of those who cannot help themselves. That protective jurisdiction could effectively be flouted if the child could properly be taken out of the country before the court was able to decide whether and by what measures its intervention was appropriate. The automatic prohibition helps to make the jurisdiction workable by ensuring that for a limited period the child is not removed or that the removal (including any conditions as to his return) is approved by the court as being for the child's welfare.

6.26 A further feature of the rule is that anyone who wishes to remove the child from the jurisdiction must assume the burden of satisfying the court that it is in the child's interests for that to be done. In the absence of the rule the onus of proof would be reversed: the person seeking to prohibit removal would have to satisfy the court on evidence that a specific prohibition was justified, though according to the theory of the law of wardship that justification already exists in the status of the child as a ward of court. The extra time required to make a case to a judge for a specific order might often be sufficient to enable the child to be removed and thus to frustrate the very purpose of the wardship jurisdiction.

6.27 Against this background the Law Commission considers that fundamental changes in the rule cannot be proposed in isolation from the comprehensive review of the wardship jurisdiction which it intends to undertake.[597] The Scottish Law Commission has regretfully accepted the Law Commission's decision that in the absence of consultation sweeping changes in the automatic prohibition rule cannot be proposed at this time. It would, however, be seen in Scotland as highly anomalous if on the one hand we recommended a carefully worked out set of rules for the allocation of custody jurisdiction to the different parts of the United Kingdom while, on the other hand, a child temporarily present in England, whose custody, if a court's intervention were required at all, should (barring emergencies) be dealt with by the Scottish courts (either because he is habitually resident in Scotland or because a parent has raised divorce proceedings in Scotland) could, by a simple application, without any consideration of the matter by a court, be prevented for a period of time from returning to Scotland; and even more anomalous if the child were already the subject of a custody order made by a court in Scotland in favour of the parent wishing to remove him to Scotland. From the Scottish point of view it would also seem odd that the mere making of an application should have the effect of altering the onus of proof in favour of the applicant on the question of allowing or prohibiting the child's removal to another part of the United Kingdom.

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[596]See paras. 6.11–6.13 above.
[597]See para. 1.25 above.

6.28 On this issue our *recommendations,* subject to the question of age limits discussed below, are that the automatic prohibition rule should be modified, so that it would not prevent the removal of the ward to another part of the United Kingdom if

(*a*) he is habitually resident in the other part, or

(*b*) his parents are parties to divorce, nullity or judicial separation proceedings in that part.

The automatic prohibition would still render it a contempt of the wardship court to remove the child outside the *United Kingdom,* even if the child were habitually resident in Scotland and even if he were the subject of a Scottish custody order in favour of the person wishing to remove him; but we recommend that the prohibition could be lifted (i) by the wardship court or (ii) in the other part of the United Kingdom, by the supreme court or (where there are divorce, etc. proceedings there) by the divorce court. These recommendations are regarded by the Scottish Law Commission as an interim solution designed to go some way towards removing a particular anomaly. As we have indicated at paragraph 6.27 above, the general operation of the automatic prohibition rule will be examined further by the Law Commission in its review of child law.

6.29 This proposed modification of the rule of English and Northern Ireland law has one aspect (relevant to paragraph (a) of the above joint recommendations) on which the Commisssions have been unable to agree: the question is whether the modification should or should not extend to children habitually resident in Scotland who have reached the age of 16 and are thus normally outside the custody jurisdiction of the Scottish courts.

(1) The Law Commission is unable to agree to such a further extension in the context of this report, for a number of reasons. The automatic restriction is a rule of law which is ancillary to the accepted jurisdiction of the English and Northern Ireland courts over children up to the age of 18, and its merits and utility have not been the subject of public consultation. Moreover, although modification of the restriction can be justified as necessary to the extent that it helps the operation of the mutual custody scheme, in the case of children aged 16 or over the jurisdiction of the English courts is, and that of the Scottish courts is not normally, available. The absence of reciprocity with Scotland in respect of the restriction provides no case of itself for abandoning the rule, any more than lack of reciprocity provides a case for abandoning the English jurisdiction over children between the ages of 16 and 18.

(2) The Scottish Law Commission is in favour of extending the modification so as to permit a ward aged 16 or over to return to his Scottish home. It regards it as absurd that the commencement of wardship proceedings by the mere making of an application (and without any consideration of the matter by a court) should of itself prevent a young person aged 16 or 17 who is habitually resident in Scotland and who may have no connection with England and Wales or Northern Ireland other than temporary presence there for a very short period from returning to his home country within the United Kingdom.

> From the Scottish point of view, the fact that a person of that age is not normally subject to the custody jurisdiction, far from being a reason for restricting his removal within the United Kingdom in a case where a younger child would not be so restricted, is an argument to quite the opposite effect. Suppose that in a Scottish divorce case, involving people who are all habitually resident in Scotland, custody of a boy aged 15 is awarded to his mother. At the age of 17 he goes with his mother on a short visit to friends in England. The father then presents an application to the High Court in England to have the boy made a ward of court. If the application had been presented when the boy was 15 it would have had no automatic effect in preventing his return to Scotland. Because he is 17 it does have that effect and the mother, apparently, has to persuade the court that it is in her son's interests to return home. The Scottish Law Commission regards this as totally unacceptable.

The automatic restriction and the age limits involved will, of course, be considered in the review of child law to which reference is made above.

6.30 The question in issue is one of the law of England and Wales and of Northern Ireland. Accordingly, clause 38 of the annexed draft Bill reflects the Law Commission's view that the modification of English and Northern Ireland law should not be extended, in so far as Scotland is concerned, to children who have reached the age of 16. If the Scottish view were preferred, the clause could be amended by making the concluding words of subsection (2) applicable only to paragraph (a) of the subsection.

(4) *Criminal Liability*

6.31 The abduction of a child in some circumstances constitutes a criminal offence, justifying the arrest of the person suspected of committing it. In addition to the common law offences of kidnapping and (in Scotland) abduction and *plagium* (child-stealing), there are various statutory offences, notably those created by the Child Abduction Act 1984 for England and Wales and Scotland and capable of being extended to Northern Ireland.[598] The relevance of all these offences to our recommendations is that the breach of a court order of the kind with which this report is concerned may involve the commission of a criminal offence; the potential consequences of the offence, therefore, including the accompanying power of arrest[599] and of punishment on conviction, provide sanctions additional to the civil remedies and other administrative methods of enforcing the court order.

6.32 In England and Wales the abduction of a child (even the child of the abductor himself) may amount to the common law offence of kidnapping,

[598]The 1984 Act is to some extent based upon recommendations made in the Criminal Law Revision Committee's Fourteenth Report (Offences against the Person) (1980), Cmnd. 7844. Extension to Northern Ireland is provided for by section 12.

[599]In the case of offences under the Child Abduction Act 1984, in England and Wales the power of arrest arises automatically because the level of the maximum penalty brings it within the ambit of the arrest powers conferred by s.2 of the Criminal Law Act 1967: under subs. (5) of that section, a constable may arrest without warrant any person who is, or whom he with reasonable cause suspects to be, about to commit an arrestable offence. Express provision to this effect is made for Scotland in s.7 of the 1984 Act.

which is committed by a person who takes or carries away another by force or fraud without the other's consent and without lawful excuse.[600] In addition, in England and Wales section 2 of the Child Abduction Act 1984 makes it an offence for a person (other than a parent or guardian or one to whom custody has been awarded) without lawful authority or reasonable excuse to take or detain a child under 16 out of lawful control; and section 20 of the Sexual Offences Act 1956 makes it an offence for a person without lawful authority or excuse to take an unmarried girl out of the possession of her parent or guardian against his will. In Scotland the common law crime of *plagium* may be committed in relation to a child under the legal age of puberty (12 for girls and 14 for boys), though the present scope of this offence—in particular whether a parent can commit it—is not clear.[601] The common law crime of abduction may also be committed in Scotland in cases where a child is removed from the care and control of another.

6.33 The Child Abduction Act 1984 has also created specific offences directed against the removal of a child from the United Kingdom by a parent or someone closely connected with the child. Section 1 makes it an offence in England and Wales for a person connected with a child under 16 to take or send the child out of the United Kingdom without appropriate consent.[602] Section 6 creates a similar, but narrower, offence for Scotland. However, whilst in the Scottish offence "person connected" includes a person awarded custody by the order of a court in the United Kingdom, the parallel provision in the English offence relates to a person awarded custody by the order of a court in England and Wales.

6.34 The developments in the criminal law mentioned in paragraphs 6.32 and 6.33 above should help to improve compliance with custody orders, and no doubt steps will soon be taken to apply appropriate provisions of the Child Abduction Act 1984 to Northern Ireland. In paragraph 6.33 above, attention is drawn to the definition of "person connected" in the English offence created by section 1 of the 1984 Act; it seems desirable that this definition should be reconsidered by the departments concerned, in the light of our recommendations relating to the mutual recognition and enforcement of custody orders throughout the United Kingdom. So far as Scotland is concerned, on 20 July 1984 the Scottish Law Commission was asked by the Secretary of State for Scotland "to consider the law of Scotland relating to the abduction, unlawful or unauthorised removal and stealing of children (including children in care or under supervision under the Social Work (Scotland) Act 1968 or other legislation), whether by their parents or otherwise; and, having regard to the laws applicable in England and Wales and Northern Ireland in relation to cases with cross-border implications, to recommend such changes in the law of Scotland as appear to the Commission to be necessary or desirable."

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[600]*R.* v. *D.* [1984] 3 W.L.R. 186, where the House of Lords reviewed the law and decided that a parent can be convicted of the offence.

[601]See Gordon, *Criminal Law* (2nd edn. 1978), p.478.

[602]The terms "connected", "take", "send" and "appropriate consent" are interpreted in ss.1(2) and 3 and (for Scotland) in s.6(2), (3) and (6).

C The enforcement machinery at the disposal of the court

(1) *England and Wales*

6.35 In wardship proceedings the High Court exercises a parental and administrative jurisdiction and may take whatever enforcement action it considers necessary in the interests of the ward. Thus the court may order a person to return the child to the person entitled to his care and control and may enforce its orders not only by the sanctions available for contempt[603] but also by directing the Tipstaff to take the child into his custody and to deliver him to the person named in the order.[604]

6.36 In custody proceedings breach of an order directing a person to deliver up the child may also amount to contempt.[605] It is not clear, however, whether the High Court has power otherwise than in wardship proceedings to enforce an order for the delivery up of a child by making an order for the recovery of the child, i.e. directing the Tipstaff to take possession of the child and then to return him to the person named in the order; and neither the county courts nor the magistrates' courts have an equivalent power.

6.37 We suggested in our consultation paper[606] that there was a strong case for conferring wider powers on the High Court to enforce delivery orders. This suggestion was welcomed on consultation, and the further point was made to us that the power to make an order for the recovery of a child should not be limited to the High Court, but should be made available to all courts. We agree. *We therefore recommend* (1) that it should be made clear that the High Court can enforce an order for the delivery up of a child made in custody proceedings, by ordering appropriate officers to recover the child; (2) that a similar power should be available to other courts in England and Wales with jurisdiction to make custody orders under our scheme; and (3) that the authorised officers should possess appropriate powers to enter and search premises, and to use force, so far as is necessary to recover the child. Whether and to what extent these powers could be used would obviously depend upon the resources available to the courts, but we hope that the existence of the powers would save time and money by reducing the need to resort to wardship proceedings for the purpose of recovering a child.

(2) *Scotland*

6.38 In Scotland the Court of Session and the sheriff courts have power to grant orders for the delivery of a child[607] and to grant warrant to messengers-at-arms or sheriff officers to search for a child, enter premises by force to seek the child, and to seize the child and deliver him or her to the person entitled to custody.[608] Failure to comply with a delivery order is contempt of court and can be punished as such.[609] The Court of Session also has power to order

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[603]I.e. committal, sequestration or fine; see paras. 2.38–2.43 above.
[604]See para. 2.37 above.
[605]See n.603 above. For the power of magistrates' courts to fine or imprison for non-compliance, see para. 2.39 above.
[606]See para. 6.26.
[607]See para. 2.81 above.
[608]See para. 2.84 above.
[609]See para. 2.83 above.

sequestration of the income from a trust in order to compel obedience to an order relating to a child[610] and, it has been said, "has ample power to take at its own hand whatever action it may deem necessary in order to make effective any interlocutor which it has pronounced".[611] One problem which caused us concern at an earlier stage in this project—the difficulty of enforcing a sheriff court order in other sheriffdoms—has ceased to exist. Rule 16 of the new sheriff court rules for ordinary causes (applying to proceedings commenced after 1 April 1983) now provides that any sheriff court decree, order, charge or warrant may be served, enforced or otherwise lawfully executed anywhere in Scotland without endorsation by a sheriff clerk and, if executed by an officer, may be so executed by an officer of the court which granted it or by an officer of the sheriff court district within which it is to be executed.[612] The present position with regard to the enforcement powers of the Scottish courts seems to us to be satisfactory.

(3) *Northern Ireland*

6.39 In Northern Ireland, there are informal arrangements under which the Royal Ulster Constabulary assists the court by making enquiries to establish:

(*a*) the whereabouts of the child; and

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

When these enquiries are complete, the party to whom custody has been awarded applies to the court for an order requiring the party with *de facto* custody of the child to produce him within a specified time. If this order is not complied with, the party to whom custody has been awarded is granted a committal order.

6.40 In response to our consultation paper it was suggested that the High Court in Northern Ireland should have powers to enforce orders for recovery similar to the powers available to the High Court in England and Wales, though it was recognised that the machinery would need to be different because there is no Northern Ireland equivalent of the English Tipstaff. However we have recommended in paragraph 6.37 above that new powers relating to the recovery of children should be conferred on all courts in England and Wales with custody jurisdiction. Since the grounds for those recommendations are equally applicable to Northern Ireland, *we recommend* that equivalent powers be made available to all courts in Northern Ireland having custody jurisdiction.

D Tracing the child

(1) *Powers of courts to require disclosure of a child's whereabouts*

6.41 In England and Wales, where a child is a ward of court, the parties are obliged to disclose the ward's whereabouts if known.[613] In addition, the High

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[610]See para. 2.85 above.

[611]*Abusaif* v. *Abusaif* 1984 S.L.T. 90, 91, *per* Lord Emslie.

[612]Sheriff Courts (Scotland) Act 1907, First Schedule (as substituted by S.I. 1983 No.747), rule 16.

[613]R.S.C., O.90, r.3.

Court may summarily order any person who may be able to give information as to the whereabouts of a child to divulge to the court his knowledge of the matter.[614] This power appears to apply only in wardship proceedings. Where, however, a person is in contempt of court by, for example, refusing to comply with an order to hand over a child and the contemnor cannot be found, the court has power of its own motion to order witnesses to attend and disclose their knowledge as to the whereabouts of the contemnor.[115] There is no reported case providing authority as to whether these powers are also available to the courts in Northern Ireland.

6.42 In Scotland the Court of Session has power to compel a person who is a party to the proceedings and who knows the child's whereabouts to disclose to the court what he knows. It has recently been made clear (although this was not clear at the date of the consultation paper) that the Court of Session also has power to order the hearing of evidence from anyone (even if not a party to the proceedings) who, it has reasonable grounds to believe, may have information which would assist the discovery of the child.[616] It is not clear whether sheriff courts have the same powers.

6.43 It was proposed in the consultation paper[617] that these deficiencies should be remedied by (a) extension of the English High Court's powers to require disclosure in wardship proceedings to High Court custody proceedings generally; and (b) the conferment of express powers upon Scottish courts to require disclosure by a third party. These proposals met with general support on consultation, and it was also suggested that these powers should be extended to all United Kingdom courts with custody jurisdiction. Although the position of the Court of Session has recently been clarified, as noted above, it is still thought desirable that express provision be made conferring a general power on all Scottish courts to require disclosure of information in custody proceedings.

6.44 *We accordingly recommend* that, where in the court of a United Kingdom country there are proceedings for or in relation to a custody order, the court should have power to order any person believed to have information as to a child's whereabouts to disclose that information to the court. *We further recommend* that for this purpose the privilege against self-incrimination should be qualified to the extent that the witness should be required to answer but the answer should not be admissible against the witness or the witness's spouse in criminal proceedings other than prosecutions for perjury.

(2) *Assistance by the police in tracing a child*

6.45 In England and Wales the Association of Chief Police Officers agreed in 1973 that whenever the Tipstaff requested the assistance of the police in

[614]See *Ramsbotham* v. *Senior* (1869) L.R.8 Eq.575, where a solicitor was obliged to disclose such information even though given to him by his client; *Mustafa* v. *Mustafa, The Times,* 11 and 13 September 1967.

[615]*N.* v. *N.* (1969) 113 S.J. 999.

[616]*Abusaif* v. *Abusaif* 1984 S.L.T. 90, 91. One way of obtaining the evidence is for the court to appoint a Commissioner and to grant warrant for the citation of the witness to appear before the Commissioner.

[617]Paras. 6.26(b) and 6.27.

tracing a child whose return had been ordered by the High Court (whether in wardship, matrimonial or guardianship proceedings), a description of the child and brief details of the relevant circumstances should be included in the Police Gazette by the force from whose area the child had been taken, and that enquiries should be made by the police in the area where the child was thought to be. If the child is traced, the Tipstaff is informed. These arrangements were made without prejudice to the previous position whereby the police informally give any help they can at an earlier stage. The arrangements were embodied in Home Office Circular No. 174/1973, and are still in force.

6.46 We proposed in our consultation paper[618] that similar arrangements should be introduced in Scotland and in Northern Ireland and this proposal was generally welcomed on consultation. In its comments to the Scottish Law Commission, the Association of Chief Police Officers (Scotland) said that its members accepted this proposal, and we are informed that it has now been put into effect.[619] The Royal Ulster Constabulary had previously been prepared to assist in establishing the whereabouts of children subject to custody orders, and indicated in 1976 that they were prepared to issue a Force Order on the lines of the Home Office Circular of 1973.

6.47 *We accordingly recommend* that consideration now be given to the establishment of formal arrangements in Northern Ireland, on the lines already applying in England and Wales and in Scotland, for police assistance to be given in tracing a missing child. *We further recommend* that in each part of the United Kingdom these arrangements should be extended to cover the orders of any court in the United Kingdom which needs help in tracing a child.

(3) *Assistance by government departments in tracing a child*

(a) The present position

(i) England and Wales

6.48 In England and Wales arrangements exist for the disclosure of addresses from the records of government departments for the purpose of tracing the whereabouts of a missing ward of court or the person with whom he is alleged to be. Under a Practice Direction issued by the Senior Registrar of the Family Division on 28 November 1972[620] requests for such information, giving all relevant particulars,[621] may be made by a registrar to the Department of Health and Social Security, the Passport Office or the Ministry of Defence.[622] Application may also be made by the registrar to any other depart-

[618]Paras. 6.33 and 6.35.

[619]Para. 44(b) on page 114 of Part IB of the Consolidation of Circulars on matters affecting the Police in Scotland (issued by the Scottish Home and Health Department).

[620]See *Practice Note (Disclosure of Addresses)* [1973] 1 W.L.R. 60, as amended by *Practice Note (Disclosure of Addresses) (No. 2)* [1979] 1 W.L.R. 925.

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

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

ment, if the circumstances suggest that the address may be known to it. When any department is able to supply the address of the person sought it will communicate direct with the registrar, who in turn will pass on the information to the applicant's solicitors (or to the applicant if acting in person) on an undertaking to use it only for the purpose of the proceedings.

6.49 These arrangements are similar to those whereby the address of a husband may be disclosed from the records of those departments for the assistance of a wife seeking to obtain or enforce an order for maintenance for herself or any child of the family.[623] However, the arrangements in relation to maintenance extend to the orders of all courts, whereas the arrangements for tracing wards of court do not extend to custody orders generally.

(ii) Scotland

6.50 In Scotland, facilities similar to those in England exist for obtaining the addresses of certain aliment defaulters from the records of the Department of Health and Social Security, the Passport Office and the Ministry of Defence.[624]

(iii) Northern Ireland

6.51 There are no specific arrangements for the disclosure of addresses by government departments to assist in tracing the whereabouts of a missing ward. But arrangements, similar to those outlined in paragraph 6.49 above, exist whereby the court may request the address of a husband from the records of the Department of Health and Social Services, the Passport Office and the Ministry of Defence, to enable a wife to commence maintenance proceedings or to enforce an order for maintenance.

(b) Recommendation for extension of assistance by government departments

6.52 As we observed in our consultation paper,[625] there are anomalies in the present arrangements. In England and Wales, if a child vanishes there has to be a wardship application before a request can be made to a department for disclosure of the address of the child or of the person with whom he is alleged to be. This facility for disclosure is not available in Northern Ireland, even though the wardship jurisdiction exists there. Nor are there equivalent arrangements in Scotland. Consequently, while in all three jurisdictions there are arrangements for obtaining disclosure of addresses in maintenance proceedings, in none of those jurisdictions are there equally good facilities for tracing a child who is the subject of a custody order or for tracing the person with whom he is alleged to be, even though in custody proceedings the welfare of the child is the paramount consideration.

6.53 To eliminate these anomalies, we proposed in our consultation paper[626] that facilities similar to those which exist in wardship proceedings in

[623]See *Practice Note (Disclosure of Addresses)*, cited in n.620 above.

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

[625]Para. 6.40.

[626]Para. 6.41.

England should be provided throughout the United Kingdom for tracing the whereabouts of a missing child. This proposal was supported in consultation and the view was also expressed that the facilities should be more widely available to trace a child in respect of whom a custody order has been made by any court in the United Kingdom and in respect of the person with whom he is alleged to be. We think such an extension is desirable and *we recommend* that the appropriate administrative steps should be taken accordingly.

PART VII

TRANSITIONAL PROVISIONS

7.1 If and when the Bill annexed to this report is enacted and brought into force, there will inevitably be a large number of custody orders in operation which were made before that date. Some of these orders will continue to be relevant until the child in question attains the age of 16. We wish to avoid so far as possible the extra delays and expense which would result from leaving pre-Bill orders outside the scope of our scheme.

7.2 *We accordingly recommend* that a custody order[627] which is still in force in the part of the United Kingdom in which it was made but which was made before the Bill comes into force should be recognised and enforced under the provisions of the Bill if there would have been jurisdiction to make the order had the jurisdictional provisions of the Bill been in force at the time it was made (the onus being on the party objecting to enforcement to show that there would *not* have been such jurisdiction).

7.3 *We also recommend* that an order made in proceedings commenced but not concluded before the Bill comes into force should not be invalidated by the Bill's jurisdictional provisions, but should not be enforceable in other parts of the United Kingdom if it is shown that the court would not have had jurisdiction to make it under the Bill.

7.4 We have not included transitional provisions in the Bill annexed to this report because their precise form will inevitably be affected by the timing of the Bill's introduction and its relationship to other possible legislation—for example legislation dealing with the international aspects of custody. We therefore confine ourselves to the above recommendations as to the general principles which we suggest should guide their framing.

PART VIII

SUMMARY OF RECOMMENDATIONS

8.1 In this Part of the report we summarise the conclusions and recommendations set out in the earlier Parts. References are given to the relevant paragraphs of the report and the relevant clauses of the draft Bill annexed.

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[627] "Custody order" would have to be given an extended definition for the purposes of the transitional provisions, in order to cover orders made under legislation which is (or at the commencement date will be) superseded.

General

8.2 The problems in United Kingdom custody cases resulting from the diversity of jurisdictional rules and the limited enforceability of orders should be dealt with by a legislative scheme incorporating uniform rules of jurisdiction and providing for the reciprocal recognition and enforcement of custody orders.

(Paragraphs 1.14, 3.10–3.13 and 3.19).

8.3 For the purposes of the scheme, "custody orders" should include orders for access and education but should not include orders committing the child to the care of a local or public authority, or orders (other than custodianship orders or the equivalent) made in adoption proceedings.

(Paragraphs 3.3–3.9; clause 1).

Uniform rules of jurisdiction

8.4 In place of the numerous existing bases of jurisdiction, which are not uniform in different parts of the United Kingdom, a new jurisdictional scheme for custody cases should be introduced throughout the United Kingdom: jurisdiction to make a custody order in a United Kingdom country should be exercisable only—

(1) where the court has jurisdiction in divorce, nullity or judicial separation proceedings in which the question of custody arises (the "divorce basis");

(2) where the child is habitually resident in that country (the "habitual residence basis");

(3) where there is a case of emergency and the child is physically present in that country (the "emergency basis"); or

(4) where the child is physically present in that country but not habitually resident in any part of the United Kingdom (the "residual presence basis").

(Paragraphs 4.2–4.26).

The "divorce basis"

8.5 Where a court in the United Kingdom has jurisdiction in proceedings for divorce, nullity of marriage or judicial separation, that court should continue to have jurisdiction to make custody orders in the course of those proceedings.

(Paragraph 4.11; clauses 4, 13 and 21).

The "habitual residence basis"

8.6 The primary basis of jurisdiction to make custody orders in proceedings other than for divorce, nullity or judicial separation should be the habitual residence of the child within the United Kingdom country concerned on the date of the commencement of proceedings in that country; and where the

habitual residence of a child in a United Kingdom country has been changed by the child or by someone else,

(*a*) in contravention of an order made by a United Kingdom court, or

(*b*) without the consent of the person or persons having a legal right to fix the child's residence, the United Kingdom court which would have had jurisdiction on the habitual residence basis should retain jurisdiction on that basis in proceedings brought within one year from the date of the change of residence.

(Paragraph 4.18; clauses 2, 3, 8, 9, 19, 20 and 40).

The "emergency basis"

8.7 Where a child is physically present in a United Kingdom country at the date of the commencement of proceedings, and the immediate intervention of a court of that country is necessary for the protection of that child,

(1) in England and Wales and Northern Ireland the High Court, and in Scotland the Court of Session, should retain the emergency jurisdiction to intervene which they possess under the existing law;

(2) in Scotland, it should be made clear that the sheriff court has a similar jurisdiction.

(Paragraph 4.22; clauses 2(2)(b), 12 and 19(2)(b)).

The "residual presence basis"

8.8 A court in a United Kingdom country should have jurisdiction to make custody orders in respect of a child who at the date of the commencement of proceedings is physically present in the United Kingdom country concerned and is not habitually resident in any part of the United Kingdom.

(Paragraph 4.26; clauses 2, 3, 10, 19 and 20).

8.9 In England and Wales and in Northern Ireland the relevant date for establishing jurisdiction under recommendations 8.6–8.8 above should be the date of the initial application for custody or (where no express custody application is made) for other relief (paragraph 4.27; (8.9 line 4) clauses 3(4), (5) and (6)(a) and 20 (4),(5) and (6)(a)), except that in wardship proceedings if no custody application is made the relevant date should be the date of the custody order (paragraph 4.28; clauses 3(6)(b) and 20(6)(b)). In Scotland the relevant date should be the date of the initial application for custody, and there should be power for this purpose to define applications by rules of court.

(Paragraph 4.27; clause 18(2) and (3)).

8.10 In consequence of recommendations 8.5–8.9 above—

(1) in independent custody proceedings in England and Wales and Northern Ireland it will be necessary for rules of court to enable process to be served abroad, as it already can be in divorce, etc. proceedings (paragraphs 4.60 and 4.87), and in England and Wales

the common law principle applicable to magistrates' courts requiring service within the jurisdiction should be excluded (paragraph 4.60; Schedule 1, paragraph 10(b)); and the possibility of extending and rationalising the rules for service of process abroad in combined proceedings for financial provision and custody in the magistrates' courts is a matter for consideration by the rule-making authorities (Paragraphs 4.61 and 4.88);

(2) in England and Wales and Northern Ireland the existing statutory provisions relating to the internal allocation of custody proceedings between county courts and between magistrates' courts should be discarded and should be replaced by provisions enabling proceedings to be allocated by appropriate rules of court (Paragraphs 4.64 and 4.89; Schedule 1, paragraphs 2, 10(a) and 18(b));

(3) in Scotland the existing rules relating to the jurisdiction of the sheriff court in custody proceedings should be discarded and should be replaced by new rules governing both jurisdiction in the international sense and the internal allocation between courts. The sheriff should continue to have jurisdiction to deal with an application for a custody order in an action for divorce or separation if he has jurisdiction in the action for divorce or separation itself, and should also have jurisdiction to deal with an independent application (a) if on the date of the application the child is habitually resident in the sheriffdom, (b) if the child is present in the sheriffdom on the date of the application and the sheriff considers an immediate order necessary for the child's protection or (c) if on the date of the application the child is present in Scotland and is not habitually resident anywhere in the United Kingdom and the pursuer or defender is habitually resident in the sheriffdom (Paragraph 4.68; clauses 9(b), 10(b) and 12).

8.11 Provision should be made to determine the priority of the bases of jurisdiction (recommended in paragraphs 8.5–8.9 above) and to regulate its exercise, as follows:

(1) jurisdiction on the divorce basis should have primacy over jurisdiction on the habitual residence or residual presence basis (paragraphs 4.3 and 4.96; clauses 3(2), 11(1) and 20(2)); but the divorce court's power to make a custody order after dismissal of the proceedings should be restricted to cases in which the application for custody was made on or before the dismissal (paragraph 4.98; clauses 4(2), 13 and 21(2)); and its power to make an order after a decree of judicial separation should not be exercisable when divorce or nullity proceedings are continuing in another United Kingdom country (Paragraph 4.98; clauses 4(3), 13(3) and 21(3));

(2) jurisdiction on the emergency basis, when available, should be capable of being invoked at any time and capable of being superseded by the exercise of jurisdiction on that or any other available basis in another United Kingdom country (Paragraphs 4.19 and 4.99; clauses 2(2)(b), 12 and 19(2)(b));

(3) jurisdiction on the residual presence basis should be exercisable only if the child is not habitually resident in any United Kingdom country (recommendation 8.8 above);

(4) a divorce court should be empowered to waive its custody jurisdiction in England and Wales or Northern Ireland in favour of a more appropriate court in another country and in Scotland in favour of another court in the United Kingdom (and to revoke or recall the waiver) (paragraph 4.97; clauses 4(5), 13(6) and (7) and 21(5)); and on the waiver the statutory duty to satisfy itself as to the arrangements for children should cease to apply (Paragraph 4.98; Schedule 1, paragraphs 4, 13 and 21);

(5) any court in a United Kingdom country which has jurisdiction on any of the recommended bases should be empowered (a) to refuse to deal with a custody application if the matter has already been dealt with outside that country (paragraph 4.111; clauses 5(1), 14(1) and 22(1)); and (b) to stay or sist proceedings either where it is appropriate for them to be brought in another country or proceedings are already continuing in another country, and to lift the stay or sist if those other proceedings are held up or concluded (Paragraph 4.103; clauses 5(2) and (3), 14(2), and 22(2) and (3));

(6) a custody order made under the scheme when followed by another such order made in another United Kingdom country should cease to have effect so far as the orders deal with the same matter (paragraph 4.115; clauses 6(1), 15(1)(a) and 23(1)); and any supervision order dependent upon the original order should also cease to have effect (Paragraph 4.115; clauses 6(6), 15(4) and 23(6));

(7) the same principle should apply to a Scottish custody order made under the scheme when followed by a foreign custody order entitled to recognition in Scotland; (paragraphs 5.13 and 5.15; clause 15(1)(b))

(8) the courts with jurisdiction under the scheme should have power to vary or revoke their orders even where the original basis of jurisdiction is no longer available (paragraph 4.30); but, saving emergencies, a power to vary a custody order should not be exercisable—

(a) in divorce, etc. proceedings which have been dismissed, or resulted in a decree of judicial separation (paragraph 4.113), or

(b) in other custody

proceedings if divorce, etc. proceedings are continuing in another United Kingdom country and the divorce court there has not relinquished custody jurisdiction (Paragraphs 4.113 and 4.114; clauses 6(3)–(5), 13(3)–(5), and 23(3)–(5)).

Jurisdiction relating to delivery orders in Scotland

8.12 In a question between parents, a court in Scotland should have jurisdiction to make a delivery order only if (a) the order is sought to enforce the right of a parent entitled to custody against a parent not so entitled or (b)

the court would have jurisdiction to make a custody order under the new jurisdictional scheme.

(Paragraph 4.72; clause 17).

Jurisdiction relating to tutory and curatory in Scotland

8.13 (1) The Court of Session should have jurisdiction to entertain an application relating to the tutory and curatory of a pupil or minor if, on the date of the application, the pupil or minor is habitually resident in Scotland;

(2) the sheriff court should have jurisdiction to entertain such an application if, on the date of the application, the pupil or minor is habitually resident in the sheriffdom;

(3) these grounds of jurisdiction should be in addition to any grounds of jurisdiction available under the existing law.

(Paragraph 4.73; clause 16).

Statements in connection with custody proceedings

8.14 A party to custody proceedings should be obliged, in accordance with procedural rules, to give the court particulars of other proceedings relating to the child.

(Paragraph 4.118; clause 39).

Recognition and enforcement

8.15 A custody order (excluding any enforcement provisions) made in one United Kingdom country should, if it is in force and the child is under 16, be recognised in any other United Kingdom country as having the same effect as if made by the supreme court of that other country, i.e. the High Court in England and Wales and in Northern Ireland and the Court of Session in Scotland.

(Paragraph 1.22 and 5.15(1); clause 25(1) and (2)).

8.16 In Scotland, the rule whereby orders made outside the United Kingdom may be recognised should be preserved, but should be amended so as to relate to orders based on the child's habitual residence instead of the child's domicile.

(Paragraph 5.15(2); clause 26).

8.17 A custody order made in one United Kingdom country and recognised in another should be enforceable in that other country if, and only if, registered there.

(Paragraph 5.38(1); clause 25(3)).

8.18 A custody order should not be registered in respect of a child who has attained the age of 16, and registration should cease to have effect on the attainment by the child of that age.

(Paragraph 5.38(2); clause 27(5)).

8.19 Anyone with rights under a custody order made in a United Kingdom country should be entitled to apply to the court which made it for it to be registered in another United Kingdom country, and on such an application that court should cause the order to be transmitted to the supreme court of the country where it is to be registered.

(Paragraph 5.38(3); clause 27).

8.20 Where a court varies or revokes or recalls a registered custody order it should arrange for the registering court to amend or cancel the registration; and where a registered order ceases to have effect (wholly or partly), amendment or cancellation should be a matter for the registering court.

(Paragraph 5.38(4); clause 28).

8.21 A registered custody order should be enforceable by the registering court as if it were its own order, and in accordance with its own procedure (paragraph 5.38(5); clause 29(1)); and the registering court should have power—

(*a*) on the making of the application for enforcement, to give interim directions (Paragraph 5.38(5)(a); clause 29(2));
(*b*) to stay or sist enforcement proceedings where any person with an interest intends to apply for variation or revocation of the order or for a fresh order, and in appropriate circumstances to remove the stay or sist (Paragraph 5.38(5)(b); clause 30);
(*c*) to dismiss the application where it is satisfied that the order has ceased to have effect (Paragraph 5.38(5)(c); clause 31);
(*d*) to exercise its residual discretion to postpone enforcement (Paragraph 5.38(5)(d); clause 29(1)).

Administrative and procedural problems

8.22 Courts in each part of the United Kingdom country (including the sheriff courts in Scotland (paragraph 6.18, clause 35(4)) which have power to prohibit the removal of a child from that part should be empowered to order that a child should not be taken from the United Kingdom as a whole or from any specified part or parts; and such an order should have effect in each of the other parts as if made by the High Court or in Scotland the Court of Session.

(Paragraph 6.17; clauses 35 and 36).

8.23 Consideration should be given to the extension of the Home Office "stop list" procedure and the control of children's passports to custody orders made by any court in Scotland and Northern Ireland, so that the procedure would apply throughout the United Kingdom in respect of all custody orders.

(Paragraph 6.20).

8.24 Where an order prohibiting the removal of a child from the United Kingdom or part of it is in force, the court which made the order (or is treated as having made it under paragraph 8.22 above) should be expressly empowered

to order the surrender of a United Kingdom passport issued to the child or containing particulars of the child.

(Paragraph 6.22; clause 37).

8.25 The rule of law in England and Wales and in Northern Ireland by which the making of a wardship application automatically restricts removal of the child from the jurisdiction should not prevent a child being removed either *to* another United Kingdom country if (a) he is habitually resident there or (b) his parents are parties to divorce, etc. proceedings there, or *from* that country with the consent of the wardship court or (in that country) of the divorce court or the High Court or Court of Session (paragraph 6.28; clause 38); and any further modification of the rule should be considered in the context of the Law Commission's review of child law.

(Paragraphs 6.27–6.29).

8.26 In England and Wales and in Northern Ireland the courts with custody jurisdiction under our scheme should be empowered (as the Scottish courts already are) to enforce custody orders by ordering appropriate officers to recover the child, with powers for that purpose to enter and search premises and use any necessary force.

(Paragraphs 6.37 and 6.40; clause 34).

8.27 Where in a United Kingdom country there are proceedings for or in relation to a custody order, the court should have power to order any person believed to have information as to the child's whereabouts to disclose that information to the court; and for this purpose the privilege against self-incrimination should not entitle a witness to refuse to answer.

(Paragraph 6.44; clause 33).

8.28 Consideration should be given to the establishment of formal arrangements in Northern Ireland, on the lines of those existing in England and Wales and Scotland, for police assistance to be given in tracing a missing child. These arrangements should apply throughout the United Kingdom to the orders of any court in the part where help in tracing the child is desired.

(Paragraph 6.47).

8.29 The kind of assistance given by government departments in England and Wales in tracing missing wards of court should be made available for tracing a child in respect of whom a custody order has been made by any court in the United Kingdom and the person with whom he is alleged to be.

(Paragraph 6.53).

Transitional provisions

8.30 A custody order made before the legislation recommended in the report comes into force should be recognised and enforced in accordance with the legislation if there would have been jurisdiction under it to make the order; but a custody order made in proceedings not concluded before the legislation comes into force should not be enforceable in other parts of the United Kingdom if it is shown that there would not have been jurisdiction under that legislation to make it.

(Paragraphs 7.2–7.3).

(Signed) RALPH GIBSON, *Chairman, Law Commission*
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R. EADIE, *Secretary*
6 November 1984

*Dr. Peter North was the Commissioner primarily responsible for this project at the Law Commission before he left on 30 September 1984 to become Principal of Jesus College, Oxford. Since that date he has continued to play an active part in the preparation of the report and he approves its contents. His name appears at the foot of this report at the request of his colleagues at the Law Commission.