The Law Commission

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FAMILY LAW

REPORT ON MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

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MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

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THE LAW COMMISSION

Item XIX of the Second Programme

REPORT ON MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

To the Right Honourable the Lord Elwyn-Jones,
Lord High Chancellor of Great Britain

PART I: INTRODUCTION: BACKGROUND AND SCOPE OF THIS REPORT

Terms of reference

1.1 In December 1970, the Home Secretary, the Right Honourable Reginald Maudling, M.P., invited us in the course of our work under Item XIX of our Second Programme (the reform and codification of family law) to consider:—

(*a*) what changes in the matrimonial law administered by the magistrates' courts may be desirable as a result of the coming into operation of the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970[1], and

(*b*) any other changes that may appear to be called for in related legislation in order to avoid the creation of anomalies.

Working Paper No. 53

1.2 In January 1971 we set up a Working Party presided over by Mr. (now Lord) Justice Scarman, then our Chairman, and comprising representatives of the Law Commission and the Home Office[2], to consider the above matters with a view to formulating proposals for any legislation that might prove necessary. The Working Party's provisional conclusions were set out in a consultative document, which was published in September 1973 as Working Paper No. 53.

The process of consultation

1.3 In accordance with our usual practice the working paper was given a wide circulation with a view to soliciting comment and criticism on the provisional conclusions. The names of those who assisted us with comments are shown in the list at Appendix 3. We are most grateful to all of them.

Events since the publication of the working paper

1.4 Since the working paper was published, three events of major significance for our report have occurred. First, in July 1974 the Committee on One-Parent Families, which sat under the chairmanship of the late Mr. Justice Finer, published its report[3]. Secondly, the House of Commons Select Committee on

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[1] These two statutes are now consolidated in the Matrimonial Causes Act 1973.
[2] The membership of the Working Party is shown in Appendix 2.
[3] (1974) Cmnd. 5629.

Violence in Marriage published its report[4] in July 1975. Thirdly, on 12 November 1975, the Children Act 1975 received the Royal Assent.

1.5 We shall refer in Part III of this report to the proceedings and conclusions of the Select Committee. In Parts V, VII and X, we shall refer to provisions of the Children Act 1975 which are of concern to us in connection with our present report. As for the report of the Finer Committee, it is necessary for us to make some observations at the outset.

Report of the Committee on One-Parent Families

1.6 The report of the Finer Committee is an illuminating and comprehensive review of all the social problems attaching to, and connected with, the one-parent family. We have derived great assistance from the skilfully presented mass of material contained in the report, and in particular from the material contained in Part 4. In that Part of their report the Committee describe and comment extensively on the existing law and legal procedures relating to family breakdown, developing the proposition that one-parent families are the subject not of a single system of family law but, in effect, of three systems, administered respectively by the divorce courts, the magistrates' courts, and the supplementary benefit authorities[5].

1.7 In Section 5 of Part 4, the Committee compare the law of divorce, as now reformed, with the matrimonial law administered in matrimonial magistrates' courts. They conclude that whereas the substantive law of divorce gives effect to modern and enlightened principles of public policy, the substantive matrimonial law administered by magistrates is still largely based on the public policy of the latter part of the nineteenth century[6]. In various passages of their report, the Committee criticise the matrimonial law administered by magistrates as being archaic, complex and uncertain[7]. In particular, they are critical of the survival in that law of the concept of the matrimonial offence, both as a ground on which relief may be granted and as a ground on which it must be refused[8].

1.8 There is no doubt that there are very serious defects in the matrimonial law administered in magistrates' courts, and our terms of reference enable us to propose changes in the substantive law to cure them. The Finer Committee did not confine itself to proposing changes in the substantive law. Indeed, in dealing with the matrimonial law and the courts which administer it, it put in the forefront of its recommendations a proposal for the establishment of a unified institution, the family court, administering a single and unified system of family law.

1.9 The terms of reference of the Finer Committee were wide[9]. The request we received from the Home Secretary (see paragraph 1.1 above) was more limited, and in this report we have not therefore discussed the case for and against a family court. We merely observe that the formidable economic, administrative and practical difficulties in the way of establishing such a court were clearly

[4] H.C. 553 (1974–5). The Select Committee has been reappointed for the Session 1975–6.

[5] (1974) Cmnd. 5629, para. 4.5.

[6] *ibid.*, para. 4.67.

[7] *ibid.*, paras 4.50, 4.62–4.66 and 4.105.

[8] *ibid.*, para. 4.64.

[9] The terms of reference of the Finer Committee are set out in Appendix 4.

demonstrated by the Secretary of State for Social Services in the House of Commons debate on the Finer Committee's report[10]. She concluded by saying that the Government could:—

"... see no prospect of accepting the recommendation for family courts."[11]

1.10 Whatever may be the future prospects of a family court, there can be no doubt that, as was also said by the Secretary of State[12], the reform of the substantive law is an immediate requirement. When the Finer Committee came to consider reform of the substantive law it took our Working Paper No. 53 as the basis of discussion and expressed general agreement with our provisional proposals, subject to the reservation that the principle of *Wachtel* v. *Wachtel*[13] should be applied in determing how the conduct of a spouse should affect the decision of the court on the question whether a maintenance order should be made and, if so, for how much[14].

1.11 The only point on which the Committee differed from the provisional conclusions in our working paper concerned the principle and objectives of the magistrates' matrimonial law. The working paper argued that there was a clear contrast between the magistrates' jurisdiction and that exercised by the divorce court under the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970 (now consolidated in the Matrimonial Causes Act 1973). Whereas one of the objectives of a good divorce law was the decent burial with a minimum of embarrassment, humiliation and bitterness of those marriages that are indubitably dead[15], the magistrates' jurisdiction was normally exercised at a stage earlier than irretrievable breakdown and was not concerned with change of status. These arguments led the Working Party to conclude that the function of magistrates' courts today was to provide first aid in a marital casualty clearing station[16]. The Committee criticised the Working Party for using this medico-military analogy[17], on the basis that:—

"... one half of the complainants who obtain matrimonial orders in the summary courts never proceed to a divorce, but remain in a matrimonial limbo in which they are single in reality but married in law."[18]

1.12 We accept that there is evidence to show that very many of the casualties of marriage breakdown, once they have obtained a matrimonial order from the magistrates, do not seek any more permanent cure for their marital ills. Where reconciliation takes place, no further cure is required. Where there is no reconciliation, it is important that the parties should be aware of the availability of divorce and of legal aid to help them in divorcing. Effective arrangements are required to ensure that advice on such matters is readily available, but, provided

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[10] *Hansard*, 20 October 1975, Vol. 898, Cols. 57–60.

[11] See also the Lord Chancellor's answer to Lord Gardiner: *Hansard* (House of Lords), 17 December 1975, Vol. 366, Cols. 1560–1561.

[12] *Hansard*, 20 October 1975, Vol. 898, Col. 58.

[13] [1973] Fam. 72.

[14] (1974) Cmnd. 5629, paras. 4.365–4.378. For our views on *Wachtel* v. *Wachtel* in the context of magistrates' matrimonial jurisdiction see para. 2.23 below.

[15] Working Paper No. 53, para. 22.

[16] *ibid.*, para. 24.

[17] (1974) Cmnd. 5629, para. 4.383; and see generally paras. 4.380–4.385.

[18] *ibid.*, para. 4.67.

it is, we think it realistic to expect that the function of the magistrates' courts in a dual system will to an increasing extent be that envisaged in our working paper. The reforms which we recommend in our present report will, we hope, contribute to the efficiency with which that funtcion is performed.

1.13 Until August 1975, it was the practice of the Supplementary Benefits Commission, where a wife applied to them for benefit in circumstances in which she might hope to obtain a maintenance order against her husband, to encourage her to apply for such an order. As the Secretary of State for Social Services informed the House of Commons on 20 October 1975[19], that practice has now ceased. It may be that the effect of the change of policy will be to reduce the number of applications by married women to magistrates' courts for maintenance orders[20]. But if such a result were to follow, it would not in our view invalidate the case for the reforms which we propose in this report.

The general tenor of the consultation on Working Paper No. 53

1.14 It is right to acknowledge that the consultation on our working paper disclosed a body of opinion which favours more radical reform than the Working Party proposed. We think it fair to say that most of those who were of this opinion are advocates of the abolition of the matrimonial jurisdiction of magistrates in its present form and of the setting up of entirely new arrangements for the administration of family law—matters which were outside the Working Party's terms of reference. We should, however, emphasise that the radical and comprehensive reforms which the Working Party proposed within the scope of its terms of reference have met with the general approval of those who commented on the working paper. How far we have modified or added to the Working Party's provisional conclusions in the light of the consultation will be apparent from later passages in this report where we cite the comments made to us on particular topics.

1.15 We wish to record our great indebtedness to all the members of the Working Party, in particular to Mr. R. L. Jones and Mr. P. C. Edwards and the other Home Office representatives on the Working Party, for the expert help they have given us at all stages of the work including the drafting of this report. We also welcome the opportunity of expressing our gratitude to Sir George Baker, the President of the Family Division, for the invaluable advice, assistance and encouragement we have received from him.

The contents of this report

1.16 The recommendations in our report include recommendations:—

(*a*) For changing the principles on which matrimonial relief is available to husbands and wives in magistrates' courts (Part II) and for making consequential changes in the law relating to wilful failure to maintain administered in the High Court and divorce county courts (Part IX).

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[19] *Hansard*, 20 October 1975, Vol. 898, Col. 62.

[20] In 1973 there were 20,993 applications for such orders and 13,657 orders were made: Civil Judicial Statistics for the year 1973 (Cmnd. 5756). The figures for 1974 and 1975 have not been published.

(*b*) For conferring on magistrates' courts new powers to meet the problems of violence in marriage (Part III).

(*c*) For the improvement of the procedure for dealing with matrimonial matters in magistrates' courts (Part IV).

(*d*) For the rationalisation of the law relating to orders in respect of children in magistrates' matrimonial proceedings (Part V).

(*e*) For related changes in the law relating to guardianship (Part VI), custodianship under Part II of the Children Act 1975 (Part VII) and affiliation (Part VIII).

1.17 In Part X we deal with certain other proposals for the protection of children which were canvassed in Working Paper No. 53 or were raised in the consultation. In Part XI we discuss the next steps which should be taken to meet what we consider is the pressing need for a comprehensive and unified presentation of the whole statute law relating to family matters. Part XII contains a comprehensive Summary of our recommendations.

1.18 In order to limit the length of this report we have not always repeated in full the arguments canvassed in the working paper but cross references to relevant paragraphs in that paper will be found in footnotes to the present text.

A draft Domestic Proceedings and Magistrates' Courts Bill

1.19 We annex as Appendix 1 a draft Bill (Domestic Proceedings and Magistrates' Courts Bill) which gives effect to those of our recommendations which we think should be implemented by statute. Where we think that some other method of implementation, such as by magistrates' courts rules, is appropriate, we say so.

1.20 We propose that the Matrimonial Proceedings (Magistrates' Courts) Act 1960 should be repealed and replaced by a new code which is contained in Part I of the annexed Bill. There are, of course, certain provisions in the 1960 Act which should be preserved; accordingly, they are re-enacted as is explained later in this report and in the Explanatory Notes which accompany the annexed Bill.

PART II:

THE PROVISION OF FINANCIAL RELIEF BETWEEN SPOUSES

The grounds for an order

(*a*) *The present position*

2.1 At present, in order to obtain a matrimonial order in the magistrates' courts, the applicant for the order must prove that the respondent has committed one or more of the acts or omissions listed in the Act, which are known colloquially, though not so described in the Act, as "matrimonial offences". The grounds for an order in section 1(1) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960[1] are, briefly, as follows, namely that the

[1] Hereafter throughout this report we refer to this Act for brevity's sake as "the 1960 Act".

respondent:—

(a) has deserted the applicant;
(b) has been guilty of persistent cruelty to the applicant or to an infant child of the applicant or an infant child of the respondent who is a child of the family;
(c) has been found guilty of an assault upon the applicant or of a sexual or indecent assault (or an attempt at such an assault) upon an infant child of the applicant or upon an infant child of the respondent who is a child of the family;
(d) has committed adultery;
(e) has insisted on having intercourse with the applicant while suffering from venereal disease;
(f) is for the time being an habitual drunkard or a drug addict;
(g) being the husband, has compelled his wife to submit to prostitution;
(h) being the husband, has wilfully neglected to provide reasonable maintenance for the wife or any child of the family; or
(i) being the wife, has wilfully neglected to provide reasonable maintenance for the husband or any child of the family while the husband was incapacitated by age, illness or mental or physical disability.

(b) *The provisional proposals in Working Paper No. 53*

2.2 The Working Party considered whether it was acceptable or necessary to retain this long list of grounds for making a matrimonial order, taking as their starting point the reformulated grounds of divorce and judicial separation set out in (what are now) sections 1 and 17 of the Matrimonial Causes Act 1973 and the grounds for making a maintenance order in proceedings instituted under those sections. They concluded that neither of these provisions could be taken over without modification as a basis for reform of the magistrates' law, because the principles and objectives underlying the two jurisdictions are not the same. The divorce court exercises its powers to make a maintenance order in respect of a party to a marriage principally on the basis that it has terminated the marriage either by divorce or by judicial separation or by a decree of nullity. But when a matrimonial case comes before the magistrates, the marriage may not yet have irretrievably broken down and may never do so; and even if it has, this is usually incapable of proof at such an early stage[2].

2.3 The Working Party also rejected as a model what is now section 27 of the 1973 Act, under which the High Court and divorce county courts may order financial provision in cases of wilful neglect to maintain. We have no doubt that the Working Party were right to reject section 27 as a model, because, as appears from paragraph 9.2 in Part IX below, the concept of wilful neglect to maintain is one of the very concepts which are in need of reappraisal.

2.4 The Working Party saw their task as being, therefore, to formulate proposals which, whilst operating consistently with the permanent remedies available in the divorce court when the marriage has irretrievably broken down, nevertheless gave full effect to the rather different objectives of the magistrates'

[2] Working Paper No. 53, para. 29.

matrimonial jurisdiction, which they set out as being:—

(*a*) to deal with family relations during a period of breakdown, which is not necessarily permanent or irretrievable—

(i) by relieving the financial need which such a breakdown can bring to the parties,

(ii) by giving such protection to one or other of the parties as may be necessary,

(iii) by providing for the welfare and support of the children; and

(*b*) to preserve the marriage in existence, where possible[3].

2.5 With these objectives in view, the Working Party set out to determine what should be the policy underlying the law relating to the support of spouses and their children. They concluded that three principles could be stated: first, that both parties to a marriage should have an absolute obligation to maintain their dependent children, which should survive irrespective of the way in which they have behaved towards each other; secondly, that the obligation of each spouse to maintain the other should be fully reciprocal; and thirdly, that it should be left to the court to determine in particular cases whether an order should be made and for how much in the light of whatever guidelines might be embodied in the law[4].

2.6 On this basis, the Working Party proposed that section 1(1) of the 1960 Act should be replaced by a general provision enabling either party to a marriage to apply to a magistrates' court for an order on one or more of the following grounds:—

(*a*) that the respondent has failed to provide such maintenance for the applicant or for any children as is reasonable in all the circumstances; or

(*b*) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or

(*c*) that the respondent is in desertion[5].

2.7 The inclusion of desertion as a ground was proposed principally to deal with the situation where the parties are living apart but the husband is financially supporting the wife. The Working Party thought that, in this situation, the courts should be able to intervene to give the wife security against her husband's future failure to maintain her. They recognised, however, that the effect of enabling the courts to intervene solely on the ground that the respondent refuses to live with the applicant, though continuing to maintain him or her, might be to encourage unnecessary litigation. If there is genuine need for relief, for example because maintenance (though substantial) is irregularly paid, the court would, in any event, be able to intervene on the ground that the respondent is not providing reasonable maintenance. Another possible justification for the court's intervention, according to the Working Party, was that desertion could be difficult to prove and, as it remained a ground for establishing irretrievable

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[3] Working Paper No. 53, para. 24.

[4] *ibid.*, paras. 33–34.

[5] *ibid.*, para. 44.

breakdown and thus obtaining a divorce, it should be made possible for the applicant to prove desertion as soon as it begins[6].

(c) *The results of consultation*

2.8 The Working Party's analysis of the principles and objectives underlying the summary matrimonial jurisdiction was generally approved in the consultation—though some of those who commented had misgivings about the principle of equality as between husband and wife in the obligation to maintain. Opinions were, however, divided when it came to the three grounds of application for a matrimonial order proposed in substitution for the existing provisions in section 1 of the 1960 Act. The first two grounds, failure to provide reasonable maintenance and unreasonable behaviour, gave rise to little controversy. The Bar Council, however, thought that it would be sufficient to provide for an "application for reasonable maintenance" without specifying the grounds on which the application might be made, and that if a ground of application was to be specified it should be limited to a failure to provide reasonable maintenance. Our own view is that it is right to give some guidance to the court by specifying the grounds on which an application may be made. We agree with the majority of those who commented on the working paper that both failure to provide reasonable maintenance and unreasonable behaviour should be grounds so specified.

2.9 On whether desertion should be retained as a separate ground opinion was more or less evenly divided. Those commentators who were opposed to the retention of desertion as a ground advanced a variety of reasons for their views. Some argued that desertion was simply a specific form of unreasonable behaviour, which, like adultery, would already be covered by the general ground. Others contended that desertion was a highly technical offence, difficult to prove and thus not appropriate to the magistrates' matrimonial jurisdiction.

2.10 Other commentators argued that the effect of including desertion as a ground would be to encourage applicants to institute proceedings to safeguard them against possible future failures to maintain. As for the argument that, since desertion remains a ground for establishing irretrievable breakdown and thus obtaining a divorce, it should be possible for the applicant to prove desertion as soon as it begins, it was asserted that magistrates' courts should not be used as a stepping stone to the divorce court since this would not be conducive to a conciliatory atmosphere.

2.11 We can see the force in all these arguments. We think, however, that the balance of advantage lies in retaining in the magistrates' matrimonial jurisdiction some means by which a wife who has been deserted can obtain a maintenance order soon after the desertion, whether or not her husband has ceased to maintain her. We do not think that a deserted wife for whom her husband is providing reasonable maintenance should be required to wait until that maintenance has ceased before making her application. We have therefore concluded that desertion should remain as a separate ground for a maintenance order.

2.12 We entertain no doubt whatever that the reformulated law should

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[6] Working Paper No. 53, para. 42.

embody the general principle that each spouse has a duty to support the other[7]. We think that the grounds on which each spouse may apply for an order against the other for maintenance during marriage should be identical, and that the guidelines to which the court is to have regard should be the same whether the application is made by the husband or the wife. It should then be for the court to determine whether an order should be made, and if so for how much, in the light of the particular circumstances of the case.

(d) Recommendations

2.13 *We accordingly recommend* that the long list of grounds provided in section 1 of the 1960 Act should be replaced by three grounds on which the magistrates should be able to make an order for financial provision, namely:—

(*a*) that the respondent has failed to provide such maintenance for the applicant or for any children as is reasonable in all the circumstances; or

(*b*) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or

(*c*) that the respondent is in desertion.

2.14 *We further recommend* that:—

(*a*) the magistrates' matrimonial law should embody the general principle that it is the duty of each spouse to support the other on a basis of equality;

(*b*) the grounds of application and the guidelines for the court should be the same whichever spouse applies for maintenance;

(*c*) the court should then determine the application in the light of the particular circumstances of the case.

The role of conduct: adultery

(a) Provisional proposals supported on consultation

2.15 The Working Party considered at length the question whether, and if so to what extent, the courts, when considering the making of a maintenance order on one of the three grounds proposed in the working paper, should have regard to the conduct of the respective parties to the marriage[8]. They concluded that, as regards adultery, it was not desirable and no longer acceptable to public opinion that the commission by the wife of a single act of adultery should be regarded as sufficient to disqualify her automatically from all financial relief. They could see no justification nowadays for a court's being bound to refuse to make a maintenance order in favour of an otherwise deserving wife because she has committed adultery; the more so since adultery is not a bar to an award of maintenance in divorce proceedings. They, therefore, suggested that the reformulated magistrates' matrimonial law should repeal, and not replace, section 2(3) of the 1960 Act, the effect of which is to make adultery by

[7] For the principle of equality in this respect, see *Calderbank* v. *Calderbank* [1975] 3. W.L.R. 586.
[8] Working Paper No. 53, paras. 45–55.

the wife an absolute bar to financial relief if committed during the subsistence of the marriage and not condoned, connived at or conduced to by the husband. They proposed a corresponding amendment to the law applicable in proceedings for wilful neglect to maintain under section 6 of the Matrimonial Proceedings and Property Act 1970 (now section 27 of the Matrimonial Causes Act 1973). These proposals were welcomed by all who commented on the working paper and we concur in them. We deal with the amendment of section 27 of the 1973 Act at paragraphs 9.1–9.4 and 9.7–9.24 in Part IX below.

(b) Recommendation

2.16 *We therefore recommend* that the magistrates' matrimonial law should be reformulated so as to make adultery no longer an absolute bar to financial relief.

The role of conduct generally

(a) The provisional proposals

2.17 On the wider question of what weight the courts should be enabled to give to the conduct of the parties, including adultery committed by either party, in deciding whether to make a maintenance order and, if so, for how much, the Working Party reached no firm conclusions. They noted, however, that so far as the divorce jurisdiction was concerned, these questions had been the subject of detailed examination by the Court of Appeal, which, in *Wachtel* v. *Wachtel*[9], had been asked to determine, for the first time, after full argument, the principles that should be applied in the Family Division when granting ancillary relief pursuant to the powers conferred by the Matrimonial Proceedings and Property Act 1970 following dissolution of a marriage.

2.18 The Working Party recognised that these principles, as formulated by Lord Denning M.R., were not applicable to the existing jurisdiction of the magistrates in matrimonial matters as the law now stands, but they thought it appropriate, on their terms of reference, to consider whether, and if so how, the principles laid down by Lord Denning could be made to operate in the magistrates' matrimonial jurisdiction under the reformulated law which was proposed. To this end comment was invited on four possible approaches to the relevance of conduct namely:—

(*a*) the obligation to maintain should be regarded as absolute and reciprocal and, thus, matrimonial conduct should not be taken into account in determining liability or quantum; or

(*b*) the conduct should be relevant in every case as regards liability, but should not be taken into account in determining the amount of an order; or

(*c*) conduct should be relevant, both as regards liability and quantum; or

(*d*) conduct should be relevant in every case, both as regards liability and quantum, but if the court decides to make an order, it should not

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[9] [1973] Fam. 72.

reduce the amount it would have ordered below a sum sufficient to provide the applicant with the basic necessities of life[10].

(b) The results of consultation

2.19 The general tenor of the consultation was to favour approach (*c*) (conduct should be relevant to both liability and quantum) though approach (*b*) (conduct should be relevant only to liability) also attracted considerable support. Approach (*a*) (conduct should be wholly irrelevant) was, in general, thought to be objectionable for the reason given in the working paper, namely, that it involves acceptance of the principle that a husband should always be required to maintain a wife who has misconducted herself, and should be required to do so however serious her misconduct may have been. It was generally agreed that such a principle would be inconsistent with accepted standards of morality and would not commend itself to public opinion. Approach (*d*) (conduct should be relevant to liability and quantum but should not reduce the amount below a sum sufficient to provide the basic necessities of life) attracted a little more support than approach (*a*).

2.20 The main area of disagreement amongst those commenting on the working paper centred on the question whether the magistrates should be able not only to refuse to make an order but also in appropriate cases to reduce the amount of maintenance they ordered by reason of the applicant's conduct. As noted above, the majority of commentators favoured approach (*c*) (conduct should be relevant to liability and quantum). The main reason given for preferring this approach was that it would offend the sense of justice of magistrates and litigants alike if the court's hands were tied in this matter, particularly having regard to the fact that it was futile to make a maintenance order which the husband considered unfair, since he might well prefer to go to prison rather than pay. It was recognised, however, that an approach which left the magistrates free by reason of any conduct which was not "obvious and gross" to reduce the amount which they would otherwise have ordered would, to some extent, be at variance with the principles enunciated in *Wachtel* v. *Wachtel*.

(c) The relevance of conduct reconsidered

2.21 In reconsidering what should be the relevance of conduct, we think it advisable to begin by paying close attention to the principles which Parliament has recently laid down in section 5(1) of the Matrimonial Proceedings and Property Act 1970 (now re-enacted in section 25(1) of the Matrimonial Causes Act 1973). In those subsections Parliament has provided that in deciding whether and if so how to exercise its powers to make financial provision for a party to a marriage on or after granting a decree of divorce, nullity or judicial separation, the court is "so to exercise those powers as to place the parties, so far as it is practicable, and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down..."

2.22 It is of course true that this statutory guideline was devised for cases in which financial provision is being considered in connection with a decree of divorce, nullity or judicial separation, whereas in the cases with which we are

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[10] Working Paper No. 53, para. 48.

concerned financial provision is being considered where no such decree has been granted. Nevertheless we think, after allowances are made for the different circumstances with which we are concerned, that the guideline provides a principle of fundamental importance for our present purposes. That principle is that in determining whether and if so how to exercise its powers to order financial provision the court should, to the extent to which it is just to do so, have regard to the conduct of the parties. Conduct may therefore, in a proper case, be relevant both to liability and to quantum. It seems to us that that principle, established as it has been by Parliament, must be accepted as equally applicable to cases where a magistrates' court is considering whether one party to a marriage should be ordered to make financial provision for the other while the marriage is still subsisting, and if so what provision should be ordered. We therefore think that in deciding whether to order such financial provision, and if so what provision to order, a magistrates' court should be required by statute to have regard to the conduct of the parties to the marriage to the extent to which it is just to do so. We further think that it should be made clear that the conduct to which the court is to have regard is limited to conduct which has relevance to the marriage.

2.23 We do not propose a statutory codification of the principles which the courts should apply in determining whether conduct has been such as to make it just to refuse an order for financial provision or to reduce the provision which would otherwise have been ordered. For the time being those principles have been authoritatively stated in the judgment of Lord Denning in *Wachtel* v. *Wachtel*[11]. We appreciate that there may be further judicial development of those principles, and we also appreciate that the principles themselves are open to review by the House of Lords, although we hope that they would emerge from such a review without material modification. We think that the statutory provision required is one which embodies the principle to which we have referred in paragraph 2.22 above, and we believe that the decision in *Wachtel* v. *Wachtel* has demonstrated that on the basis of such a provision the courts will have no difficulty in identifying the limited class of cases in which the conduct of the parties should properly influence their decision.

2.24 As we have already mentioned in paragraph 2.5 above, the Working Party took the view that both parties to a marriage should have an absolute obligation to maintain their dependent children irrespective of the way in which they conducted themselves towards each other. This proposition was universally accepted by those who commented on it and we believe that it is not open to challenge.

(d) Recommendation

2.25 *We accordingly recommend* that, in deciding whether to order one party to a marriage to make financial provision for the other, and if so what provision to order, magistrates should be required to have regard to the conduct in relation to the marriage of the parties to the extent to which it is just to do so. In no circumstances should the conduct towards each other of the parties affect the maintenance to be ordered for children of the family.

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[11] [1973] Fam. 72, 90 A–D.

Factors other than conduct

(a) The provisional proposals

2.26 When considering factors other than conduct which the courts should take into account in determining whether or not to make an order and, if so, for what amount, the Working Party looked at the guidelines contained in what is now section 25 of the Matrimonial Causes Act 1973. They suggested, however, that not all of these were suitable for transplantation into the magistrates' matrimonial law, because many of them related to the termination of the marriage. They therefore confined themselves to recommending that the court should have regard to:—

(*a*) the income, earning capacity, property and other financial resources of each of the parties; and

(*b*) the financial needs, obligations and responsibilities of each of the parties[12].

(b) The results of consultation

2.27 There was a consensus of opinion amongst those commenting on the working paper that these two sets of factors were not adequate, and a number of helpful suggestions were made as to other factors which ought to be included[13]. No set of guidelines can be exhaustive, and the principle of universal application must be that the court should have regard to all the circumstances of the particular case with which it is dealing. Nevertheless, it is our view that the courts will derive assistance from fairly full statutory guidelines. We think that in respect of orders made in favour of one spouse against another the right course is to reproduce, as far as possible, the guidelines contained in section 25 of the 1973 Act[14], modifying them only so far as is necessary to reflect the

[12] Working Paper No. 53, para. 56.

[13] *viz.*, housing needs, the length of the marriage, the standard of living enjoyed by the parties, and all the considerations set out in s. 25 of the 1973 Act, the inclusion of which it was argued would bring the jurisdiction of the divorce court and of the magistrates' courts as close as possible.

[14] Section 25(1) of the 1973 Act reads:—

> "It shall be the duty of the court . . . to have regard to all the circumstances of the case including the following matters, that is to say—
>
> (*a*) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
> (*b*) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
> (*c*) the standard of living enjoyed by the family before the breakdown of the marriage;
> (*d*) the age of each party to the marriage and the duration of the marriage;
> (*e*) any physical or mental disability of either of the parties to the marriage;
> (*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
> (*g*) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;
>
> and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

rather different circumstances of a matrimonial case before magistrates and in particular excluding the guideline contained in section 25(1)(*g*) of the 1973 Act.

2.28 Some commentators thought that the terms "income" and "needs" required further definition, so as to make clear that "income" included income of other members of the household and also income deriving from the obligations of other parties, e.g. a putative father of a child of the wife, and that "needs" included the needs of a person for whom the party must or might reasonably provide[15]. Though we can see that there might be advantage in putting these matters beyond doubt in the legislation to give effect to our recommendations, we are not aware of any difficulties having arisen in the divorce jurisdiction concerning the interpretation of the guidelines contained in section 25(1) of the 1973 Act, where these terms are not further defined. We think, on balance, that the advantages of further defining the terms "income" and "needs" for the purposes of the magistrates' matrimonial jurisdiction are outweighed by those of maintaining consistency, so far as possible, between the guidelines operating in the two jurisdictions and we accordingly make no recommendation on this point.

(*c*) ***Recommendation***

2.29 *We accordingly recommend* that where the order applied for is an order for the benefit of a spouse the factors other than conduct which should be taken into account by the court should be set out in the form of statutory guidelines and should be as follows:—

(*a*) the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the forseeable future;

(*b*) the financial needs, obligations and responsibilities which each of the parties has or is likely to have in the forseeable future;

(*c*) the standard of living enjoyed by the parties to the marriage before the occurrence of the conduct which is alleged as the ground of the application;

(*d*) the age of each party to the marriage and the duration of the marriage;

(*e*) any physical or mental disability of either of the parties to the marriage;

(*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(*g*) any other matter which in the circumstances of the case the court may consider relevant, including, so far as it is just to take it into account, the conduct of each of the parties in relation to the marriage.

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[15] *cf.*, The Attachment of Earnings Act 1971, s. 25(3).

The nature of the orders to be made available

(a) The provisional proposals

2.30 In considering how far it is possible to achieve the broad objective of assimilating the powers of the magistrates' courts to grant financial relief with those of the divorce court, the Working Party drew attention[16] to the fact that the powers of a magistrates' court to award financial relief are very much narrower than those of the divorce court[17]. They nonetheless took the view that some of the powers exercisable by the divorce court were unsuitable for exercise by the magistrates' courts because lay justices are not equipped to determine the complicated legal questions which can arise when property rights are in dispute.

2.31 Accordingly the Working Party concluded that magistrates should not have the power to order the transfer of property or the making or variation of a settlement of property (section 21(2) of the 1973 Act), such power, in any event, being suitable for exercise only on the termination of a marriage, not when the marrige still subsists. They similarly concluded that it would not be appropriate for the magistrates to be able to make orders for secured periodical payments (section 21(1)(*b*) of the 1973 Act), in particular because there is no suitable organisation in the magistrates' courts for seeing that security is provided.

2.32 Two suggestions for reform were put forward by the Working Party:—

(*a*) that magistrates should be given power to order the payment of a lump sum for a limited amount in addition to any periodical payments ordered[18];

(*b*) that magistrates should be given power similar to that conferred on the divorce court by section 23(1)(*a*) of the 1973 Act to order periodical payments at such intervals as they may consider appropriate[19].

(b) The results of consultation

2.33 Consultation on the working paper disclosed general agreement that it would be unsuitable for magistrates to make orders for the transfer or settlement of property or for secured periodical payments.

2.34 On whether power should be given to order the payment of a lump sum, the majority of those who commented agreed that such a provision should be made, but differing views were expressed as to how it should be framed. Some thought there should be no upper limit to the amount of the lump sum magistrates could order, and that they should be able to make such an order not only when the original order is made, but subsequently on a change of circumstances. Others took the view that the upper limit for the lump sum should be as little as £25 and that the court should have power to make such an order only on the

[16] Working Paper No. 53. para 58.

[17] Under the 1960 Act, magistrates only have power to order maintenance in the form of weekly periodical payments. Under the Matrimonial Causes Act 1973 the divorce court, on granting a decree of divorce, nullity or judicial separation, has power to order periodical payments, secured periodical payments, the payment of a lump sum, the transfer of property, the settlement of property or the variation of ante-nuptial or post-nuptial settlements.

[18] Working Paper No. 53, para. 59.

[19] *ibid.*, para. 61.

occasion when the original order was made. We have given careful thought to the comments expressed on this point. We think that what the Working Party had in mind when making the proposal was that the magistrates, in addition to any periodical payments they order, should be able to award an applicant some comparatively modest sum to cover expenses such as outstanding hire purchase debts, gas or electricity bills or removal expenses. The power to award a lump sum will also in many cases be a useful means of dealing with maintenance expenses incurred before the date of the order.

2.35 We have reached the conclusion that the Act should empower the court to order payment of a lump sum not exceeding £500, and that there should be power to alter the maximum by Order in Council. We differ from the views in the working paper only in one respect. We think it should be possible to make a lump sum order not only on the original application but also on a subsequent application. There may be more than one occasion on which an order for a lump sum is justified.

2.36 Where a divorce court has ordered payment of a lump sum under section 23(1) or section 27(6) of the Matrimonial Causes Act 1973, it has no power to vary the amount of the lump sum. It may, however, order the lump sum to be paid by instalments (section 23(3) and section 27(7) of the Act) and may vary or revoke the order for instalments (section 31(2) of the Act). Where magistrates have made an order for the payment of a lump sum under the powers we now propose, we do not think they should have power to make a subsequent order varying the amount of the lump sum awarded. To enable them to deal with cases where the respondent has difficulty in making the payment, they would have the powers conferred by section 63 of the Magistrates' Courts Act 1952 to allow time for payment and to order payment by instalments. We think it should be made clear that where they have made an order for payment of a lump sum by instalments, they have power to vary the instalments.

2.37 The second proposal for reform, that it should be possible to order periodical payments at such intervals as the magistrates may think appropriate was also generally agreed on consultation. For our part we are firmly in favour of such a change. In a society in which people in many kinds of occupation receive their earnings monthly it seems undesirable that the powers of magistrates' courts should be restricted to the ordering of weekly sums.

2.38 There is a further point. Section 23(1)(*a*) of the 1973 Act provides for the making of orders for periodical payments for such term as may be specified in the order. The effect seems to be to enable the divorce court to make a financial provision order for a limited period of time. It has been held by the President of the Family Division in *Chesworth* v. *Chesworth*[20] that the magistrates already have power to make an order for a limited period of time. We think, nevertheless, that it would be useful for this power to appear on the face of the statute.

[20] (1973) 4 Fam. Law 22.

(c) *Recommendations*

2.39 *We therefore recommend:—*

(a) That the magistrates should be given power to order the payment of a lump sum of up to £500 and that the exercise of this power should not be limited to a single occasion.

(b) That it should be made clear that, when the magistrates have ordered payment of a lump sum by instalments, they have power to vary the instalments.

(c) That there should be an express statutory provision whereby periodical payments can be ordered for such term and at such intervals as may be specified in the order.

Varation and revocation of the order

(a) *Discussion of the problem*

2.40 Section 8(1) of the 1960 Act provides for section 53 of the Magistrates' Courts Act 1952 to apply for the purposes of the revocation, revival or variation of any matrimonial or interim order as if that order were an order for the periodical payment of money, whether or not it is in fact such an order. Section 53 of the 1952 Act confers on a magistrates' court which has made an order for the periodical payment of money a general power to revoke, revive or vary that order on application being made.

2.41 The Working Party saw no reason to change these provisions so far as they concern variation of an order for maintenance in favour of a spouse. They said that they had no wish to deprive magistrates' courts of the complete discretion given them under the provisions as to the factors they should take into account in varying an order[21]. As regards revocation, the Working Party likewise proposed that the courts should retain their complete discretion as in the case of variation[22].

2.42 Section 8(2) of the 1960 Act makes it compulsory for the court (except in certain cases) to revoke a matrimonial order on proof that the party on whose complaint the order was made has committed an act of adultery during the subsistence of the marriage. The Working Party thought that if the applicant's adultery was not to be a bar to her obtaining an order for maintenance in the first instance, it should not be retained as a bar to her continuing to receive maintenance because of adultery subsequent to the making of the order[23].

2.43 It is our view, supported by the general tenor of the comments on the working paper, that there should be no rule of law which requires the court to treat adultery as a bar in any circumstances whatsoever. On an application for variation or revocation of an order, the court should be required to have regard to all the circumstances, including any change in any of the matters to

[21] See Working Paper No. 53, para. 63, in which reference was also made to the desirability of the magistrates giving an indication of the factors they had taken into account in exercising their discretion. In this report the question of giving reasons for magistrates' decisions is dealt with in paras. 4.67–4.76 below.

[22] Working Paper No. 53, para. 67.

[23] *ibid.*, para. 67.

which the court was required to have regard when making the order. This principle is embodied in section 31(7) of the Matrimonial Causes Act 1973, and we think that it should apply in relation to the magistrates' matrimonial jurisdiction. The adultery of the party in whose favour the order was made would be one of the circumstances to be taken into account, and the court would attach to it such weight as might be just in the light of all the other relevant circumstances.

2.44 Section 8(1) of the 1960 Act provides not only for the variation and revocation of orders but also for their revival. The question whether a provision for revival is necessary deserves separate consideration and we revert to it in Section (F) of Part IV below.

(b) Recommendations

2.45 *We recommend* that on an application for the variation or revocation of a maintenance order for periodical payments made in favour of a husband or wife, the court should have a discretion to make whatever order it thinks appropriate having regard to all the circumstances including any change in any of the matters to which the court was required to have regard when making the original order.

2.46 *We further recommend* that there should be no rule of law making it compulsory for the order to be revoked on the ground of adultery.

The cessation of an order by reason of remarriage or cohabitation

(a) The present law

2.47 In certain circumstances, discussed by the Working Party[24], an order under the 1960 Act requiring one spouse to make payments for the maintenance of the other ceases to have effect by operation of law namely:—

(*a*) such an order ceases to have effect if the other spouse, following a dissolution or annulment of the marriage, remarries[25];

(*b*) where the order was made while the spouses were still cohabiting, the order ceases to have effect if they continue to cohabit for 3 months from the date of the order[26];

(*c*) where the order was made when the spouses were not cohabiting, the order ceases to have effect if there is any resumption of cohabitation after the order is made[27].

(b) Automatic cessation on remarriage: no change proposed

2.48 Adopting the conclusion reached by the Working Party, we propose that there should be no change in the present provision whereby a matrimonial order requiring the payment of money to a spouse automatically ceases to have effect on the remarriage of the payee.

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[24] Working Paper No. 53, paras. 64–66.
[25] s.7(4) of the 1960 Act (inserted by s.30 of the Matrimonial Proceedings and Property Act 1970).
[26] s.7(1)(*b*) of the 1960 Act.
[27] s.7(2) of the 1960 Act.

(c) Cessation where cohabitation is continued or resumed: the provisional proposals reconsidered after consultation

2.49 On the provisions recited in paragraph 2.47(*b*) and (*c*) above whereby an order automatically ceases to have effect where cohabitation is continued or resumed, the Working Party made two points, one of substance and one of procedure. We deal with the point of substance first[28].

2.50 The Working Party proposed that there should be automatic cessation of a matrimonial order only if there had been cohabitation for a period of 6 months after the order, whether the parties:—

(*a*) were cohabiting at the time the order was made, or

(*b*) were not cohabiting when the order was made but have resumed cohabitation subsequently[29].

In general this was approved by those commenting on the working paper. The principle merit of the proposal is that it will make it easier for a wife to seek reconciliation without fear of losing her order. This is an important consideration and in our view the proposal should be adopted.

2.51 We think, however, that the words "cohabit" and "cohabitation", which are used in section 7 of the 1960 Act, deserve further consideration. The predecessor of section 7(1) was section 1(4) of the Summary Jurisdiction (Separation and Maintenance) Act 1925. The latter section provided that no order made under the Summary Jurisdiction (Married Women) Act 1895 should be enforceable and no liability should accrue under such an order "whilst the married woman . . . resides with her husband", and that any such order should cease to have effect "if for a period of three months after it is made the married woman continues to reside with her husband".

2.52 The concept of "residence with" the husband gave rise to a conflict of judicial opinion. In *Evans* v. *Evans*[30] it was held that the mere fact that a wife resided under the roof of her husband's house, in which he was also living, was sufficient to constitute residence with him for the purposes of section 1(4). That was a decision of a King's Bench Divisional Court, and it was followed by the same court in *Wheatley* v. *Wheatley*[31] and *Harris* v. *Harris*[32]. On the other hand, in *Hopes* v. *Hopes*[33], Denning L.J. expressed the view that *Evans* v. *Evans*[34] was wrongly decided and that a wife was not to be said to be residing with her husband merely because she was living in the house in which he also resides. The view of Denning L.J. was preferred by a Divisional Court of the Probate Divorce and Admiralty Division in *Naylor* v. *Naylor*[35], where the authorities are reviewed.

2.53 The predecessor of section 7(2) of the 1960 Act was section 2(2) of the

[28] Working Paper No. 53, paras. 65–66.
[29] *ibid.*, para. 65.
[30] [1948] 1 K.B. 175.
[31] [1950] 1 K.B. 39.
[32] [1952] 1 All E.R. 401.
[33] [1949] P. 227, 236–238.
[34] [1948] 1 K.B. 175.
[35] [1962] P. 253.

Summary Jurisdiction (Separation and Maintenance) Act 1925, which provided that where a married woman with respect to whom an order had been made under the Summary Jurisdiction (Married Women) Act 1895 resumed cohabitation with her husband after living apart from him, the order should cease to have effect. Construing this provision in *Thomas* v. *Thomas*[36], Lord Goddard C.J. held that "cohabitation" meant living together as man and wife.

2.54 For the purpose of the proposals which we are now making, we intend the expression "cohabit" and related words to be understood as meaning that the husband and wife are living with each other in the same household. We have taken the expression "living with each other in the same household" from section 2(6) of the Matrimonial Causes Act 1973 because the expression describes exactly the meaning which we wish to attribute to cohabitation for our present purposes. It is our view that anything less than cohabitation in this sense should be insufficient to affect a magistrates' matrimonial order. This substantially resolves the conflict to which we have referred in paragraphs 2.52–2.53 above in favour of the view expressed in *Hopes* v. *Hopes*[37] by Denning L.J.[38].

2.55 The remaining question of substance is whether the 6 months period should or should not be a continuous period. Under section 7(1)(*b*) of the 1960 Act the 3 months period must be a continuous period. We think that the 6 months period should also be continuous. It is not our intention that the order should cease to have effect by reason of cohabitation, unless the cohabitation is such as to hold out a prospect that the parties have resumed living together permanently. Short and interrupted periods of cohabitation can hardly be said to hold out such a prospect, and we think they should not be sufficient to bring a maintenance order to an end. We therefore propose that the cohabitation required to bring a maintenance order to an end by operation of law should be cohabitation for a continuous period of 6 months.

2.56 The Working Party's procedural point relates to section 8(2) of the 1960 Act. That subsection provides that the court shall on application revoke an order requiring one spouse to make payments for the maintenance of the other where it is proved that the spouses have resumed cohabitation. The Working Party observed that the relationship of this provision to section 7(2) is not satisfactory, for where an order automatically ceases to have effect it seems to be unnecessary to have to take proceedings to revoke it. On that point we agree. However, cases can and do arise in which there is disagreement between the parties as to whether and on what date cohabitation has been resumed, and it has been represented to us that section 8(2) provides a means of resolving such questions. We agree that there should be a means of resolving such questions, but we do not think that section 8(2) is well designed for the purpose. What is required is a general provision that where an order has ceased to be in force by reason of cohabitation, the court may on application make a declaration to that effect and may specify the date on which the order ceased to be in force.

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[36] [1948] 2 K.B. 294, 297.
[37] [1949] P. 227.
[38] See *Santos* v. *Santos* [1972] Fam. 247, 262 (C.A.).

(*d*) ***Recommendations***

2.57 *We accordingly recommend* as follows:—

(*a*) That there should be automatic cessation of an order requiring one spouse to make periodical payments for the maintenance of the other only if there has been cohabitation for a continuous period of 6 months after the order, whether the cohabitation is continued or resumed.

(*b*) There should be a general provision that where an order has ceased to be in force by reason of cohabitation, the court may on application make a declaration to that effect and may specify the date on which the order ceased to be in force.

Enforceability of an order during cohabitation

(*a*) ***The provisional proposals***

2.58 As we have mentioned in paragraph 2.47(*b*) above, section 7(1)(*b*) of the 1960 Act provides that an order made while the parties are cohabiting shall cease to have effect after 3 months continued cohabitation. We now turn to the provision in section 7(1)(*a*) whereby an order made while the parties are cohabiting is not to be enforceable or to give rise to any liability until they have ceased to cohabit. There is no similar restriction on orders made by the divorce court under section 27 of the Matrimonial Causes Act 1973.

2.59 It is desirable to reconsider this provision of section 7(1)(*a*) in connection with the provision which we recommend in paragraph 2.57 above that an order shall cease to have effect only if there has been cohabitation for as long as 6 months. It was the view of the Royal Commission on Marriage and Divorce (the Morton Commission) that orders obtained on the ground of wilful neglect to provide reasonable maintenance should be enforceable while the parties were cohabiting[39]. The Working Party were inclined to share that view, and, while making no firm proposals, thought there might be advantage if such an order were enforceable during the period of 6 months before it ceased to have effect. They referred to an order so enforceable as an enforceable "housekeeping order"[40].

(*b*) ***The results of consultation***

2.60 This tentative proposal by the Working Party, not unnaturally, aroused strong feelings amongst those commenting on the working paper. The feeling of the majority was that such a provision would be useful, but it was pointed out that there would be practical difficulties. How, for example, would payments be made under such an order? Would a husband who had failed to maintain his wife be required to send payments to the court each week for collection by his wife? Or would he be expected to make payments direct to her? Neither course would be free of difficulty. Another significant criticism of this proposal was that it might lead to a number of wives asking the court to "fix the housekeeping".

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[39] (1956) Cmd. 9678, paras. 1042–1050.
[40] Working Paper No. 53, para. 66.

2.61 We have no doubt that cases occur in which the sole cause, or the root cause, of matrimonial difficulties is the husband's carelessness of his financial responsibilities. Where the parties are still living together in such cases, it seems to us to be wrong that the court should be unable to make an immediately enforceable financial order in favour of the wife. The result is that a wife who stays with her husband is worse off financially than she would be by leaving him. While the law is in such a state it may be argued that it is providing an inducement for the wife to leave her husband and is thus favouring the breakdown of the marriage instead of its repair. We, therefore, think that a maintenance order made in favour of a spouse while the parties are cohabiting should be enforceable notwithstanding the cohabitation.

2.62 We recognise that this raises a problem as to how the payments should be made under the order. Section 52(2) of the Magistrates' Courts Act 1952 requires the court to order that maintenance payments under the 1960 Act shall be made through the justices' clerk unless, upon representations expressly made in that behalf by the applicant, the court is satisfied that it is undesirable to do so. We have considered whether, in the case of maintenance orders made during cohabitation, it is desirable to relax this requirement so as to give the court wider powers to dispense with payment through the clerk.

2.63 We see the force of the argument that a requirement that payments should be made through the clerk while the parties are living together is cumbrous and liable to exacerbate their relations. On the other hand, once the court has made the maintenance order, it is of great importance that the order should be effective; and in many cases the only way of making it effective will be to require the payment to be made through the clerk. Our conclusion is that the provisions of section 52(2) of the Magistrates' Courts Act 1952 should not be modified in relation to maintenance orders made during cohabitation.

2.64 Where a maintenance order has been made while the parties are not cohabiting, we do not think that a resumption of cohabitation should affect the enforceability of the order (for so long as it remains alive) or the machinery for the collection of payments under the order. If the cohabitation continues for 6 months the order will, under our proposals, cease to have effect; and if the parties desire a variation or revocation of the order before the end of that period, we think it best to leave it to them to apply to the court for that purpose.

(c) *Recommendation*

2.65 *We therefore recommend,* on the assumption that an order requiring one spouse to make periodical payments for the maintenance of the other will remain in effect when the parties are cohabiting for a period of 6 months as we recommend in paragraph 2.57 above, that the order should be enforceable throughout that 6 months period.

PART III: THE PROVISION OF OTHER RELIEF

(A) THE NATURE OF THE RELIEF REQUIRED

The non-cohabitation order: a "non-molestation order" provisionally proposed

3.1 One of the Working Party's most important proposals was that, in place

of the existing power under section 2(1)(*a*) of the 1960 Act to order that the complainant be no longer bound to cohabit with the defendant, the magistrates should have power to provide a new type of remedy in the form of what the Working Party called a "non-molestation order"[1].

3.2 The Working Party noted that the non-cohabitation order originated in the Matrimonial Causes Act 1878 which was passed explicitly to protect the wife from a violent husband[2]. However, they went on to express the opinion that, if there is need for one spouse to be personally protected from the other, the non-cohabitation order, as at present framed, is not an effective way of providing such protection. Unlike the injunction which can be granted by the divorce court, it is simply a declaration and is not enforceable. Furthermore, it brings an end to desertion[3], which has caused difficulties for a wife who subsequently attempts to obtain a divorce in reliance on a period of desertion[4].

3.3 It is unhappily all too clear, as demonstrated in recent times by cases which have attracted general public attention, that protection against a violent or threatening husband is still urgent today. The concern of Parliament with the problem has been demonstrated by the appointment of the Select Committee on Violence in Marriage[5]. The question is whether a "non-molestation order", framed in the way suggested by the Working Party, will adequately ensure the safety of a wife who is in danger.

Criticisms of the suggested "non-molestation order" made on consultation

3.4 The Working Party suggested that a "non-molestation order" should be made only where the court considers that the wife needs protection from harm or harassment by the husband, and that it should be enforceable under section 54 of the Magistrates' Courts Act 1952, which enables the magistrates by monetary sanction or by committal to custody to enforce an order other than for the payment of money. The Working Party further suggested that it should be possible for the new order to include such conditions as the magistrates in their discretion might decide, and they invited views, in particular, on whether there should be power to attach a condition preventing the husband from entering the matrimonial home[6].

3.5 The proposals regarding a "non-molestation order" have, in general, been welcomed on consultation. There seems to be a fairly strong consensus of opinion that the existing non-cohabitation order is not an effective means of protecting a wife. It was, however, pointed out by several commentators that the suggested "non-molestation order" enforceable by a fine or imprisonment would be effective only to the extent that it enabled protection to be given quickly and by a simple and inexpensive procedure. Other commentators expressed serious doubts about the desirability of empowering magistrates to

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[1] Working Paper No. 53, paras. 68–70.

[2] s. 4 of the 1878 Act provided: "If a husband shall be convicted summarily or otherwise of an aggravated assault . . . upon his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband . . .".

[3] *Harriman* v. *Harriman* [1909] P. 123 (C.A.).

[4] Working Paper No. 53, para. 69.

[5] See para. 1.4 above.

[6] Working Paper No. 53, para. 70

prevent a husband from entering his own home. We consider these criticisms below.

The practical considerations underlying the need for relief

3.6 In the light of the consultation, we have reconsidered the Working Party's proposal. We feel it is important to state clearly the types of danger, as we now see them, against which a wife should be safeguarded and the practical considerations which must be taken into account. Our aim is the same as that of the 1878 Act, namely, to safeguard a wife, but more effectively than the non-cohabitation provision was able to do, against physical violence. In many cases the only practical way of ensuring the safety of a wife against a violent or threatening husband will be to keep the parties physically apart. There are, however, at least four different types of situations which should be considered.

3.7 First, there is the situation where the parties have already separated because the wife has left the home and has no wish to return to it. In such a case, an order excluding the husband from the home is unnecessary to protect the wife. If, however, the husband refuses to leave her alone and his behaviour towards her is violent or threatening, we think that the court needs to be able to make and order prohibiting him from using or threatening violence towards her.

3.8 The second and more difficult situation is where the parties are still living together but the husband, following some violent or disruptive incident, has left home for the time being. In this situation we think that if the wife is to be afforded adequate protection from any further violent or threatening conduct, then an order prohibiting the husband from using or threatening violence against her may not be sufficient. The court needs to have power to make an order keeping the husband out of the home.

3.9 Thirdly, another difficult situation is where, by reason of the husband's violent or threatening behaviour, the wife has been driven out of the home and has taken refuge with a relative or friend or in a hostel for "battered wives". It might be thought that, if the wife has physically removed herself from the home, the only remedy required is an order prohibiting the husband from using or threatening violence against her. We take a different view. The accommodation in which the wife has taken refuge may only be available for a few days' stay, and in any case it is scarcely likely to offer the same kind and standard of amenities as she had in her own home. Consequently, as time passes, the wife may find herself under increasing pressure to patch up her differences with her husband and return home. We think it most undesirable that the law should in effect encourage a woman to expose herself in this way to the risk of further violence from her husband. We therefore conclude that, in appropriate circumstances, the magistrates' court should have power to order the husband to quit the matrimonial home.

3.10 The fourth situation, which may represent that of acutest hardship, is where the husband and wife are both living in the matrimonial home and the husband is behaving in a violent manner to the wife, but the wife is, for one reason or another (perhaps because she has nowhere to go), unable to leave the home. In this case, an order prohibiting the husband from using or threatening violence towards her may be insufficient, and it may well be necessary to empower the court to make an order excluding him from the home.

3.11 In all the situations described in paragraphs 3.7–3.10 above we have dealt with violence or a threat of violence only in terms of the wife being the victim. But where there are children it is of the greatest importance that the court should have powers to protect them also. It is not uncommon that one of the spouses is violent, or threatens violence, towards the children even though the other spouse may not be in direct danger. We therefore consider that a wife should be entitled to apply for an order for the protection of the children no less than herself. Moreover, cases may occur where it is the husband or the children who are the victims of a violent wife. We think that the magistrates should have power to provide a remedy in all these cases. When, throughout this Part of our report, we speak of the wife as the victim, we are using her case to illustrate the general principle.

3.12 It is also necessary to state our view of the case where the wife's complaint is not of physical violence or the threat of it but of psychological harm. We have come to the conclusion that psychological damage by itself should not be a ground for the remedy we propose in the magistrates' courts. Our reason is that adjudication on an allegation of psychological damage is a very difficult matter which may involve the assessment of expert evidence by psychiatrists. This is a highly skilled task which we do not think can appropriately be placed on magistrates. It is perfectly possible to exclude cases of purely psychological damage from the magistrates' jurisdiction while giving them power to deal with the cases of violence and threats of violence which in the present context are the primary cause for concern.

The general case for conferring new powers on magistrates

3.13 The common characteristic of all the situations which we have discussed in the preceding paragraphs is that there is actual or threatened violence by one spouse against the other or against the children. We have suggested in those paragraphs that two types of remedy may be required to suit differing sets of circumstances and in the result we are able to pose the question whether the law should be reformed to enable a magistrates' court to make one or both of the following orders, namely:—

(*a*) an order prohibiting a spouse from using or threatening violence against the other spouse or the children (which we call a "personal protection order");

(*b*) an order excluding a spouse from the matrimonial home (which we call an "exclusion order").

3.14 There is no doubt that, once matrimonial proceedings have, begun, the High Court and a divorce county court have power to make such orders, and that the power extends to making an order excluding a spouse from a home of which he is the sole tenant or sole owner[7]. There is also no doubt that the High Court can act speedily where speed is required. This is apparent from the evidence of the President of the Family Division to the Select Committee on Violence in Marriage[8]. The President was of the opinion that magistrates' courts should have such powers[9], one of his reasons being because it would help to reduce the

[7] See *Silverstone* v. *Silverstone* [1953], P. 174; *Jones* v. *Jones* [1971] 1 W.L.R. 396 (C.A.).

[8] See the *Report of the Select Committee on Violence in Marriage*: H.C.553-ii (1974–75) Vol. 2, p. 463, question 1803.

[9] *ibid.*, pp. 468–9, question 1823.

number of such cases before the divorce courts[10]. Another consideration which in our view is relevant is that the powers of the High Court are not in practice exercised unless matrimonial proceedings are pending or an undertaking has been given that such proceedings will be commenced[11]. On the other hand, if magistrates' courts had powers such as we have described, the powers could be made available when no proceedings for the dissolution of the marriage or for judicial separation were in immediate contemplation.

3.15 It is also we think of great importance to bear in mind that the jurisdiction of magistrates is specifically designed to afford summary, local and inexpensive relief, and these considerations are clearly in point for the case where violence erupts within a marriage. While we appreciate the misgiving which commentators on the working paper expressed about excluding a husband from his home, our clear conclusion is that magistrates should be able to make in appropriate circumstances, each of the two types of order described in paragraph 3.13. We are strongly reinforced in our view by the Report of the Select Committee on Violence in Marriage, in paragraph 49 of which the Committee referred to our Working Paper No. 53 and said:—

> "We would also wish to see better protection given to married women who apply in matrimonial proceedings to the Magistrates Court. Whereas Divorce County Courts are often up to 20 or 30 miles from the towns which they serve and in many areas Divorce Judges do not sit daily, Magistrates Courts exist in most small towns and there are relatively few houses which are not within 5 miles of a Magistrates Court. Most of these courts sit frequently, 2 or 3 days weekly at least. . . . Where the wife is not seeking to end the marriage, an immediate remedy, if immediate hearings could be made available, would often be provided more conveniently at the Magistrates Court than in the Divorce County Court or High Court. We therefore also recommend that, as suggested by the Law Commission in its Working Paper No. 53, Magistrates are given power in matrimonial proceedings to make an injunction restraining the husband from assaulting the wife and, when necessary, temporarily excluding him from the matrimonial home." [12].

3.16 We emphasise again that the powers which we have in mind are directed to situations of actual or threatened violence. In this respect they are much more restricted than the powers of the High Court, which extend to excluding a spouse from the matrimonial home whenever it has become intolerable that the spouses should live together in it[13].

The Domestic Violence Bill

3.17 On 17 December 1975 the Domestic Violence Bill was introduced into the House of Commons by Miss J. Richardson, M.P. The Bill provides for extending the powers and jurisdiction of county courts to grant injunctions in cases of domestic violence. It also enables judges to attach a power of arrest for breach of orders made by them following domestic violence, and it extends the

[10] *Report of the Select Committee on Violence in Marriage*; H.C. 553-ii (1974–75) Vol. 2, p. 463. question 1804.

[11] *ibid.*, p. 468, question 1822. See also *Rayden on Divorce*, (12th ed., 1974), pp. 903–4.

[12] *Report of the Select Committee on Violence in Marriage*; H.C. 553-i (1974–75) Vol. 1.

[13] *Bassett* v. *Bassett* [1975] Fam. 76 (C.A.); *Softley* v. *Softley* (1974) 5 Fam. Law 22 (C.A.).

powers of the High Court and county courts under the Matrimonial Homes Act 1967 by enabling such courts to make orders prohibiting, suspending or restricting the exercise by either spouse of a right to occupy the matrimonial home. If the Bill, or any Bill in substantially similar terms, were to become law, we do not think that the case for the reforms which we are proposing in this Part of our report would be in any way diminished. The Bill provides some means of dealing with domestic violence; we are concerned with others.

The different grounds for the two orders we propose

3.18 We now consider the grounds on which a magistrates' court should have power to make a personal protection order and an exclusion order respectively. For the wife or the children both orders aim to produce the same result namely to protect them from a violent and dangerous husband. For the husband, however, the two orders will have different results. The personal protection order will merely prohibit him from behaving in a way which is dangerous to his wife and children. The exclusion order, on the other hand, will have the positive and drastic result of preventing the husband from living in his own home. This difference in the effect of the two orders upon the husband must, in our view, be taken into account in formulating the grounds for the making of the orders and to this question we now turn.

Grounds for a personal protection order

3.19 We think that magistrates' courts should have power to make a personal protection order whenever they are satisfied it is necessary to do so for the protection of the wife or a child of the family by evidence proving that the husband has used violence against the wife or the children or has threatened violence against them. Thus, in a proper case, evidence of threatened violence will be sufficient to ground a personal protection order without proof of the actual use of violence. Accordingly, to ground an application for a personal protection order the test should be whether the husband by using or threatening violence to his wife or children has placed them in danger and consequently in need of protection.

3.20 It follows from what we have just said that there will be no ground for making a personal protection order if the only complaint against the husband is that he uses or threatens violence outside his home and family circle: for example that he is given to violent or threatening behaviour when attending a football match.

3.21 On the other hand we do believe that evidence of violent behaviour outside the home and family circle should be relevant to the making of an exclusion order and we now turn to the grounds which we consider would be appropriate for the granting of this more drastic remedy.

Grounds for an exclusion order

3.22 Given the drastic nature of this order from the husband's point of view, we are sure we are right in thinking that it would be unsafe and unacceptable to empower magistrates to make an exclusion order against a husband if the only proved complaint against him is that he has merely threatened violence to his wife or child. For this situation, in any event, as we have explained above,

the magistrates should certainly be empowered to make a personal protection order.

3.23 In our view the first condition which should be fulfilled before the court makes an exclusion order is that the court should be satisfied that the wife or children are in danger of being physically injured by the respondent. Where that condition is fulfilled, we think the court should have power to make an exclusion order if one of the following further conditions is satisfied, namely:—

(*a*) Where it is proved that the husband has actually used violence against his wife or children. Here the justification for a drastic remedy is self-evident.

(*b*) Where it is proved that the husband has threatened violence against his wife or children and also that he has actually used violence against anyone. The man who has only threatened his wife or children but has a proved record of actual violence outside the family circle may clearly constitute a danger to his wife and children which could justify the drastic remedy of an exclusion order.

(*c*) Where it is proved that the husband is in breach of a personal protection order by having threatened violence. We consider that such a breach should be sufficient to found an exclusion order, because such a breach of a personal protection order made against the husband would, in our view, be strong evidence that he has embarked on a course of violent behaviour which is likely to put his wife and children in serious danger.

3.24 In order to make the protection of an exclusion order available in the three situations we have described above, we accordingly consider that the formulation of the grounds of application for such order should be that the wife or children are in danger of being physically injured by the respondent and—

(*a*) that the respondent has used violence against the applicant or a child of the family, or

(*b*) that the respondent has threatened violence against the applicant or a child and also has used violence against some other person, or

(*c*) that the respondent has disobeyed a personal protection order by threatening violence.

Provisions to be included in the proposed orders

3.25 In addition to the above proposed powers of magistrates to make a personal protection order and an exclusion order, we consider that legislation should also enable the court to include in the orders provisions which may be necessary to deal with certain circumstances which could arise, namely:—

(*a*) When making a personal protection order, the court should be able to include a provision that the respondent shall not incite or assist any other person to use or threaten violence against the complainant or a child of the family. Such a power is desirable to cover the kind of case where one spouse instigates a relative or some other person to perpetrate the violence.

(*b*) When making an exclusion order, the court should have power to

authorise entry into the home for a temporary or limited purpose. This power is desirable to enable, for example, a husband to collect his clothes or other personal belongings.

The Matrimonial Homes Act 1967: no jurisdiction proposed for magistrates

3.26 We have carefully considered whether, in addition to the power to make the two orders we propose, it would be appropriate to give to magistrates the jurisdiction now exercised by the High Court and the county court under section 1 of the Matrimonial Homes Act 1967 to make orders conferring upon a spouse occupation rights in the matrimonial home. Theoretically there is one situation, but only one, where it might be thought helpful if magistrates could make an order under the 1967 Act. Where a wife has fled from home because of her husband's violence and the magistrates have made an exclusion order against the husband, it might be thought that magistrates could usefully make an order under the 1967 Act to help the wife if she was likely to experience difficulty in getting back into the matrimonial home.

3.27 The operation of the 1967 Act was not discussed in Working Paper No. 53 since the Working Party considered it was outside their terms of reference. We consider that magistrates should not be given jurisdiction under the Act and for the following reasons. The object of the 1967 Act was not to protect a wife from violence, but to ensure that she had a roof over her head by giving her an occupation right in the matrimonial home. We think this jurisdiction is better exercised by the High Court and the county court. We have received evidence from the President of the Family Division that the Act is not used in cases involving domestic violence[14]. There is, therefore, in our view, no case for empowering magistrates to make orders under the Act in order to deal with problems of violence in marriage. We are confirmed in this conclusion by the views of the Select Committee on Violence in Marriage who said in their report:—

> "When the home is privately rented the wife can apply for a transfer order under section 7 of the Matrimonial Homes Act 1967, where the tenancy is a protected or statutory tenancy, or under the Matrimonial Causes Act 1973. We consider it important that the law is seen clearly to empower the Courts to transfer such a tenancy even when the landlord objects or there is a prohibition against assignment. We do not, however, believe that Magistrates Courts should have power to order the transfer of any interest in the matrimonial home."[15]

(B) PROCEDURE ON APPLICATION FOR THE ORDERS PROPOSED

The standard procedure

3.28 We recognise that the power to make orders such as we propose will in many cases have to be exercised in circumstances of emergency when it may be necessary to act with speed. Nevertheless, we think that it is desirable that the ordinary procedure of magistrates' courts should be followed except where the

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[14] The Act is not extensively used at all. In 1974 there were only 57 applications in the Hight Court including applications by owner spouses: in the same year in the county court only 44 applications by non-owner spouses were filed, of which 26 resulted in orders being made.

[15] *Report from the Select Committee on Violence in Marriage*; H.C. 553-i (1974–75) Vol. 1, para 51.

circumstances are such as to justify varying that procedure. The ordinary procedure would be as follows:—

(*a*) complaint by an aggrieved spouse alleging that circumstances have arisen which justify the making of an order;
(*b*) service of summons on the respondent;
(*c*) appearance of respondent on the return day;
(*d*) consideration of the evidence by a full bench, followed by whatever order, if any, is appropriate.

3.29 We think that the service of the summons should be governed by rules of court[16]. Whether the complainant seeks a personal protection order or an exclusion order, we think the normal requirement under the rules should be for personal service of the summons upon the respondent. At the same time the rules should enable personal service to be dispensed with if the court considers there is evidence that the respondent will attempt to delay matters by evading personal service or if, for any reason, the court considers that expeditious personal service of the summons is not practicable.

The problem of making orders to deal with an emergency

3.30 The circumstances of emergency in which it is desirable to follow a more expeditious procedure for the making of orders than that set out above will arise both where a personal protection order is sought and where an exclusion order is sought. We incline to think that the need for speedy action will most frequently arise in the making of an exclusion order because the justification for making this drastic order at all is that the wife is in physical danger. For both classes of case it is necessary to reach a compromise between the need for speed and the need for proper safeguards. The need for safeguards is especially evident in the case of the exclusion order, in view of its far reaching effects. In the light of these considerations we make the following proposals for making orders to deal with emergency cases.

Emergency cases: the making of expedited personal protection orders

3.31 We think that where the complainant seeking a personal protection order satisfies the court that the circumstances justify the making of an order and that, in order to prevent physical injury to the complainant or a child of the family, it is essential that the order be made without delay, the court should have power to make an expedited order, by which we mean that the court should be able to make the order notwithstanding that the respondent has not been served with the summons to answer the complaint or that some other requirement of normal procedure has not been complied with[17]. If an expedited order is made the respondent should of course, be informed that it has been made.

3.32 We further think that a single justice should have power to make an expedited personal protection order whenever he is satisfied that, as explained

[16] In civil proceedings generally in magistrates' courts the service of the summons is governed by such rules: see Magistrates' Courts Rules 1968 (S.I. 1968 No. 1920) Rule 82.

[17] *e.g.*, that the expedited hearing takes place at a time or place different from that specified in the summons, or that the court does not include both a man and a woman. See clause 13 in the annexed Bill.

in the foregoing paragraph, it is essential that the order be made without delay.

3.33 When an expedited order has been made in the absence of the respondent, we think that there will be many cases when it will be desirable for the order to take effect as soon as the respondent has been notified of it. We propose that provisions as to the coming into effect of such orders should be made by rules.

3.34 We propose that where an expedited order has been made, there should subsequently be a hearing in accordance with normal procedure. The expedited order should expire on the return date for that hearing but the court should be able to make a further temporary order for a specified period. The power to make a further temporary order in this way is necessary, we think, to deal with cases where for any reason the court is unable to dispose of the matter finally on the return day. We propose that provision should be made by rules for such further temporary orders.

Emergency cases: the making of exclusion orders

3.35 The effect of an exclusion order may be so serious that we do not feel justified in recommending that it may be made under an emergency procedure, or that it may be made by a single justice. We think an exclusion order should only be made after the respondent has been duly served with a summons to answer the complaint and after a hearing by a full bench. On the other hand, we think that every effort should be made to ensure the expeditious hearing of such cases. We, therefore, propose that magistrates' courts rules should provide for the early hearing by a full court of any complaint in which an exclusion order is sought.

Enforcement of personal protection and exclusion orders

3.36 Enforcement of personal protection and exclusion orders and of other orders made by magistrates are dealt with in paragraphs 5.52 and 5.53 below.

The effect of an exclusion order on desertion

3.37 It has been held that there can be no desertion while a non-cohabitation order is in force[18]. It is possible that unless express provision were made to the contrary, it would be held that there can be desertion while an exclusion order is in force. We have no wish to cause difficulties for a wife who, after the making of an exclusion order against her husband, attempts to obtain a divorce in reliance on a period of desertion, and we therefore propose that express provision should be made that a period during which an exclusion order is in force may be treated as a period of desertion notwithstanding the order.

Existing non-cohabitation orders

3.38 Although existing non-cohabitation orders have only a limited value, we see no reason why they should not continue to remain in force until brought to an end according to the present rules. We therefore consider that the legislation implementing the proposals in this report should contain a transitional provision safeguarding the continuing effect of existing non-cohabitation orders.

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[18] *Harriman* v. *Harriman* [1909] P. 123 (C.A.).

3.39 We have referred above to the existing law that there can be no desertion while a non-cohabitation order remains in force. While we think it right that existing non-cohabitation orders should continue in force, we do not think it would be right to perpetuate the rule that such orders are inconsistent with desertion. We therefore propose that it should be provided by statute that the court may treat a period during which a non-cohabitation order is in force as a period during which the respondent has deserted the petitioner.

(C) SUMMARY OF THE RECOMMENDED SCHEME

Recommendations

3.40 Taking account of the considerations mentioned in the foregoing paragraphs, *we recommend* as follows:—

(*a*) *Personal protection orders*. A magistrates' court should have power, if it is satisfied by evidence of violent behaviour or threat of violent behaviour on the part of the respondent against the complainant or a child of the family that it is necessary to do so for the protection of the complainant or a child of the family, to make one or both of the following orders:—

(i) an order that the respondent shall not use or threaten violence against the complainant;
(ii) an order that the respondent shall not use or threaten violence against a child of the family.

(*b*) *Exclusion orders*. A magistrates' court should have power, if it is satisfied that the complainant or a child of the family is in danger of being physically injured by the respondent and that the respondent has used violence against the complainant or a child of the family, or that the respondent has threatened violence against the complainant or a child of the family and also has used violence against some other person, or that the respondent has disobeyed a personal protection order by threatening violence, to make one or both of the following orders:—

(i) an order that the respondent should vacate the matrimonial home;
(ii) an order that the respondent should not enter the matrimonial home.

(*c*) The court should have power to include in a personal protection order a provision that the respondent shall not incite or assist any other person to use or threaten violence against the complainant or a child of the family.

(*d*) In making an exclusion order the court should have power to authorise entry into the home for a temporary and limited purpose, such as, for example, the collection and removal of personal belongings.

3.41 *We recommend* that either of the above orders should be capable of being made generally or subject to exemptions and conditions and for an indefinite period or such period as is specified in the order.

3.42 *We recommend* that application should be made by way of complaint and that as a standard procedure the matter should be dealt with by a full bench after the issue of a summons served and returnable in accordance with the ordinary rules.

3.43 *We further recommend* that, if it appears to the court to be essential

to do so in order to prevent physical injury to the applicant or a child, the court should be able to make an expedited personal protection order (but not an expedited exclusion order), notwithstanding that the respondent has not been served with the summons or that some other requirement of normal procedure has not been complied with.

3.44 *We also recommend* that an expedited personal protection order as specified in the foregoing paragraph should be capable of being made either by a single justice or a full bench.

3.45 *We recommend* that an exclusion order should not be made otherwise than by a full bench after a hearing in accordance with the ordinary rules.

3.46 *We recommend* that rules should provide generally for the detailed matters relating to the making of the above mentioned orders and in particular should provide:—

(*a*) that a respondent should be given notice of any expedited order and that such an order should take effect on the date of the notice thereof or such later date as the court may specify;

(*b*) for the duration of an expedited order and also for conferring on the court a power to make a further temporary order for a specified period;

(*c*) for the hearing of an application for an exclusion order by a full bench with the minimum of delay.

3.47 *We recommend* that legislation should specifically provide that an exclusion order should not for the purpose of divorce proceedings stop the party against whom the order was made from being in desertion.

3.48 *We finally recommend* that existing non-cohabitation orders should continue in force until brought to an end in accordance with the present law but that the court may in future treat a period during which such a non-cohabitation order is in force as a period during which the respondent has deserted the petitioner.

PART IV: PROCEDURAL AND RELATED MATTERS

(A) THE CONSENT ORDER FOR MAINTENANCE

The provisional proposals

4.1 The Working Party proposed[1], subject to certain safeguards, that provision should be made for an order by consent where the parties to a marriage agree about the amount of maintenance one should pay the other and wish to have this agreement given legal force as a maintenance order. The principal safeguard proposed by the Working Party was that the court should have discretion to refuse to make an order by consent if it considered that such an order would not be in the best interests of the parties and their children. But they also proposed that, where the party who would be required to make payments was unable to be present in court, whether in person or by a

[1] Working Paper No. 53, paras. 73–78.

representative, but the court nevertheless made a consent order on the strength of written evidence of his consent and as to his means, there should be a provision enabling him to challenge the order within 14 days from the date of its service or such longer period as the court might direct. Within that period it would be open to him to apply for the order to be set aside on the ground that it was made without true consent; and appeal would lie to the Divisional Court from the rejection of the application.

4.2 The Working Party further suggested[2] that the court should have power subsequently by order to vary or revoke a consent order on the application of one party and with the consent of the other. But if consent was not forthcoming, they suggested that there should be power to vary or revoke the order only if some change in circumstances is adduced. The court should not have power to reopen the case on its merits.

4.3 The Working Party concluded their discussion of the consent order[3] by saying they considered that the consent procedure should apply to orders for the maintenance both of spouses and of children although they thought that only rarely would magistrates be willing to make consent orders in respect of children before the circumstances of the case had been fully investigated.

The results of consultation

4.4 The proposals for a consent order recited in paragraph 4.1 above have generally been welcomed as providing an effective means by which, where a marriage has temporarily broken down, the parties to the marriage can obtain the assistance of the courts in regulating the financial arrangements between themselves without having to parade before the court their marital difficulties. The only points on which some doubt was expressed concerned the constitution of the court before which an application for a consent order was heard and the procedure in a case where the party who was to make the payments was unable to be present in court. On the constitution of the court, the Working Party had suggested that applications for a consent order might be heard by a single magistrate. The preponderance of opinion, however, was that a consent order ought not to be made except by a full court of 2 or 3 magistrates. As far as the absence of the person who is to make the payments is concerned, there was general support for the suggestion that a consent order ought not to be made unless both parties were present or legally represented (in which case, by virtue of section 99 of the Magistrates' Courts Act 1952, they would be deemed not to be absent).

4.5 As to the power of the court to vary or revoke a consent order, referred to in paragraph 4.2 above, there was some feeling among commentators that it would not be realistic to deprive the court of power to reopen the case on its merits, since any court asked to vary or revoke a consent order ought to be able to give such weight to the fact that the respondent consented to it as is warranted by the circumstances of the case. The respondent ought to be able to allege, for example, that he had not been fully aware of the consequences of the order, or that he was misled as to, or had misunderstood, the state of the applicant's means. We agree that it is undesirable to prevent the court from

[2] Working Paper No. 53, para. 76.

[3] *ibid.*, para. 78.

looking at the case on its merits on an application to vary or revoke a consent order.

4.6 We think that, as the Working Party proposed, the consent procedure should apply to orders for the maintenance both of spouses and of children. We consider, however, that safeguards are required in the following respects:—

(*a*) We think that a magistrates' court should not make a consent order for maintenance if it is aware of any reason why it would be contrary to the interests of justice to do so.

(*b*) We think that the court should not make a consent order for the maintenance of a child unless it considers that the payments provide, or make a proper contribution towards, reasonable maintenance for the child.

(*c*) We think that as a general rule a consent order should only be made when both parties are present or legally represented. We recognise, however, that there will be cases where it will be proper to make an order against a respondent who is not present if there is affidavit or other sufficient evidence of his consent to the making of the order and of his financial resources. We propose that the nature of the evidence on these points should be prescribed by rules of court.

(*d*) We think that the court, on an application for an order for maintenance by consent, should have the same special powers and duties with regard to safeguarding the welfare of children of the family as it has on any other application for a maintenance order[4].

In spite of these restrictions on the making of consent orders, we still think that they will be of value in the case both of spouses and children since the necessity of establishing one or more of the grounds for making a matrimonial order recommended in paragraph 2.13 above will be dispensed with. Moreover, in cases where the wife is seeking maintenance it will not be necessary, as it is at present, to receive evidence as to means[5].

4.7 Cases may arise where the court, in the exercise of its powers to vary or revoke maintenance orders, is requested to give effect to an agreement made between the parties on the payment of maintenance. We think it is right that the court should be required, in the exercise of its powers of variation and revocation, to have regard to any such agreement and to give effect to the agreement so far as it appears to the court to be just to do so.

Recommendations

4.8 *We accordingly recommend* as follows:—

(*a*) Provision should be made for an order by consent in cases where the husband and wife are in agreement about the amount of maintenance and wish to have this agreement given legal force as a maintenance order.

(*b*) The court should have discretion to refuse to make the order if it

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[4] These special powers and duties are at present set out in s. 4 of the 1960 Act.

[5] *Jones* v. *Jones*, *The Times*, 18 June 1975.

considers that it would be contrary to the interests of justice for the order to be made.

(*c*) With regard to consent orders in respect of a child, the court should not make an order unless it considers that the payments provide, or make a proper contribution towards, reasonable maintenance for that child.

(*d*) A consent order should not be made except by a full court of two or three magistrates.

(*e*) As a general rule, both parties should be present or legally represented in court. Exceptionally, a consent order may be made against a respondent who is not present in court either personally or through a legal representative, provided that there is sufficient evidence of his consent to the making of the order and of his financial resources. The nature of such evidence should be prescribed by rules of court.

(*f*) On an application to vary or revoke the consent order the court should be entitled to re-examine the whole case on the merits.

(*g*) In the exercise of its powers to vary or revoke maintenance orders, the court should be required to have regard to any agreement made between the parties as to maintenance payments and to give effect to the agreement so far as it appears to the court to be just to do so.

(B) RECONCILIATION

The provisional proposals

4.9 The Working Party's proposals concerning reconciliation[6] were that, in substitution for the arrangements envisaged by section 59 of the Magistrates' Courts Act 1952, there should be placed on the courts by statute a duty to consider the possibility of reconciliation and to direct the parties' attention to this possibility; and that it should be expressly provided that, if the court considers at any stage in the proceedings that there is a reasonable possibility of a reconciliation, the court may adjourn the proceedings and may request a probation officer or other person to attempt to effect a reconciliation between the parties.

The results of consultation

4.10 These proposals were generally approved in the consultation, though with reservations. The main reservation concerned the idea of imposing a duty on the courts to consider the possibility of reconciliation. Some commentators felt strongly that it was undesirable to include a provision which, at least implicitly, gave the court the right to adjourn the proceedings and thus delay substantive relief, against the wishes of the parties. Another criticism of the proposals was that they did not sufficiently emphasise the value of attempting to effect a reconciliation at the outset of the case, before any summons had been issued. The Working Party had adverted to the practice in certain magistrates' courts of holding a preliminary meeting (or "applications court") between the applicant, the justices' clerk and a justice, often with the court probation officer in attendance, at which, in addition to considering whether

[6] Working Paper No. 53, paras. 80–82.

a summons for a matrimonial order should be issued, reconciliation is mentioned and where there is a prospect of reconciliation the services of the probation officer are engaged. This practice was strongly supported by several commentators, on the principle that the earlier an attempt at reconciliation was made, the better was the chance it stood of success. The suggestion was therefore made that, rather than simply to place the existing arrangements on a more regular footing, the reformulated magistrates' law should require all courts to hold a preliminary "applications court".

4.11 A related criticism was that "reconciliation" had been viewed by the Working Party in the very narrow sense of enabling or persuading couples to continue or resume cohabitation. However, it was suggested that appropriate intervention at this time might have other outcomes, and might include helping one or both partners to resolve their conflicts without necessarily resuming cohabitation, to make decisions affecting their relationship or their children, and to come to terms emotionally with the inevitable personal problems accompanying marital distress.

4.12 There is force in all these criticisms, particularly the last. We think, however, that whilst the magistrates should be alert at all times to the possibilities of reconciliation (and, indeed, conciliation in the widest sense) they ought not to become too closely involved in the processes by which conciliation work is carried out. The primary function of any court is adjudication and, while that certainly does not exhaust its functions, a careful limit must be set to any functions going beyond adjudication. Whilst, therefore, we think that there would be value in giving the court a duty to consider the possibility of reconciliation, with power to adjourn the proceedings at any stage if it considers there is a reasonable possibility of a reconciliation, we think that this is as far as the law should go. We also think that a duty on the court to consider the possibility of reconciliation can only be relevant to the cases where the applicant is endeavouring to establish one of the three grounds proposed in paragraph 2.13 above for a maintenance order. To oblige the court to consider the possibility of reconciliation would clearly be inappropriate in an application for a maintenance order by consent or an application for a protection or exclusion order against violence. This limited formulation could still enable a court to adjourn proceedings against the wishes of a party and thus delay the granting of the maintenance applied for. We think, however, that this is a matter which can be left to the good sense and discretion of the courts.

4.13 As to the "applications courts" which are held in some magistrates courts, the evidence is that they have been successful where they have been tried in suitably favourable circumstances. They clearly can play a valuable role in bringing the parties into contact at an early stage with social workers who can help them sort out their problems. In our view the establishment of "application courts" is to be encouraged, though we recognise that there may be cases where the local circumstances may present difficulties. Accordingly, while we favour the setting up of such courts, we believe this is a matter best left to local initiative and arrangement, rather than one to be embodied in a statutory procedure. Furthermore we believe that the informality which is a valuable feature of such courts might be impaired if some general statutory procedure were substituted for the local arrangements which operate successfully at present.

4.14 As regards the detailed procedure for effecting a reconciliation, the Working Party considered that the procedure under section 59 of the Magistrates' Courts Act 1952 has disadvantages[7]. In the light of the evidence we have received, we think that the procedure set out in section 59 under which a report may be provided to the court, in the event of an unsuccessful attempt at reconciliation, setting out the allegations made by the parties and certain other information, is of no practical utility. In this we share the view of the Morison Committee on the Probation Service which recommended in its 1962 Report[8] that section 59 should be repealed, and that "any report volunteered by an officer who has attempted conciliation at the request of a court should be confined to a statement that the attempt has or has not succeeded, and the court should not require any fuller statement from him".

4.15 We have also reconsidered section 62 of the Magistrates' Courts Act 1952 which provides that where a magistrates' court requests a probation officer or other person to attempt to effect a reconciliation, the court is to have regard to the religious persuasion of the parties, and in certain circumstances is to select a probation officer of the same religious persuasion as the parties. We think that the selection of the probation officer who is to deal with a particular case should not be governed by any rigid rules, and that the best results are likely to be achieved in practice if the selection is governed by administrative arrangements rather than by a direction of the court.

Recommendations

4.16 *We recommend,* having regard to the considerations discussed in paragraphs 4.9–4.13 above, that the reformulated magistrates' matrimonial law should place on the courts a duty to consider the possibility of reconciliation and to direct the parties' attention to this possibility; and that it should be expressly provided that if a magistrates' court dealing with an application for a maintenance order (other than an order by consent) considers at any stage in the proceedings that there is a reasonable possibility of a reconciliation, the court may adjourn the proceedings and, either separately or in addition, may request a probation officer or other person to attempt to effect a reconciliation between the parties.

4.17 *We further recommend,* for the reasons discussed in paragraphs 4.14–4.15 above, as follows:—

(*a*) Where the court requests a probation officer or other person to attempt a reconciliation, the report to the court should consist simply of a statement as to whether the attempted reconciliation has succeeded.

(*b*) Section 59 and 62 of the Magistrates' Courts Act 1952 should be repealed.

(C) THE INTERIM ORDER

The main provisional proposal: interim maintenance orders

4.18 At present, magistrates' courts have power to make an interim order

[7] Working Paper No. 53, para. 81.
[8] (1962) Cmnd. 1650, paras. 128–129.

for maintenance (and, where there are special circumstances, for custody or access) before final adjudication, but under section 6(1) of the 1960 Act this power can be exercised only where the court adjourns the hearing for more than a week or is of the opinion that the case would be more conveniently dealt with by the High Court. The Working Party considered that it might be possible to extend this power so as to enable a court to make an interim order for maintenance at any time after the applicant makes her initial complaint and the summons is issued. They expressed the opinion that this would be a desirable and necessary addition to the magistrates' powers, if it proved practicable, because various factors such as the pressure of court business, and the time required for the parties to seek legal aid and for their advisers to prepare their cases mean, in some magistrates' courts, that a hearing often cannot be arranged within less than 2 months from the initial application. The Working Party thought that such a situation could cause hardship. They noted that the Supplementary Benefits Commission is able to relieve absolute need during this 2 months period of delay but observed that such relief is insufficient because not all the women applying for maintenance in the magistrates' courts will be eligible for supplementary benefits; some of them, for example, may be working full time. The Working Party therefore discussed the possibility of making available an enforceable interim maintenance order at any time after the initial application is made[9].

4.19 The Working Party did not consider an *ex parte* procedure appropriate for this purpose, and they proposed instead a procedure under which, when making her initial complaint, the wife would be invited to fill in a simple means questionnaire, which would include a question about her husband's current earnings and employment situation. The means questionnaire, together with the summons (which would be returnable on a date no more than, say, 21 days ahead), would then be served upon the respondent and he would be given an opportunity both to answer a simple means questionnaire of his own and to make representations, within a given period of, say, 14 days, as to the amount of any interim order or why an interim order should not be made. If no representations were received, the court would proceed to make an interim order. If representations were received, then both parties would be given an opportunity to present their case to the court on the date for which the summons was returnable, and the court would determine whether or not it was appropriate in the circumstances to make an interim order and, if so, for what amount[10].

4.20 The Working Party further proposed that if, for any reason, the court was unable to hear the case on the date given in the summons, it should be made possible for a single magistrate, sitting in private, to consider the application and, if appropriate, to make an interim order for maintenance[11].

The results of consultation: interim maintenance orders

4.21 The proposals in the working paper met with a mixed response in the consultation. Though there was a fair measure of support for the idea of enabling the magistrates to make an enforceable interim order at any time after the initial application, some commentators doubted whether such an elaborate

[9] Working Paper No. 53, para. 84.
[10] *ibid.*, para. 87.
[11] *ibid.*, para. 87.

procedure as that proposed was necessary, given the availability of social security benefits. They argued that women and children in acute financial difficulties could always obtain help from the Supplementary Benefits Commission; and that if a woman was not eligible to receive supplementary benefits, the only reason why she was not so eligible was that she must have a sufficient income from some other source.

Reconsideration of the main provisional proposal: *interim* maintenance orders

4.22 Notwithstanding that supplementary benefit will be available in appropriate cases, we agree with the majority of those who commented that magistrates should have power to make interim orders for maintenance pending the final determination of an application for maintenance. We think, however, that the procedure envisaged by the working paper for the making of such orders was too elaborate and too rigid. As appears in paragraphs 4.25–4.29 below we think that a simple means questionnaire may well have a useful role to play, but we do not think that the power to make interim orders should be dependent on the applicant having answered such a questionnaire.

4.23 The powers of the magistrates to make interim orders for maintenance under section 6 of the 1960 Act are in our view inadequate, being limited to cases when the magistrates have declined jurisdiction on the ground that the High Court is a more convenient forum and cases when the magistrates have adjourned the hearing of a complaint for more than one week. In our view magistrates should have a general power to make an interim maintenance order at any time pending the final hearing of an application for maintenance. On the hearing of an application for interim maintenance, the ordinary rule as to the making of orders in the absence of the respondent would apply, and an interim order would not be made in the absence of the respondent unless there was proof of the service on him of the application.

4.24 We have reconsidered whether, as proposed by the Working Party, a single magistrate should have power to make an interim maintenance order. Several of those who commented opposed this proposal, although it received some support. On reconsideration, we have decided not to pursue the proposal. We understand that the amount ordered under an interim order for maintenance is quite often used as a basis for determining the amount payable under a final order. It might later form the basis for a consent order. We have come to the conclusion that it is important, therefore, for careful consideration by at least two justices to be given to the amount of any interim order for maintenance.

The use of the means questionnaire

4.25 Against the background of our main proposal in paragraph 4.23 above that magistrates should have a general power to make an interim order at any time, we return to the question whether it would be desirable to make provision for a means questionnaire. In July 1975, a most interesting experimental scheme for the early hearing of matrimonial cases was put into operation in the magistrates' court at Manchester. The scheme included provision for the use of forms setting out the means of the parties, and we have been greatly assisted by a paper dated 17 October 1975 from Mr. Cecil Latham, the clerk of the Manchester Justices in which the scheme is described. We quote the following extract from the paper:—

"Complainants are interviewed by a senior court clerk, and local solicitors have given great assistance from the outset by operating a voluntary "Civil Duty Solicitor" rota.

The clerk completes a means form setting out the wife's financial circumstances, and a questionnaire is sent to the husband inviting him to state his income and expenditure.

It has been found that in about half the cases, at the time she makes her complaint, the wife's financial circumstances are uncertain. In cases where she is not earning she often has not applied for Supplementary Benefit (but proposes to do so) or, if she has applied for Benefit, does not know how much she will receive. In very few cases does the husband complete and return the questionnaire sent to him."

4.26 As we have said in paragraph 4.22, we do not think that the power of the court to make an interim maintenance order should be dependent on the applicant having answered a means questionnaire. We cannot see any good reason for depriving the court of the power to make an interim order on oral evidence alone; and we think the experience of the Manchester scheme shows that answers to a questionnaire are likely in many cases to be no adequate substitute for oral evidence. If there is to be any scheme providing for the use of a means questionnaire, we do not think that it should be a feature of such a scheme that the applicant should be under any compulsion to answer the questionnaire. Equally, we think it would be wrong for such a scheme to impose on the respondent any obligation to answer the questionnaire. If he intends to appear at the hearing of an application for an interim or final order, he will be able to give oral evidence of his means at the hearing. If he does not appear or does not give evidence, the court will not be powerless, because it will be able to act on such other evidence as is before it. We do not think that compelling the respondent to answer a questionnaire can be said to be a necessity; and we are reluctant to propose compulsory measures unless the need for such measures can be clearly demonstrated.

4.27 It was a feature of the scheme for means questionnaires proposed by the Working Party that there should be a penalty for knowingly giving false answers[12]. If there is to be such a scheme and if a penalty is to be a feature of it, then, in our view, it would be essential that the questionnaire form should contain a clear warning of the criminal consequences of knowingly giving false answers[13].

4.28 We would sum up our views in this way. The purpose of any scheme for means questionnaires is to provide the court as promptly as possible with information as to the financial resources of the parties. We do not think that that purpose is likely to be achieved by a scheme providing for penalties and warnings of penalties. We think that penalties and warnings are likely to engender timidity and reticence rather than confidence and candour. We do, however, think that the parties should be encouraged to provide the court at an early stage with information as to their means, and we think that a scheme for questionnaires

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[12] Working Paper No. 53, para. 89.

[13] Such warnings are included in a written statement admitted in evidence in committal proceedings under s. 2 of the Criminal Justice Act 1967; see s. 2(2) of that Act.

will contribute to that end. But we think that such a scheme should be voluntary in all its aspects and should not include criminal sanctions. We recogise that a scheme of this nature will often fail to produce the desired results, but we have no doubt that it will have a measure of success, and a greater measure of success than a scheme of any other type. We accordingly propose that magistrates' courts rules should make provision whereby (taking for the purposes of illustration the case where the wife is the applicant):—

(*a*) when making her complaint, the wife would be invited to fill in a simple means questionnaire, which would include a question about her husband's current earnings and employment;

(*b*) the means questionnaire, together with the summons, would then be served on the respondent, who would also be invited to complete a questionnaire of his own as to his means.

4.29 Where a party answers a means questionnaire, his answers will frequently be admissible in evidence against him under the ordinary rules of evidence relating to admissions. We do not propose any special provision to make a party's answers admissible in evidence where under the ordinary rules they would not be so admissible. Any such special provision would, we think, need to be supported by penalties for giving false answers. We have explained in the preceding paragraph our reasons for thinking that such penalties would be objectionable.

Interim custody orders

4.30 The powers of a magistrates' court under section 6 of the 1960 Act include power to make an interim order providing for custody and access. These powers are exercisable where by reason of special circumstances the court thinks it proper. Their exercise is subject to certain restrictions specified in section 2(4) of the Act.

4.31 Except where the magistrates have declined jurisdiction on the ground that the High Court is a more convenient forum, their powers to make an interim custody order are also subject to the restriction imposed by section 6(1), namely that they are only exercisable where the hearing is adjourned for a period exceeding one week. We can see no justification for this last restriction, and its retention would be inconsistent with the views we have expressed in paragraph 4.23 above as to the powers of magistrates' courts to make interim orders for maintenance. We consider that this restriction should be removed.

Duration of an interim order

(a) The provisional proposal

4.32 As to the duration of an interim order, section 6 of the 1960 Act at present imposes an overall time limit of 3 months. The Working Party considered whether the time limit should be extended to 6 months or whether an order should be capable of running on indefinitely, thus taking on the status of a final order, but they rejected both these ideas on the grounds that an interim order is no substitute for an order made in substantive proceedings and in either case unreasonable delay might be encouraged. On the other hand, they thought

there might be merit in providing for an interim order to be capable of extension, on application, for a further limited period of one month[14].

(b) The results of consultation

4.33 The consensus of opinion amongst those commenting on this particular proposal was that interim orders should be capable of extension but for a period of 3 months rather than one month. It was pointed out to us that magistrates' courts are often prepared to adjourn an application for maintenance for 3 months in the hope of a reconciliation. If, however, the hoped-for reconciliation does not occur, a further adjournment will usually be necessary, and this might have to be for longer than one month. We appreciate the force of these arguments. In our view the duration of any interim order should not in the first instance extend beyond 3 months from the making of the order, but the court should have power to grant an extension for a further period not exceeding 3 months.

Recommendations

4.34 *We accordingly recommend* that the powers of magistrates to make interim orders in matrimonial proceedings (whether for maintenance or for custody) should be exercised in accordance with a scheme incorporating the following main features:—

(*a*) The power to make an interim order will be capable of being exercised at any time before the final determination, and without having to adjourn the hearing in those cases where an adjournment is now required.

(*b*) The power to make an interim order will only be exercisable by a bench of at least two justices.

(*c*) The duration of the interim order will not in the first instance extend beyond 3 months from the making of the order but the court will have power to extend the order for a further period not exceeding 3 months.

4.35 *We also recommend* that the provisions for the duration of interim orders set out in paragraph 4.34(*c*) above should also apply to interim orders made by the High Court in the circumstances envisaged by section 6 of the 1960 Act.

4.36 *We further recommend* as regards the means questionnaire as follows:—

(*a*) Magistrates' courts rules should provide that a complainant in matrimonial proceedings will on making her complaint be invited to answer a simple means questionnaire which will include a question about her husband's earnings and employment.

(*b*) The wife's completed questionnaire should be served on the husband with the summons, and he should be invited to complete a simple questionnaire about his means.

(*c*) The admissibility in evidence of the answers to the questionnaires,

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[14] Working Paper No. 53, para. 92.

both on applications for an interim order and on applications for a final order, should not be the subject of special provisions but should be governed by the ordinary rules of evidence.

(D) THE EFFECTIVE DATE OF MAINTENANCE ORDERS AND THE POWERS OF THE HIGH COURT ON APPEALS AS TO MAINTENANCE

Antedating of interim orders and related matters

4.37 The working paper introduced its discussion of the effective date of maintenance orders by referring to a particular difficulty which has arisen in relation to interim orders made by the High Court[15]. By virtue of section 6(1)(*c*) of the 1960 Act, the High Court has power to make an interim order where it directs a rehearing of the case by the magistrates, either under section 5 of the Act or on an appeal from, or from the refusal of, a matrimonial order.

4.38 The difficulty is that, as the Divisional Court concluded in *Bould* v. *Bould*[16], there is no power under the existing law to antedate an interim order made on appeal. Sir Jocelyn Simon P. said:—

> "It may be urged that a construction whereby there is no power to antedate interim orders might cause hardship to a wife who has been wrongly left without support and who may have run up debts; and so far as appeals are concerned it is far from infrequent for a husband to cease paying under an order which is subject to appeal . . . it may be, therefore, that there is a lacuna here that merits the attention of the Law Commission or Parliament —whether there should not at least be some power in this court or a court appealed from to order interim maintenance pending an appeal."[17]

4.39 Where there is a maintenance order in being, and the husband has ceased complying with it pending determination of his appeal against the order, the Working Party could not see there was any lacuna in the existing powers of the magistrates. The order would remain enforceable in the usual way unless and until it was revoked or discharged on appeal. Where, however, the magistrates have refused to make a maintenance order, and the wife appeals to the High Court from the refusal, the Working Party recognised that real hardship can occur because of the length of time which is likely to elapse before the appeal could be heard. The Working Party could see no way of meeting this hardship through the magistrates' courts[18]; nor can we.

4.40 In considering whether there is any lacuna in the powers of the High Court, as appellate authority, the Working Party dealt separately with two types of case:—

(*a*) where the magistrates refuse to make a maintenance order and the wife appeals;

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[15] Working Paper No. 53, para. 93.
[16] [1968] P. 262.
[17] *ibid.*, at pp. 268G–269C.
[18] Working Paper No. 53, para. 94.

(*b*) where the magistrates made a maintenance order and the husband appeals[19].

4.41 As to cases of the first type (where no maintenance order has been made), the Working Party analysed the possible situations as follows:—

(*a*) if the wife's appeal fails, that will end the matter;

(*b*) if the appeal succeeds, the Divisional Court can bring about several results, namely:—

(i) it can make a maintenance order itself, or

(ii) it can make an interim maintenance order and remit the case for rehearing, or

(iii) it can simply remit the case for rehearing without making any order.

The Working Party considered that if the Divisional Court decides to make an interim order, it should have power to antedate that order.

4.42 As to cases of the second type (where as in *Bould* v. *Bould* a maintenance order is made and the husband appeals), the Working Party analysed the possible situations as follows:—

(*a*) if the husband's appeal fails, again that will end the matter;

(*b*) if the appeal succeeds, the Divisional Court can bring about several results, namely:—

(i) it can vary the amount of the order, or

(ii) it can discharge the order, make an interim order and remit the case for rehearing, or

(iii) it can discharge the order without making an interim order and remit the case for rehearing, or

(iv) it can discharge the order altogether.

4.43 If the Divisional Court discharged the magistrates' order and made an interim order pending a rehearing, the wife would not be able to recover any arrears which had accumulated under the magistrates' original order because that order would fall to be treated for enforcement purposes as if it had never been made. The Working Party could see no reason why, to meet this possible hardship, the Divisional Court should not have power, if it thought fit, to antedate its own interim order, giving full credit to the husband for any payments he has made under the magistrates' maintenance order. The Working Party therefore proposed that the High Court should have power to antedate any interim maintenance order which it makes to a date not earlier than the application to the magistrates' court for a matrimonial order.

4.44 The Working Party's proposals described above for the antedating of the interim order were based on a recognition that in certain cases hardship could be caused to a wife pending determination of an appeal (whether brought

[19] Working Paper No. 53, paras. 95–97.

by herself or her husband) because of the length of time which could elapse before the appeal was heard. The Working Party felt that if the wife was to be allowed the benefit of these proposals, it was only reasonable that the husband should be eligible to receive no less favourable treatment. Suppose, for example, that the magistrates made an order for maintenance, from which the husband successfully appealed to the Divisional Court, with the result that the order was discharged altogether. In the view of the Working Party, a husband in these circumstances would be at some disadvantage under the existing law. If he failed to comply with the order pending determination of the appeal, arrears would accumulate, and then he would be liable to enforcement action initiated by the wife. If he did comply with the order, even though confident that his appeal had every chance of succeeding, there would appear to be no means at present by which he could subsequently recover the sums he paid. The Working Party suggested that, to meet this or other circumstances, the Divisional Court should have power to order repayment to the husband of some or all of any sums received by the wife as payments under a magistrates' maintenance order whenever it thinks that such repayment is just[20].

4.45 It will be seen that at this stage the Working Party's discussion of the effective date of interim orders made by the High Court had led to wider questions relating to the powers of the High Court on appeals.

The results of consultation

4.46 The Working Party's proposals for enlarging the powers of the High Court in exercising its appellate jurisdiction were, in general, approved on consultation and we have concluded they are satisfactory. It was, however, pointed out to us by the President of the Family Division that the Working Party had overlooked the very common case where the wife appealed against the quantum of a substantive maintenance order made by a magistrates' court and the Divisional Court increased the amount of the order. This was liable to result in substantial arrears because the position at law was thought to be that the Divisional Court's order was to be regarded as one with the magistrates' order, so that the increase in quantum had to be computed from the date of the hearing in the magistrates' court. In order to meet this case, it was suggested that, in addition to a power to antedate interim orders for maintenance, the Divisional Court should be given a specific power to remit arrears or to make any increase in the quantum of a magistrates' substantive order operative only from the date on which the Divisional Court decided the appeal.

4.47 We think that this point is most conveniently dealt with by providing that the Divisional Court should have power to fix the date from which its order operates. We think that when disposing of an appeal the Divisional Court should have power to make all such consequential orders as the justice of the case may require, including orders for the repayment of sums paid under the order of the magistrates' court, and orders for the remission of sums payable under the order of the magistrates' court.

The effective date of maintenance orders generally

4.48 As the discussion in the preceding paragraphs shows, the question

[20] Working Paper No. 53, para. 97.

whether the High Court should have power to antedate interim orders is closely connected with broader questions relating to the date of operation of maintenance orders generally. The powers of the courts to make retrospective maintenance orders were considered in *Bould* v. *Bould*[21]. Sir Jocelyn Simon P. accepted that there was power for both the divorce court and magistrates' courts to antedate an order but he mentioned that there was some judicial doubt about the exact date from which a maintenance order can be made to run. This is a point which the Working Party thought might suitably be clarified in the new magistrates' matrimonial legislation. They suggested that it should be expressly stated that maintenance can be ordered to be paid from a date earlier than the hearing but not earlier than the date of application for the order[22].

4.49 This was generally agreed on consultation. It was, however, suggested that if the magistrates were to be given express power to antedate maintenance orders to the date of application, they should be given a similar power in relation to orders of variation or revocation. We think there is merit in this suggestion.

4.50 A related suggestion made by the Working Party was that there should be power to make a maintenance order operating from a future date. They suggested that such a power would be useful where a man was unemployed at the time of the hearing but had arranged to start work in the near future[23]. This was generally agreed on consultation and we concur.

Conclusions

4.51 The overall conclusion which we draw from our review of the problems connected with the date of operation of maintenance orders is that, in order to enable justice to be done in the many different circumstances which may occur:—

(*a*) both magistrates' courts and the High Court should have a wide discretion as to the date from which their interim and final orders as to maintenance should take effect;

(*b*) the High Court, on appeals from magistrates' courts on maintenance matters, should have wide powers to order the repayment of sums paid under the magistrates' order and to remit arrears which have accrued under the magistrates' order.

Recommendations

4.52 *We accordingly recommend* as follows:—

(*a*) A magistrates' court should have power to direct that any interim or final maintenance order shall take effect from such date, whether before or after the making of the order, as the court may determine, except that the date so fixed should not be earlier than the original application for the final order.

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[21] [1968] P. 262.

[22] Working Paper No. 53, para. 99.

[23] *ibid.*, para. 100.

(*b*) A magistrates' court should have power to direct that any order varying or revoking an interim or final maintenance order shall take effect from such date, whether before or after the making of the order for variation or revocation, as the court may determine, except that the date so fixed should not be earlier than the application for that order.

(*c*) On an appeal from a magistrates' court in a matter of maintenance the High Court should have power:—

(i) to direct that any interim or final order which it makes should take effect from such date, whether before or after the date of the making of the order, as the court may determine, except that the date so fixed should not be earlier than that which the magistrates themselves could have fixed for such an order;

(ii) when making an order which is to take effect as from a date before the making of the order, to order that credit shall be given for any payments previously made under the magistrates' order;

(iii) to order repayment of some or all of any sums received by way of payments under a magistrates' maintenance order, and to remit arrears under such an order;

(iv) generally, to make such orders as may be necessary for the determination of the appeal and such consequential orders as may seem just.

(E) TEMPORARY SUSPENSION OF MAINTENANCE ORDERS

Discussion of the problem

4.53 Under section 31(1) of the Matrimonial Causes Act 1973 a divorce court which has made an order for periodical payments of maintenance has power to suspend any provision of the order temporarily and to revive the operation of any provision so suspended. The provision for suspension is of value in cases where a person is temporarily unable to comply with a maintenance order because, for example, he is unemployed.

4.54 Magistrates have no equivalent power to suspend a maintenance order temporarily. When a man is unable to comply with a maintenance order made by magistrates because he is out of work, arrears under the order accumulate until such time as the court has the opportunity, on proceedings for the enforcement, variation or discharge of the order, to exercise its general power under section 76 of the Magistrates' Courts Act 1952 to remit the arrears either wholly or in part[24].

4.55 We think that where there is good reason for excusing a man temporarily from making payments under an order, it is better to suspend the operation of the order than to allow arrears to accumulate and then exercise the power of remission. This is, in our view, a consideration which applies generally to all

[24] It is not customary to enforce payment of arrears which have accrued more than one year before the hearing of enforcement proceedings: see *Pilcher* v. *Pilcher* (*No. 2*) [1956] 1 All E.R. 463.

orders made by magistrates' courts for the periodical payments of money. Section 53 of the Magistrates' Courts Act 1952 confers on magistrates' courts a general power to revoke, revive and vary orders which they have made for the periodical payments of money. We think that the section should also confer a general power to suspend the operation of any such order.

Recommendation

4.56 *We accordingly recommend* that section 53 of the Magistrates' Courts Act 1952 should be amended so as to provide that where a magistrates' court has made an order for the periodical payment of money, it may on application suspend the operation of the order and subsequently revive it.

(F) THE REVIVAL OF ORDERS WHICH HAVE CEASED TO HAVE EFFECT

Discussion of the problem

4.57 In paragraph 2.40 above we referred to the provisions of section 53 of the Magistrates' Courts Act 1952; this confers on a magistrates' court, which has made an order for the periodical payment of money, a general power to revoke, revive or vary the order. We deal fully in other parts of the report[25] with the powers which in our view the courts should have to revoke or vary their orders. In the draft Bill annexed to this report those powers are conferred expressly and not by reference to section 53 of the 1952 Act; we have in this respect departed, on grounds of convenience and clarity, from the precedent of section 8 of the 1960 Act.

4.58 In *Bowen* v. *Bowen*[26] there is some judicial guidance as to when the power of revival may be appropriately exercised. In that case Lord Merriman P. expressed the view that where a maintenance order ceased to have effect under section 7 of the 1960 Act because the parties had temporarily resumed cohabitation, an order of revival might be proper when the cohabitation came to an end. Under our proposals maintenance orders will, with certain exceptions, cease to have effect if there is cohabitation for a period of 6 months after the date of the order. Where an order ceases to have effect under that provision, it appears to us that a party who thereafter seeks maintenance from the other may properly do so by applying for a fresh order. We therefore see no occasion for the use of the power of revival in such a case.

4.59 When an order has wholly ceased to have effect we think that a power of revival will be of value in one class of case only. As will appear hereafter[27], we propose that as a general rule a maintenance order made by magistrates in favour of a child in the exercise of their matrimonial jurisdiction should in the first instance not extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age or, if the court thinks it right, beyond the child attaining the age of 18. As an exception to that rule, we propose that there should be power to make an order extending

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[25] See paras. 2.40–2.46 above and paras. 5.93–5.96 below.

[26] [1958] I.W.L.R. 508, 512–514; *cf.*, *Markham* v. *Markham* [1946] 2 All E.R. 737.

[27] See paras. 5.81–5.89

beyond 18 for the purpose of enabling the child to receive education or training, or where there are special circumstances. We point out, however, that cases of hardship may arise where, after a maintenance order made in favour of a child who is under 18 has ceased to have effect, the child decides that he wishes to receive instruction or training beyond that age[28]. To deal with such cases we recommend that the court should, in certain circumstances, have power on the child's own application to revive the order with variations[29]. The Bill attached to this report contains a specific provision for that purpose. Apart from that provision, we do not think that magistrates, in the exercise of their matrimonial jurisdiction, will require power to revive an order which has wholly ceased to have effect[30].

Recommendation

4.60 *We therefore recommend* that where an order made by magistrates in the exercise of their matrimonial jurisdiction has wholly ceased to have effect, the power to revive it should be confined to cases where specific statutory provision has been made for the purpose.

(G) PROCEDURE AT THE HEARING: A SIMPLE FORM OF "PLEADINGS"

The provisional proposals

4.61 It was an objective of all the proposals in Working Paper No. 53 that the procedure for hearing matrimonial cases in the magistrates' court should be as simple and expeditious as possible. However the Working Party accepted[31] that if either party advanced conduct, whether as a ground for or a defence against the making of a matrimonial order, the court would have to review conduct in detail. They thought this unavoidable if conduct was still to be taken into account by the magistrates. They hoped, however, that the effect of their proposals would be that the number of cases which were contested on the grounds of conduct would be substantially reduced. They envisaged that the procedure at the hearing would vary according to whether the claim was opposed and to the nature of the opposition. In all maintenance cases, the applicant would open the proceedings by giving evidence in support of her claim for maintenance. If her case was a purely financial one and the respondent did not advance a defence of conduct, the court would be able to proceed at once to a final order on the basis of evidence as to means, whether given orally or in any means questionnaire which might have been completed. But if she were relying upon the conduct ground, she would have to establish that ground as

[28] See para. 5.94 below.

[29] See para. 5.96 below.

[30] In *Pratt* v. *Pratt* [1927] 137 L.T. 491, magistrates, acting under s. 7 of the Summary Jurisdiction (Married Women) Act 1895, revoked a wife's maintenance order on the ground of adultery. In subsequent divorce proceedings, the High Court found that she had not committed adultery on the occasion alleged. It was held that in these circumstances the magistrates could properly revive the order. A precisely similar case could not occur if our recommendation at paragraph 2.46 above is accepted; and in any event recourse to the power of revival in *Pratt* v. *Pratt* was unnecessary, as Lord Merriman P. indicated in *Bowen* v. *Bowen* [1958] 1 All E.R. 770 at p. 774 I.

[31] Working Paper No. 53, paras. 102–104.

well as her financial case. The court would therefore have to consider conduct before proceeding to a final order, unless the respondent did not advance a case either defending his own conduct or attacking hers.

4.62 The Working Party recognised that one difficulty about this procedure under the reformulated substantive law which they had proposed was that if the applicant was not aware that the respondent was going to raise her conduct as a defence until the court hearing, there was likely to be an application for an adjournment. To minimise this risk of delay, they suggested that there should be introduced into the magistrates' procedure some very simple form of "pleadings"[32]. They pointed out that to a limited extent "pleadings" already occurred in cases where there were allegations of adultery[33], and they did not think that an extension of this arrangement would jeopardise the summary nature of the proceedings, provided a simple procedure could be devised. They suggested a procedure on the following lines. The summons would inform the respondent of the grounds on which the applicant was applying for an order and he would be requested to indicate whether he proposed to contest the application and, if so, on what grounds. The Working Party did not think it would be desirable to compel him to indicate what defence he proposed to raise, nor did they think he should be prevented from changing his mind, but, particularly where the parties were represented, they considered that a procedure of this kind would help to ensure that at least in the majority of cases both parties were aware in general terms of what the other was going to say in court.

The results of consultation

4.63 These proposals were generally approved in the consultation. It was, however, pointed out that, whilst allegations of failure to maintain or desertion spoke for themselves, if the applicant was alleging the respondent's unreasonable behaviour as ground for an order, little useful purpose would be served by stating this on the summons. It was therefore suggested that where application was made on this ground, the applicant should be required to include a short summary of the facts she proposed to rely on. We think there is merit in this suggestion provided that the summary is indeed kept short and is confined to the main facts without entering into incidental matters or matters of detail.

4.64 We have considered whether it would be possible to go further and to devise a procedure whereby the parties would set out in "pleadings" not only what they proposed to allege, but also certain basic details about the marriage, with a view to a statement being drawn up on any non-controversial and agreed facts. (It was pointed out to us that there is clear authority in the case of *Berkhamstead RDC* v. *Duerdin-Dutton*[34] for the proposition that in civil proceedings in magistrates' courts admitted facts do not need to be proved.) We can see the attraction of a procedure on these lines, but we think it would militate against simplicity and would give rise to difficulties where the parties, particularly the defendant, were unrepresented. We therefore reject this particular suggestion.

4.65 Section 15 of the Justices of the Peace Act 1949 and section 122 of the

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[32] Working Paper No. 53, para. 103.
[33] *Duffield* v. *Duffield* [1949] 1 All E.R. 1105.
[34] (1964) 108 S.J. 157.

Courts Act 1952 confer on the Lord Chancellor wide powers to make rules as to the procedure and practice to be followed in magistrates' courts and by justices' clerks. We have no doubt that the powers are wide enough to enable rules to be made providing for "pleadings" such as we now have in mind.

Recommendations

4.66 *We accordingly recommend* that rules of court should provide for the introduction into the magistrates' matrimonial procedure of a very simple form of "pleadings". The summons should inform the respondent of the ground on which the applicant is applying for an order and should, where unreasonable behaviour is the ground, state briefly the main facts on which the applicant intends to rely. The respondent should be requested to indicate whether he proposes to contest the application and, if so, on what grounds.

(H) REASONS FOR THE MAGISTRATES' DECISIONS

The provisional proposals

4.67 Another important procedural proposal made by the Working Party was that a magistrates' court should be required to make a note of the factors which it took into account in determining the amount of a maintenance order and preserve that note in the court records. The Working Party did not think it necessary that the note should be made immediately after the hearing, nor did they suggest that the order should be noted to like effect, but they thought that some record should be set down within a reasonably short time of the hearing, certainly not later than a week. The record should then be available as of right to the parties (as the justices' reasons in matrimonial and certain other cases are now available as of right on request for the purposes of an appeal). They went on to suggest that a system could be devised without much difficulty to make the record available to any court which heard subsequent proceedings in relation to the maintenance order, as part of the machinery provided by Rule 34 of the Magistrates' Courts Rules 1968 (jurisdiction to hear variation etc., proceedings). The Working Party suggested that the record should be admissible in any subsequent proceedings as evidence of the matters contained therein[35].

The results of consultation

4.68 Though some reservations were expressed about these proposals, the general feeling disclosed in the consultation was that the justices ought to be required to record the reasons for their decisions as soon as possible. It was, however, represented to us by the Justices' Clerks' Society that any reasons which were set down for the record ought to be formulated *before* the justices announced their decision, rather than within a week of the hearing because otherwise there might be a danger of decisions being given in haste and an attempt made to rationalise them afterwards. Another reason given by the Society for formulating reasons at the time of the hearing, rather than later on, was the strictly practical one that meetings between the justices who heard the

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[35] Working Paper No. 53, paras. 105–106.

case and the clerk of the court would be difficult to arrange. We appreciate the force of these arguments, and we have therefore re-examined the Working Party's proposals in the light of them.

The existing arrangements

4.69 Under existing law, the justices are not under any duty to state in court the reasons for their decision in a matrimonial case. They do, however, have a duty to supply a copy of their reasons for a decision, on request, to any party wishing to appeal to the High Court, so as to enable that party to consider the question of an appeal and to make any necessary application for legal aid. This duty derives from Order 90, rule 16, of the Rules of the Supreme Court, which requires an appellant under the 1960 Act to lodge in the Principal Registry, *inter alia,* three copies of the justices' reasons for their decision. The same rule also requires the applicant to lodge three copies of the clerk's note of evidence. By virtue of rule 9(2) of the same Order, rule 16 applies, with the necessary modifications, also to appeals from a county court or a magistrates' court to the High Court under section 16(2) or (3) of the Guardianship of Minors Act 1971 and to appeals from a magistrates' court under section 10 of the Adoption Act 1958.

4.70 Where a magistrates' court receives a request for copies of the justices' reasons in a matrimonial, guardianship or adoption case, the reasons supplied must of course be those of the magistrates themselves, but the task of formulating the reasons for consideration by the magistrates falls in practice to the justices' clerk. To guide him in drawing up an appropriate document for the magistrates' approval, he has a body of decisions, observations and Practice Directions of the High Court relating to the procedure on an appeal.[36] But there are at least two difficulties which may arise. The main difficulty is that the clerk may not know what processes of thought led the justices to decide the case in the way they did. This difficulty is especially likely to occur in cases where the justices have found it necessary to retire before making their decision but have not taken the clerk with them. Another difficulty which can arise under the existing arrangements is one to which the Working Party referred, namely, that where reasons are prepared some time after the event, they may not be as accurate as they would have been had they been set down sooner.

Possible solutions to existing difficulties

4.71 One solution to these difficulties would be to take a suggestion made originally by Sir Jocelyn Simon, as President of the Probate Divorce and Admiralty Division, in the case of *Theobald* v. *Theobald*[37], which he repeated in *Griffiths* v. *Griffiths*[38]. This was that:—

> ". . . the justices should, at the time of their decision, give to their clerk a summary of their reasons, so that there is some contemporary note which will assist them in the event of an appeal."[39]

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[36] See *Stone's Justices' Manual* 108th. ed., 1976, pp. 1794–1797, and *Pugh's Matrimonial Proceedings Before Magistrates,* 3rd ed., 1974, pp. 74–79.

[37] [1962] 1 W.L.R. 837.

[38] [1964] 3 All E.R. 929.

[39] [1962] 2 All E.R. 863, 8641.

4.72 The solution favoured by the Justices' Clerks' Society would go somewhat further. The Society proposed that a requirement should be placed on the justices to consult the clerk in every case with a view to reasons being formulated before they announce their decision.

4.73 The solution which we favour is in effect a combination of these two suggestions. We think that magistrates' courts rules should require that in certain classes of domestic proceedings to be prescribed by the rules the justices should, before announcing their decision, draw up in consultation with their clerk a note of reasons for the decision. A copy of the note would not be supplied automatically to the parties, but would be available as of right to either party for the purposes of an appeal or for the purpose of considering whether or not to appeal.

4.74 We attach importance to the proposal that the reasons should be drawn up in consultation with the clerk, because we think that the justices will in this way receive the expert help which they are likely to need in formulating their reasons. The present law recognises that the functions of the clerk include advising the justices on points of law, practice and procedure[40]. If our proposal is adopted, it will be recognised that his functions also include that of assisting the justices to formulate reasons for their decisions in the cases to which the rules which we propose will apply. In order to perform that function, it will clearly be proper for him to join the justices when they retire to consider their decision. We should not wish it to be thought, however, that it would not be proper for him to join the justices when they have retired to consider their decision in other classes of domestic proceedings. The practice is governed by the very flexible rules laid down in the Practice Direction of 15 January 1954[41], and it is clear that under that direction it will often be proper for the clerk to join the justices when they retire in all classes of domestic proceedings.

4.75 We recognise that our proposal involves placing an extra burden of work on the justices and their clerk. It would, moreover, tend to prolong the hearing of cases, since an adjournment might be necessary in order to comply with it. It is for these reasons that we have confined the proposal to certain classes of domestic case to be prescribed by rules. Consultations would be necessary before the classes were defined, but we have it in mind that they would include applications by a husband or wife for maintenance where the court, by reason of the applicant's conduct, awards less than it would otherwise have done, and all cases under the matrimonial or the guardianship legislation where the custody of a child is in issue.

Recommendations

4.76 *We accordingly recommend:—*

(*a*) That in prescribed classes of domestic proceedings rules should require the justices, before announcing their decision, to draw up in consultation with the clerk a note of reasons for the decision. A copy of the note would not be supplied automatically to the parties, but a copy should be available as of right to either party for the purposes of an appeal or for the purpose of considering whether or not to appeal.

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[40] Justices of the Peace Act 1968, s. 7.

[41] [1954] 1 W.L.R. 213.

(*b*) A copy of the note would be made available to any magistrates' court which hears subsequent proceedings in relation to the order, as part of the machinery provided by rule 34 of the Magistrates' Courts Rules 1968. The copy should be admissible in any subsequent proceedings as evidence of those reasons.

(I) JURISDICTION

The provisional proposals

4.77 Section 1(2) of the 1960 Act gives jurisdiction to any one of three courts, namely the court of the petty sessions area where the applicant ordinarily resides, the court of the petty sessions area where the respondent ordinarily resides or the court of the petty sessions area where the matrimonial offence occurred. The choice of court lies with the applicant.

4.78 The Working Party thought that one of the consequences of the reduction of emphasis on the matrimonial offence which they were proposing would be that in the great majority of cases it would be unnecessary to give jurisdiction to any other courts than those acting for the petty sessions area where either the applicant or respondent lives. If, however, jurisdiction were limited in this way, they thought that inconvenience might be caused where, for example, both spouses have moved from the area where they had their matrimonial home and they wished to call evidence from those who knew them when they lived in that area. The Working Party thought it desirable that application should in the first instance be made to the applicant's or respondent's home court, but that, when that had been done, the court applied to should have discretion, on the application of either party, to transfer the proceedings to another court which might be more convenient for the parties or their witnesses. Thus the procedure for establishing jurisdiction to hear an application for an original order might be on the same lines as that provided in rule 34 of the Magistrates' Courts Rules 1968 (jurisdiction to hear variation etc. proceedings). The Working Party suggested that jurisdiction could be established by rules of court, and that the principal Act should provide simply that an application for an order should be made to a magistrates' court by way of complaint; this would import the power to make rules to establish jurisdiction under section 122(1) of the Magistrates' Courts Act 1952[42].

4.79 Consideration of the jurisdiction of magistrates' courts in matrimonial matters led the Working Party to make a proposal concerning the jurisdiction of such courts in civil proceedings generally. Section 44 of the Magistrates' Courts Act 1952 (which applies where no express provision is made by any other Act or by rules) contains provisions which make the jurisdiction of a magistrates' court to hear a complaint dependent on the existence of a connection between the subject matter of the complaint and the petty sessional area of the court. The Working Party proposed that section 44 should be amended so as to make it sufficient that the connection should be with the county in which the court sits. This would bring the magistrates' civil jurisdiction into line with their criminal jurisdiction; it would allow for greater flexibility and it would also help to meet the criticism, which is sometimes made, that a hearing might be prejudiced by the fact that a particular bench had prior knowledge of

[42] Working Paper No. 53, para. 108.

the circumstances or that the parties might be embarrassed by personal acquaintance with all the available justices[43].

The results of consultation

4.80 These proposals met with general approval. Our attention was, however, drawn to the case of *Collister* v. *Collister*[44] in which there was detailed argument before a Divisional Court of the Family Division as to whether a magistrates' court could proceed with an application for a matrimonial order under the 1960 Act solely on the basis that the applicant had become ordinarily resident within the petty sessions area, even though the marriage, the whole of the matrimonial cohabitation, as well as the whole of the cause of complaint, arose, and the respondent resides, and has always resided, outside the jurisdiction of the adjudicating court and even outside the United Kingdom altogether.

4.81 The judgment of the Divisional Court, given by Sir George Baker P., was that, whether intentional or not, this was precisely the effect of the relevant provisions of the 1960 Act, as supplemented by those of the Maintenance Orders (Facilities for Enforcement) Act 1920 and of the Maintenance Orders (Reciprocal Enforcement) Act 1972.

4.82 We do not ourselves feel any misgivings about a magistrates' court having jurisdiction to proceed with an application for a matrimonial order solely on the basis that the applicant has become ordinarily resident within the county. Where the respondent resides outside the United Kingdom, the court would only be able to proceed with the case if the country where the respondent resides is one with whom the United Kingdom has arrangements for the reciprocal enforcement of maintenance orders, whether under the 1920 Act or under the 1972 Act. These Acts have been specially designed to overcome the problem of the inability of a magistrates' court to serve process on an absent respondent. In the case of a respondent residing in a reciprocating country, this would be done by the making of a "provisional maintenance order". Such an order, if made, could be transmitted to the reciprocating country concerned by the Home Office and would be of no effect unless and until it was confirmed by a competent court in the reciprocating country. The court in the reciprocating country would consider whether the order should be confirmed in the light of any representations made by the respondent. Given the availability of a procedure on these lines, we can see no objection to a magistrates' court being able to proceed with an application for maintenance solely on the basis of the applicant's ordinary residence within the county.

4.83 We observe that when the United Kingdom accedes to the EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters this could well have implications for the magistrates' matrimonial law, at least in relation to a respondent "domiciled" in a member State of the EEC[45]. This is because the Convention provides, in Article 2, that persons "domiciled" in a Contracting State shall, whatever

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[43] Working Paper No. 53, para. 109.

[44] [1972] 1 W.L.R. 54.

[45] What is intended is a jurisdictional domicile which does not correspond to domicile as usually meant in English private international law.

their nationality, be sued in the courts of that State. The only exception allowed to this general proposition, so far as maintenance orders are concerned, is contained in Article 5(2) of the Convention, which provides that a person domiciled in a Contracting State may be sued in another Contracting State, in matters related to maintenance, in the courts for the place where the claimant is domiciled or habitually resident. Further consideration of the effects of the Convention must await final decisions as to the form in which the Convention is to be ratified. For the time being, we do not see any need for departing at present from the policy underlying the existing law, except to the extent suggested in the working paper.

Our present views regarding jurisdiction

4.84 We therefore propose that the basic provision as to the jurisdiction of magistrates' courts in matrimonial proceedings should be that a court should have jurisdiction if its area falls within the county where the complainant or the defendant ordinarily resides. There should be power to transfer the proceedings to another magistrates' court if that appears to be a more convenient forum. Section 44 of the Magistrates' Courts Act 1952 should be amended on the lines indicated in paragraph 4.79 above.

4.85 The 1960 Act contains certain other provisions relating to jurisdiction the substance of which we think it necessary to retain, namely:—

(*a*) Section 1(3)(*a*) provides that (with one qualification) jurisdiction to hear a complaint under the section shall be exercisable notwithstanding that the defendant resides in Scotland or Northern Ireland if the complainant resides in England and the parties last ordinarily resided together as man and wife in England.

(*b*) Section 1(3)(*b*) declares that jurisdiction to hear such a complaint is exercisable where the complainant resides in Scotland or Northern Ireland if the defendant resides in England.

(*c*) Section 9(1) declares (subject to one qualification) that the jurisdiction to vary or revoke orders made under the Act is exercisable notwithstanding that the proceedings are brought by or against a person residing outside England.

(*d*) Section 14(1) provides that section 15 of the Maintenance Orders Act 1950 is to have effect as if section 1(3) and section 9(1) of the 1960 Act were included in Part I of the 1950 Act. (The effect of section 14(1) is to provide for the service of process on a person residing in Scotland or Northern Ireland.)

(*e*) Section 14(3) declares that any jurisdiction conferred on a magistrates' court by the Act is exercisable notwithstanding that any party to the proceedings is not domiciled in England.

4.86 All the provisions of the 1960 Act which we have enumerated in the preceding paragraph are provisions the substance of which should in our view be retained in the reformulated magistrates' matrimonial law. This has led us to reconsider the provisional proposals of the Working Party that jurisdiction should be established by rules of court[46].

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[46] Working Paper No. 53, para. 108: see para. 4.78 above.

Mode of implementing our proposals as to jurisdiction

4.87 We do not think that the power to make rules under section 15 of the Justices of the Peace Act 1949, as extended by section 122 of the Magistrates' Courts Act 1952, includes power to make rules containing provisions of the kind to which we have referred in paragraph 4.85 above; nor do we think it appropriate that such provisions should be contained in rules.

4.88 It is arguable that instead of amending section 44 of the 1952 Act directly on the lines indicated in paragraph 4.79 above, it would be possible to produce substantially the same effect by rules; but we are satisfied that a direct amendment of section 44 is preferable, and that such a direct amendment can only be made by Act of Parliament.

4.89 For those reasons we think it inevitable that the Act containing the reformulated magistrates' matrimonial law should contain some provisions as to jurisdiction. That being so, we think it desirable that the Act should contain the primary rule as to jurisdiction which we propose, namely, that a court should have jurisdiction if its area falls within the county where the complainant or the respondent ordinarily resides. We see no reason, however, why the power of transfer which we propose should not be conferred by rules made by virtue of section 122(2) of the 1952 Act.

Recommendations

4.90 *We accordingly recommend* as follows:—

(*a*) A magistrates' court should have jurisdiction in matrimonial proceedings if its area falls within the county in which the complainant or the respondent ordinarily resides.

(*b*) There should be power to transfer the proceedings to another magistrates' court if that appears to be a more convenient forum.

(*c*) The reformulated law as to matrimonial proceedings in magistrates' courts should contain provisions corresponding to sections 1(3), 9(1), 14(1) and 14(3) of the 1960 Act.

(*d*) Section 44 of the Magistrates' Courts Act 1952 should be amended so that jurisdiction under its provisions is based on the county and not on the petty sessions area.

(*e*) Provision to give effect to our proposals under sub-paragraphs (*a*) (*c*) and (*d*) above should be made by Act of Parliament. Provision to give effect to our proposals under sub-paragraph (*b*) should be made by rules.

(J) THE RELATIONSHIP BETWEEN MAGISTRATES' COURTS AND THE DIVISIONAL COURT

Appeals generally

4.91 The opinion has often been expressed (notably by Lord Simon of Glaisdale, the former President of the Probate Divorce and Admiralty Division, and by Sir George Baker, his successor) that there ought to be some more satisfactory avenue of appeal from the matrimonial decisions of the magis-

trates. Like the Working Party[47], we express no views upon questions of that kind. A general review of the arrangements for appeals is entirely outside the scope of this report.

Appeals against interim orders

4.92 However, in restating the law as to appeals in the draft Bill annexed to this report, we have taken the opportunity to remove a minor anomaly. Under the Summary Jurisdiction (Separation and Maintenance) Acts 1895 to 1949, it was possible for interim maintenance orders to be made, and such orders were not subject to appeal. The interim custody order was introduced into the magistrates' matrimonial law by section 6 of the 1960 Act and under section 11 of the Act an appeal lies against the making or refusal of an interim custody order. As to interim maintenance orders, section 6(2) of the Act provides that no appeal is to lie if the appeal relates only to a maintenance provision of an interim order. This does not prevent an appeal in relation to such a provision if there is also an appeal against a provision for custody or access. We think it right that an appeal should lie against the making or refusal of an interim custody order, and we also think it right that no appeal should lie against an interim order if the only issue is one of maintenance. We therefore do not propose any change in the policy of the 1960 Act on these matters.

4.93 The 1960 Act has however left open the possibility of an appeal against the refusal of an interim maintenance order in cases where the only issue is one of maintenance. We think that this is an anomaly which was not intended, and in our draft Bill we have removed it.

The relationship generally between magistrates' courts and the Divisional Court

(a) The provisional proposals

4.94 Although, as noted in paragraph 4.91 above, the Working Party regarded it as largely outside their terms of reference to consider appeals, they recognised that their proposals for changing the substantive magistrates' law had certain direct implications upon the relationship between the higher and lower courts[48].

4.95 The first matter which they considered in this context was whether it was necessary or desirable that magistrates should retain their power, under section 5 of the 1960 Act, to refuse to make a matrimonial order where they are of the opinion that any of the matters in question between the parties would more conveniently be dealt with by the High Court[49].

4.96 Section 5 of the 1960 Act confers no jurisdiction on the High Court, and the magistrates may employ their powers under it only when the High Court has concurrent jurisdiction[50]. The cases where jurisdiction will, under our proposals, be concurrent are cases where an applicant husband or wife is

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[47] Working Paper No. 53, para. 111.
[48] *ibid.*, paras. 111–116.
[49] *ibid.*, para. 112.
[50] *Perks* v. *Perks* [1946] P. 1; *Davies* v. *Davies* [1957] P. 357; *Hinchcliffe* v. *Hinchcliffe* (1971), not reported.

seeking a maintenance order on the ground of failure to provide reasonable maintenance; application on this ground will be possible either under the reformulated magistrates' law or under a reformulated section 27 of the Matrimonial Causes Act 1973. On the other hand, the powers of the divorce court under section 27 of the 1973 Act are rather wider than those of the magistrates will be, in that they include powers to order secured periodical payments and payment of an unlimited lump sum. If, therefore, the case before the magistrates is one in which the defendant has substantial assets, it is reasonable that the magistrates should be able to decline to proceed with the case on the ground that it would more conveniently be dealt with by the High Court. We therefore think that magistrates should retain their power to decline jurisdiction on the ground that the case can more conveniently be dealt with by the High Court.

4.97 A second aspect of the relationship between magistrates' courts and the Divisional Court, which was touched on in the working paper[51], concerned the situation where matrimonial proceedings were pending in a divorce court when an application for a matrimonial order was due to be heard by a magistrates' court. As noted in the working paper, it was held in *Kaye* v. *Kaye*[52] that in such a situation the magistrates had jurisdiction to hear the case, but that save in exceptional circumstances they should, as a matter of convenience and public policy, exercise their discretion to adjourn the proceedings before them until the High Court proceedings have been disposed of. In *Lanitis* v. *Lanitis*[53] where a wife's urgent need for maintenance and the unsatisfactory situation of the children were held to be exceptional circumstances which justified the magistrates in proceeding with the hearing of the wife's application though a petition for divorce had been filed by the husband the day before the hearing, Ormrod J. said:—

> "... the magistrates in this class of case should be wary and on the look out for this tactical manoeuvring which I have mentioned before; and they should be alert to see that they are not used, and do not permit themselves to be used in this fashion by parties filing petitions in the High Court at the last minute with the major object of frustrating the magistrates' jurisdiction."[54]

4.98 We agree with the Working Party that it would be undesirable for a man to be able to delay his wife's application for maintenance simply by proceeding for matrimonial relief in the divorce court. We think that there should not be any statutory limitation on the powers of magistrates where there are concurrent proceedings in the divorce court. In the words of Ormrod J. the magistrates should "look at the whole thing and as a matter of public policy and general convenience decide what is the right thing for them to do"[55].

4.99 A third aspect of the relationship between magistrates' courts and the higher courts, which was touched on in the working paper[56], concerns cases

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[51] Working Paper No. 53, para. 113.
[52] [1965] P. 100.
[53] [1970] 1 W.L.R. 503.
[54] *ibid.*, at p. 510.
[55] *ibid.*, at p. 509.
[56] Working Paper No. 53, para. 114.

where, after a magistrates' court has made a matrimonial order containing a money provision, or an interim order, proceedings between, and relating to the marriage of, the parties are commenced in a divorce court. In such a case the divorce court has, under section 7(3) of the 1960 Act, a discretionary power to discharge the magistrates' order. The Working Party considered that this discretionary power should be retained for reasons of convenience. This was agreed in the consultation, and we concur.

(*b*) *Recommendations*

4.100 *We accordingly recommend* as follows:—

(*a*) That section 5 of the 1960 Act which gives the magistrates power to refuse jurisdiction should be re-enacted in the reformulated magistrates' matrimonial law.

(*b*) That where matrimonial proceedings are pending in a divorce court when an application for a matrimonial order is due to be heard by a magistrates' court, the magistrates should be entitled to hear the case before them or to adjourn it as they may think fit.

(*c*) That where after magistrates have made a matrimonial order containing a money provision, or an interim order, proceedings between, and relating to the marriage of, the parties are commenced in a divorce court, the discretionary power of the divorce court to discharge the magistrates' order under section 7(3) of the 1960 Act should be retained.

Powers to rehear an application

4.101 The Working Party considered the question whether, when the magistrates had made a matrimonial order in the absence of the respondent, they should have power to hear an application by the respondent for a rehearing of the case if he can show good cause for his absence and that he has a prima facie defence[57]. At present in such cases the only course open to the respondent is to appeal to the High Court. The Working Party said that the present appeal procedure could give rise to long delays before an appeal was heard by the Divisional Court and that this could cause hardship to the applicant if the original order was subsequently set aside and new proceedings had to be instituted before the magistrates. On the other hand, the Working Party pointed out that to give a right to apply for a rehearing on the ground that the order was made in the absence of the respondent might lead to abuse, and, by delaying the effective date of an order, could cause equal hardship to the applicant. Moreover, such a right to apply might encourage the magistrates to proceed more frequently in the defendant's absence, a development which the Working Party did not think desirable.

4.102 The Working Party made no proposal in this matter and merely invited views. Very few of those commenting on the working paper have, however, given us the benefit of their view. Our own opinion is that it is unnecessary to confer on the magistrates a power to rehear a case in the circum-

[57] Working Paper No. 53, paras. 115–116.

stances described by the Working Party, because the magistrates already have power to vary the amount of a maintenance order (including one made in the defendant's absence) to nil if necessary, and that power is available whether the order is for the benefit of the wife, or the children, or both. We fear that to give a power of rehearing such as the Working Party envisaged might lead to delay and hardship. Moreover, the decision of a Divisional Court of the Family Division in *Trousdale* v. *Trousdale* indicates how swiftly the position can be rectified when a decision has been given in the respondent's absence owing to a genuine mistake[58]. We make no recommendation.

PART V: ORDERS IN RESPECT OF CHILDREN IN MAGISTRATES' MATRIMONIAL PROCEEDINGS

Introductory

5.1 Up to this point, following the scheme of Working Paper No. 53, we have been concerned with the consequences of the recent matrimonial causes legislation for the magistrates' matrimonial jurisdiction mainly in so far as they affect the parties to a marriage. We have thought it best to deal with this aspect of the jurisdiction first, not because we do not attach the greatest possible importance to the court's powers to make orders in respect of any children, but for the strictly practical reason that the jurisdiction depends for its exercise on an allegation of misconduct by one party to a marriage against the other. We consider now the position of the children of the marriage.

The welfare of the child, the first and paramount consideration

5.2 When a broken or imperilled marriage is brought before a magistrates' court, one of the court's primary duties must be to consider the welfare of any children. This principle is already embodied in the magistrates' matrimonial law. In the first place section 4(1) of the 1960 Act contains provisions requiring magistrates, on hearing a complaint under the Act, to consider issues relating to the children of the family and to make appropriate orders in regard to those children, irrespective of the nature of the relief which the applicant is seeking in his complaint. Secondly, the law already contains clear guidance as to the principle on which magistrates should decide issues relating to children: section 1 of the Guardianship of Minors Act 1971 requires all courts in proceedings of any description, in deciding any question relating to the custody, upbringing or property of a child, to regard the welfare of the child as the first and paramount consideration.

[58] (1974) *The Law Society's Gazette*, 15 January 1975. This was a case where the husband failed to appear at the hearing of his wife's complaint for a matrimonial order. The justices heard the case in his absence and made a maintenance order. Later, a letter was received from the husband asking for an adjournment because he had had an accident. The husband appealed. The clerk to the justices thereupon wrote to the Principal Registry that under such circumstances it was plain that the appeal would be allowed and remitted to the justices for a rehearing. The clerk suggested therefore that, in order to save time and costs, the appeal could be heard without the attendance of legal advisers. The Divisional Court agreed to this. Sir George Baker P., giving judgment, said that it was sufficient to have an affidavit from the husband, an addendum to their reasons by the justices saying that they would have granted an adjournment if the husband's letter had arrived in time and the consent of both firms of solicitors. The appeal was therefore allowed and the case remitted to a fresh panel of justices for rehearing.

5.3 The Working Party saw no reason to modify the principle of section 4(1)[1], and their view has been generally accepted in the consultation. There were, however, some commentators who thought that the subsection does not go far enough and that the matrimonial law should declare, as a broad general principle, that the interests of the children of a broken or imperilled marriage are of first and paramount importance. For our part, we think it is necessary to look at section 4(1) in conjunction with section 1 of the Guardianship of Minors Act 1971. Each of the two provisions embodies a proposition of the first importance; and when the two provisions are taken together they lay down the essential principles clearly and comprehensively. We shall consider later[2] when we deal with the questions of welfare reports and of separate representation of children, whether there may not be scope for introducing additional safeguards into the matrimonial law in so far as it affects the children of a marriage.

(A) THE NEED FOR RATIONALIZATION

How the need for rationalization arises

5.4 Our primary task in this Part of our report must be the rationalization of the powers of magistrates' courts to make orders in relation to the custody, the maintenance and the care and supervision of children. The case for such rationalization was argued by the Working Party[3] and was strongly supported by most of those who commented on Working Paper No. 53. Not only are the powers of magistrates to make orders in respect of children out of line with the divorce court's powers in respect of children, following the modernisation effected by the Matrimonial Proceedings and Property Act 1970, but the magistrates' powers with respect to children under the 1960 Act differ unnecessarily from their powers under the Guardianship of Minors Act 1971, the Guardianship Act 1973 and the Affiliation Proceedings Act 1957.

5.5 Since Working Paper No. 53 was published, the Children Act 1975 has been passed by Parliament. The provisions of Part II of that Act introduce further variations on the theme of the magistrates' powers to make orders in relation to the custody, the maintenance and the care and supervision of children.

5.6 The need for rationalization is we think illustrated by Appendix 5 to this report which (following the example of Appendix 2 to the working paper) sets out the relevant provisions in the various Acts in the form of a comparative table.

Some definitions in the Children Act 1975

5.7 While the Children Act 1975 added to the complexities of the law, it also took some important preliminary steps towards rationalization by defining certain concepts not only for the purposes of the Act itself, but also for the purposes of future enactments. It is convenient to refer to those definitions now.

5.8 Section 86 of the 1975 Act defines the expression "legal custody" by

[1] Working Paper No. 53, para. 117.
[2] See paras. 10.12–10.36 below.
[3] Working Paper No. 53, paras. 118–119.

providing that it "means, as respects a child, so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent); but a person shall not by virtue of having legal custody of a child be entitled to effect or arrange for his emigration from the United Kingdom unless he is a parent or guardian of the child".

5.9 The expression "the parental rights and duties" is defined by section 85 of the Act, which provides that the expression "means, as respects a particular child (whether legitimate or not) all the rights and duties which by law the mother and father have in relation to a legitimate child and his property".

5.10 The Act also contains what is in effect a definition of the expression "actual custody". Section 87(1) of the Act 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. Section 87(2) provides that while a person not having legal custody of a child has actual custody of the child he has the like duties in relation to the child as a custodian would have by virtue of his legal custody. Section 87(3) of the Act provides that when the Act speaks of the person with whom a child has his home it is referring to the person who (disregarding certain temporary absences) has actual custody of the child.

5.11 The Act seeks to give a measure of permanence to the concepts which it has thus defined by introducing three of them into the Interpretation Act 1889[4]. The obvious intention of the definitions of "legal custody", "actual custody", and "the parental rights and duties" in the Children Act 1975 was to prepare the way for a desirable measure of uniformity in statutory provisions relating to the custody of children. We think that we should support that objective by making use of the definitions, whenever they are adequate for our purpose; and that is the policy we follow in this report.

Steps towards rationalization

5.12 In this Part of our report we consider what reforms are required in the law relating to children as administered by the magistrates' courts in matrimonial proceedings. Later in this report we shall consider, in the light of the reforms proposed in this Part, what amendments should be made for the sake of consistency in the guardianship legislation[5], in the Children Act 1975[6], and in the law relating to affiliation[7]. We emphasise, as did the Working Party[8], that our proposals for amendment of the guardianship and affiliation law are not designed to produce fundamental changes, but to avoid anomalies; and the same observation applies to our proposals for amendment of the Children Act 1975.

(B) THE DEFINITION OF "CHILD OF THE FAMILY"

Introductory

5.13 Under the 1960 Act, the magistrates in matrimonial proceedings can

[4] Children Act 1975, s. 89. The three concepts are the parental rights and duties, legal custody and the person with whom the child has his home.

[5] See Part VI below.

[6] See Part VII below.

[7] See Part VIII below.

[8] Working Paper No. 53, para. 120.

make orders for custody and access, committal to care, supervision, and maintenance of any "child of the family". The Working Party began by examining each of these features of the law, starting with the definition of "child of the family"[9] because this defines the scope of the magistrates' powers. We shall follow their example.

The definitions in the 1960 Act and the Matrimonial Causes Act 1973 compared

5.14 In section 16(1) of the 1960 Act "child of the family" is defined in relation to the parties to a marriage as:—

(*a*) any child of both parties; and

(*b*) any other child of either party who has been accepted as one of the family by the other party.

The same subsection, as amended by Part I of Schedule 4 to the Children Act 1975, defines "child", in relation to one or both of the parties to a marriage, as including an illegitimate child of that party or of both parties.

5.15 In section 52(1) of the Matrimonial Causes Act 1973, the definition of "child of the family" is substantially different; the expression means, in relation to the parties to a marriage:—

(*a*) a child of both parties; and

(*b*) any other child, not being a child who has been boarded-out with those parties by a local authority or voluntary organization, who has been treated by both the parties as a child of their family.

The definition of "child" in section 52(1) of the 1973 Act, as amended by Part 1 of Schedule 4 of the Children Act 1975, is the same as that under the 1960 Act, as amended.

The provisional proposals and the results of consultation

5.16 The Working Party provisionally proposed[10] that the existing definition of "child of the family" in the 1960 Act should be replaced by that in the matrimonial causes legislation, since it would be undesirable that the magistrates' courts, by virtue of having a narrower definition of "child of the family" than the High Court, should be unable to make orders in respect of certain children when in similar circumstances the divorce court would be able to make orders. They noted that if this wider definition were to be used, it would follow that the provisions of section 2(5) of the 1960 Act should be replaced by what are now those of section 25(3) of the 1973 Act. Both these provisions require the court to have regard to the extent to which, and the basis on which, any party has taken on responsibility for a child of the family not his or her own and to the liability of any other person to maintain the child, but section 25(3) of the 1973 Act goes further, in that it enables the court to take into account also the length of time for which a party discharged this responsibility and whether he knew that the child was not his own. The provisional proposals were generally approved on consultation and we concur in them.

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[9] Working Paper No. 53, paras. 122–123.

[10] *ibid.*, para. 123.

Recommendation

5.17 *We accordingly recommend* that the existing definition of "child of the family" in the 1960 Act be replaced by that in the Matrimonial Causes Act 1973.

(C) THE DURATION OF CUSTODY ORDERS

The provisional proposals and the results of consultation

5.18 The 1960 Act at present limits the court's powers to make a custody order to children under the age of 16 (section 2(1)(*d*)). Further, there is doubt whether an order for custody under the Act made before a child attains 16 can continue in effect after that age and until he attains his majority[11]. By contrast, it is clear that the divorce court has power under the 1973 Act to make a custody order in respect of a child up to the age of 18 (section 42(1)).

5.19 The Working Party considered two questions in this connection:—

(*a*) first, whether a magistrates' order made when the child is under 16 should run until the child reaches 18;

(*b*) secondly, whether the magistrates should have power to make a custody order *de novo* in respect of a child between the ages of 16 and 18[12].

5.20 The Working Party saw no reason why the magistrates' powers in this respect should be different from those of the High Court. They therefore proposed that any uncertainties which may exist as to whether a custody order made under the 1960 Act continues until the child is 18 should be resolved by an express provision to this effect. They further proposed that the magistrates should have the same powers to make custody orders *de novo* in respect of children between 16 and 18 as the High Court.

5.21 These proposals were generally approved in the consultation. It was, however, pointed out to us that the making of a fresh order in respect of a child over the age of 16 would be likely to cause practical difficulties, not the least of which would be difficulties of enforcement, unless the child in question were in agreement with the order. This seems to us an important point, having regard to the fact that society nowadays deems children under the age of 18 competent, for example, to contract marriages or enlist in the Army, if they have parental consent. We doubt, however, whether any special provision is called for in this connection. We should be surprised if a court would ever make a custody order *de novo* in relation to a child over the age of 16 without first establishing that the child was content with the arrangements contemplated by the order.

Recommendations

5.22 *We accordingly recommend* that the magistrates' matrimonial law should make express provision for custody orders to last until the child reaches the age of 18, and should also enable a custody order to be made *de novo* in respect of children between the ages of 16 and 18.

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[11] A note in *Stone's Justices' Manual* 108th ed., 1976, p. 1805 says that the order will operate until the child is 18. In *C.* v. *C.* (*The Times*, 5 July 1972) Sir George Baker P. says that the note describes the settled practice, but points out the need for clarification of the law.

[12] Working Paper No. 53, paras. 124–127.

(D) CUSTODY ORDERS IN FAVOUR OF HUSBAND OR WIFE: THE "SPLIT ORDER"

Introductory

5.23 It follows from the principles which we have discussed in paragraphs 5.2 and 5.3 above that the magistrates, when making orders with respect to the custody of children in matrimonial proceedings, may wish to confer rights of custody on the husband or the wife irrespective of who is the applicant in the proceedings. They may in some cases think it appropriate that rights of custody should be shared between the husband and the wife. In some cases they may think it appropriate that custody of the child should be entrusted to a third party. We deal with this last possibility in section (E) below. In this section we are concerned with cases where the appropriate order is that custody should be given either to the husband or to the wife, or that custody rights should be shared between them.

The "split order"

5.24 Under the guardianship legislation, it has been held that the magistrates have power to make a "split order" by which responsibility for a child is divided between husband and wife either by giving custody to one and "care and control" to the other or by giving custody to the husband and wife jointly with "care and control" to one of them[13]. Under the 1960 Act magistrates do not have power to make "split orders"[14].

5.25 The Working Party suggested[15] that the object of a "split order" was to give a father whose conduct had been unimpeachable a say in, for instance, a child's education or religious upbringing although "care and control" was given to the mother. They thought, however, that whatever the merits of the "split order" might have been, the provisions of the Guardianship Act 1973 had removed its rationale by giving equal rights of custody to both parties and thereby superseding the old common law rule which gave sole custody to the father. It would be nonsensical, the Working Party suggested, to deprive a mother of the equal custody rights she now has by statute whilst leaving her with "care and control". But this said, they thought provision might reasonably be made, both in the magistrates' matrimonial law and in the guardianship law, for the court at its discretion to leave equal rights of custody with both parents but (since the child can clearly only live with one parent at a time) to give "care and control" to one parent and to order the other to contribute towards the child's maintenance.

5.26 Though this proposal met with some degree of approval several commentators had reservations. In part, these reservations seem to have been attributable to uncertainty as to the legal meaning, and hence the practical effect, of "custody" and "care and control" orders. But it was also suggested that the proposal did not go far enough and that the only practical course, rather than to confer the specific powers proposed by the Working Party, would be to give magistrates discretion to make whatever orders they consider to be in the best interests of the child.

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[13] *In re W.* (an infant) [1964] Ch. 202; *Jussa* v. *Jussa* [1972] 1 W.L.R. 881.
[14] *Wild* v. *Wild* [1969] P. 33.
[15] Working Paper No. 53, para. 128.

The questions the magistrates have to decide

5.27 In reconsidering the provisional proposals, we take as a starting point section 1(1) of the Guardianship Act 1973, under which the mother and father have equal rights and authority in relation to the custody and upbringing of a child. Against that background the court may, in cases where rights of custody are in issue between the parents, have to consider a variety of questions. Where the parents have separated, any child of the marriage obviously cannot continue to live with both parties. In this situation the court is faced with the need to decide the following questions:—

(*a*) The first, and no doubt the most important, question is with which of the parents the child should have his home in the future, and this will involve considering who should have the actual custody of the child.

(*b*) The court will then have to decide whether and on what basis the other parent, who does not have actual custody, should be allowed access to the child, since the court's decision about which parent should have the actual custody of the child need not, of itself, deprive the other parent of any of his parental rights under the 1973 Act, except in so far as those rights relate to actual custody.

(*c*) After the above two questions have been determined, the court must then decide whether the parent who is excluded from actual custody should continue to have some say in the way in which the child is brought up.

It is with question (*c*) above that we now concern ourselves.

The appropriate form of order

5.28 There will be cases where the court decides to give actual custody to one parent to the exclusion of the other, and in such cases the court should have power to give the sole legal custody of the child to the parent who is to have the actual custody. The parent with whom the child is living will then to able to exercise his or her parental rights and authority in relation to the child free from the restraints imposed by sharing those rights and that authority with another. No doubt in many cases this will be precisely the result the court wishes to achieve.

5.29 We do not, however, think that anyone would dispute that circumstances can sometimes arise where the court, recognising that a man has behaved responsibly towards his wife and children, wishes to give him the right, notwithstanding that his children have ceased to live with him, to intervene in and influence the outcome of the important decisions regarding their upbringing. By what sort of order can this result best be achieved?

5.30 In the past, the courts have dealt with this problem under the guardianship legislation by the making of a "split order" giving care and control of the child to one of the parties and custody to the other or to both of them. Where a "split order" gives custody to one and care and control to the other, the division of responsibility will no longer be so clear as it has been in the past, because the effect of section 87(2) of the Children Act 1975 will be that the person who has the actual custody of the child by virtue of having care and control will also have all the duties appertaining to legal custody[16]. There can be no doubt, we think,

[16] See para. 5.10 above.

that this will diminish the attractions and add to the complications of the "split order" which gives custody to one of the parties and care and control to the other. We should not therefore wish to encourage the courts to make such orders.

5.31 The sort of order which, in our view, would best meet the case where the position of the excluded parent merits sympathetic consideration would have the following features:—

(*a*) The mother (assuming she is the person in whose actual custody the court decides the child should live) would be free to exercise her full parental rights and authority without consulting the father.

(*b*) The father would, however, retain parental rights and authority in relation to the child, other than the right to actual possession of the child. He would also be entitled to access to the child.

(*c*) As the father would retain parental rights and authority, except for the right to actual custody, he would be entitled to his own point of view on the way in which the child was being brought up. Where he was in agreement with the mother's unilateral decisions regarding upbringing, he would not need to intervene in any way. Where, however, he thought she was mistaken in come course of action affecting the child's welfare, he should be entitled to apply to the court for their direction on the particular matter in issue.

5.32 It now remains to consider how to frame the provision which will best achieve the result we think is desirable. The Working Party seem to have contemplated a limited provision under which magistrates' courts could either give custody to one parent to the exclusion of the other or, if they thought the father's position merited sympathetic consideration, could leave equal rights of custody with both parents except that actual custody would be given to one parent only. We think that a formulation on these lines is somewhat too restrictive. We think that a magistrates' court in matrimonial proceedings should have power to order that one of the parties to the marriage shall have the legal custody of any child of the family. Where the court gives legal custody to one of the parties to the marriage, it should have power to order that the other party should retain all or any of the parental rights and duties comprised in legal custody (other than the right to actual custody of the child) and should have those rights and duties jointly with the person who is given legal custody. The court should also have power to confer rights of access to the child on the party not entitled to actual custody and on any other person who is a natural parent of the child.

5.33 To meet the situation described in paragraph 5.31(*c*) above, where a parent (who is excluded from having the children living with him but who retains custody rights) disagrees with the other party on any matter affecting the welfare of the children, we propose that separate provision should be made, on the lines of section 1(3) of the Guardianship Act 1973, enabling the excluded parent to apply to the court for its direction on the matter in issue. Section 1(3) of the 1973 Act cannot be relied on for this purpose, since application can be made under it only by one or other of a child's natural parents. A step-parent or other person who has treated a child as a "child of the family" may not apply.

Recommendations

5.34 *We recommend* as follows:—

(*a*) A magistrates' court in matrimonial proceedings should have power to order that one of the parties to the marriage shall have the legal custody of any child of the family. When the court gives legal custody to one of the parties to the marriage, it should have power to order that the other party shall retain all or any of the parental rights and duties comprised in legal custody (other than the right to actual custody of the child) and should have those rights and duties jointly with the person who is given legal custody. The court should also have power to confer rights of access to the child on the party not entitled to actual custody and on any natural parent.

(*b*) Separate provision should be made, on the lines of section 1(3) of the Guardianship Act 1973, for the resolution by a court of disputes between the parties to a marriage about the exercise or performance of a parental right or duty which they share.

(E) CUSTODY ORDERS IN FAVOUR OF THIRD PARTIES

The provisional proposal and the results of consultation

5.35 At the end of their discussion on the duration of orders the Working Party noted that, by implication under section 2(1)(*e*) of the 1960 Act, it was possible for a magistrates' court to award custody of a child to an individual other than one of the parties to the marriage. The Working Party proposed that this power should be made explicit[17].

5.36 This proposal has been generally approved in the consultation, and we agree with it in principle. We think, however, that in giving effect to the proposal it is desirable to draw a distinction between cases where the third party is a parent of the child but not a party to the marriage and other cases involving relatives, foster parents, etc. We see no reason why the court in matrimonial proceedings should not continue to be able to award the legal custody of a child to a parent of the child who is not a party to those proceedings. When the court makes such an order, it should have power to order that either party to the marriage in question shall retain all or any of the parental rights and duties comprised in legal custody, other than the right to actual custody of the child, and shall have those rights and duties jointly with the person who is given the legal custody of the child. There should be provision for the resolution of disputes on the lines recommended in paragraph 5.34(*b*) above. The court should also have power to confer rights of access to the child on either party to the marriage.

5.37 We think, however, that where the court has it in mind to award the legal custody of the child to a relative or foster parent or other person who is neither a party to the marriage nor a parent, what is required is a provision on the lines of section 37(3) of the Children Act 1975. That subsection provides that where, on an application under section 9 of the Guardianship of Minors Act 1971, the court is of opinion that legal custody should be given to a person other than the mother or father, it may direct the application to be treated as if

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[17] Working Paper No. 53, para 127.

it had been made by that person under section 33 of the Children Act 1975 and (if such is not the case) as if he were qualified to apply for a custodianship order; Part II of the Children Act (except section 40) then has effect accordingly.

Recommendations

5.38 *We accordingly recommend* as follows:—

(*a*) The reformulated magistrates' matrimonial law should contain a provision empowering the court to give the legal custody of a child to a parent of that child who is not a party to the marriage.

(*b*) When the court exercises that power, it should have power to confer rights of access to the child on either party to the marriage and power to direct that either party to the marriage shall retain all or any of the rights and duties comprised in legal custody (other than the right to the actual custody of the child) and shall have those rights and duties jointly with the natural parent. There should be provision for the resolution of disputes on the lines of section 1(3) of the Guardianship Act 1973 as recommended in paragraph 5.34(*b*) above.

(*c*) Where the court is minded to award legal custody to a person who is neither a parent nor a party to the marriage, it should have power to direct that that person shall be treated as if he had applied for a custodianship order under section 33 of the Children Act 1975 and (if such is not the case) as if he were qualified to apply for such an order.

(F) STAY OF EXECUTION OF CUSTODY ORDERS

The provisional proposals

5.39 The Working Party noted that there is no statutory provision that expressly empowers a magistrates' court to stay the execution of a custody order which it has made. They thought that it was nevertheless clear, on the basis of decided cases, that magistrates' courts do have such a power, both in relation to applications under section 9 of the Guardianship of Minors Act 1971 and applications under section 2(1)(*d*) of the 1960 Act. The main authority is *Re S. (an infant)*[18], where it was held that in appropriate cases the magistrates' court should direct that an order transferring custody from one parent to another should not take effect so as to allow an aggrieved party to ask the High Court to grant a stay pending an appeal. This decision was approved by Sir Jocelyn Simon P. in *B.* v. *B.*[19] when he said that the matter of the justices' power in granting a stay was put beyond doubt by the decision of the High Court in 1958. It was stated in *Smith* v. *Smith*[20] that although the first obligation is upon the advocate to ask for a stay of execution of the order pending an appeal, if he does not do so the justices should consider and apply a stay of execution of their own motion.

5.40 The Working Party had no doubt, therefore, that magistrates have the authority of decided cases to grant a stay. They suggested, moreover, that there was every reason to think that the decided cases were well known to justices'

[18] [1958] 1 W.L.R. 391.
[19] [1969] P. 103.
[20] (1971) 115 S. J. 444.

clerks and that stays were already granted whenever there was need of them. They thought nevertheless that there might be a case for conferring on magistrates an express statutory discretion to stay the execution of a custody order and for giving guidance as to the circumstances in which such a power might be used, because the extent of the existing power has never been precisely defined, and because there is uncertainty about such matters as the effect of staying an order upon any related maintenance order. They invited views on this question[21].

The results of consultation

5.41 There was general agreement in the consultation that magistrates should be given an express statutory discretion to stay the execution of a custody order. There was also general agreement that guidance could usefully be given to magistrates about the circumstances in which such a power might be used.

5.42 The main circumstance in which it was thought that such a power should be used was that where the magistrates made an order transferring custody of a child from one parent to the other. It was felt that the court ought as a matter of course to grant a stay in such cases, particularly if the parent from whose custody the child was to be removed had looked after the child for more than 12 months.

5.43 Another situation where it was felt that the magistrates ought usually to order a stay of execution was that where there was some risk that the child might be taken out of the jurisdiction. To meet this and other circumstances, it was suggested that magistrates should be given express statutory power to stay for 14 days the execution of a custody order which they had made in all cases where the child might be taken out of the jurisdiction or where such a stay was requested. If notice of intention to appeal were then given, the stay should continue for a further 28 days and thereafter, if the appeal was filed, until the hearing. The respondent should be free to apply to a judge of the Family Division to set aside the stay if the appeal was not prosecuted expeditiously.

5.44 One further situation was put forward in which it was felt that power to stay the execution of a custody order might be useful. This was where it was represented to the court that it would be for the convenience of all the parties concerned if the order did not take effect immediately, so that preparations could be made to receive the child; for example the parent to whom custody is transferred may need time to find accommodation.

5.45 We are grateful for these helpful suggestions. They make it quite clear that it will often be appropriate for the court (either on application or of its own motion) to postpone the coming into operation of a custody order which it has made. We think, however, that it is unnecessary and undesirable to impose on the court a positive requirement to postpone the coming into operation of custody orders in circumstances precisely defined by statute. In our view the better course would be to give the court a discretion, whenever it makes an order (whether interim or final) in regard to the custody of a child, to postpone the coming into operation of the order.

5.46 Section 54(1) of the Magistrates' Courts Act 1952 contains provisions which empower a magistrates' court to specify the time within which anything

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[21] Working Paper No. 53, para. 131.

ordered by the court is to be done. We do not think, however, that these provisions are wholly appropriate for enabling the court to postpone the coming into operation of a custody order. We propose that there should be an express provision enabling a magistrates' court to postpone the coming into operation of any custody order which it makes in matrimonial proceedings or proceedings under the Guardianship of Minors Acts 1971 and 1973.

Recommendation

5.47 *We accordingly recommend* that where a magistrates' court makes an interim or final custody order in matrimonial proceedings or in proceedings under the Guardianship of Minors Acts 1971 and 1973 the court should have power to postpone the coming into effect of the order for such period or until the occurrence of such event as may be specified in the order. It should be possible for the court to exercise its powers either on application or of its own motion, and the court should be able to extend the period of postponement in appropriate circumstances.

(G) ENFORCEMENT OF CUSTODY ORDERS

The provisional proposal on the Magistrates Courts' Act 1952

5.48 The Working Party noted that the only power available to a magistrates' court for enforcing a custody order is that contained in section 54 of the Magistrates' Courts Act 1952, which provides for orders other than for the payment of money to be enforced by a penalty not exceeding £1 for every day during which the default continues: or for commitment to prison until the defaulter has remedied his default. Under this provision a person who disobeys a custody order may not be ordered to pay more than £20 or be committed to prison for more than two months in all. The Working Party suggested that inflation has long since overtaken the financial penalties provided in the section and that the time had come when the daily penalty should be increased to £10 and the cumulative limit to £400. They did not see any need to increase the maximum term of imprisonment of two months[22].

The results of consultation

5.49 The provisional proposals were generally agreed on consultation. It was, however, suggested to us that there are certain unsatisfactory features about section 54 of the 1952 Act which are in need of attention namely:—

(*a*) there is some doubt whether, once the provisions of section 54(3) have been invoked for the breach of an order, further proceedings may be taken for a subsequent breach;

(*b*) it is unsatisfactory that (as provided by section 54(4)) any sum ordered to be paid under section 54(3) should be enforceable as a civil debt, since it is clear from the way in which the provision was framed that the sum was to be regarded in the nature of a fine imposed by the court for disobedience to its order rather than as a debt between the parties.

5.50 As regards the first point, it is evident that section 54(3) is in terms which could give rise to doubts and difficulties of construction. After consultation with

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[22] Working Paper No. 53, para. 132.

the Home Office, we have come to the conclusion that these doubts and difficulties should be resolved by a reformulation of the subsection in terms which make clear that further penalties may be imposed for any breach of an order which is subsequent to a breach for which penalties have already been imposed under the subsection.

5.51 As regards the second point, we think that monetary penalties imposed under the subsection should be treated for enforcement purposes as sums adjudged to be paid on a conviction.

5.52 The Working Party's proposal, consistently with their terms of reference, was that any increase in the maximum financial penalty under section 54(3) should be limited to the enforcement of custody orders and of what they called "non-molestation" orders. However, we are proposing that section 54 should be amended in other respects also and it does not seem satisfactory to limit the operation of the amendments to the enforcement of particular classes of orders. We think that the amendment which we are proposing to section 54(3) and (4) should be of general application.

Recommendations

5.53 *We recommend* that section 54 of the Magistrates' Courts Act 1952 should be amended as follows:—

(*a*) The financial penalties specified in subsection (3) should be increased to £10 for the daily penalty and £400 for the cumulative limit.

(*b*) Subsection (3) should be reformulated so as to enable further penalties to be imposed for breaches of an order subsequent to a breach for which penalties have already been imposed under the subsection.

(*c*) Subsection (4) should be amended to provide for sums ordered to be paid under subsection (3) to be treated for enforcement purposes as sums adjudged to be paid on a conviction.

The position under the 1960 Act and the guardianship legislation

5.54 In connection with the enforcement of custody orders, we have considered section 13(3) of the 1960 Act and section 13(1) of the Guardianship of Minors Act 1971, which contain provisions for the enforcement of custody orders made under those Acts. A custody order is not enforceable under these provisions except on behalf of a person to whom the legal custody of the child has been committed by the order. Although the difference may not be of great practical importance, we think that it is more logical to provide that enforcement proceedings may be brought under these subsections on behalf of any person who, under the court order, is for the time being entitled to the actual custody of the child, and we think that the subsections should be amended accordingly. Such an amendment would, incidentally, produce greater conformity between these subsections and the enforcement provisions of section 43(1) of the Children Act 1975.

Recommendation

5.55 *We accordingly recommend* that section 13(3) of the 1960 Act and section 13(1) of the Guardianship of Minors Act 1971 should be amended so

as to provide that the person on whose behalf enforcement proceedings may be brought is the person entitled, under the order of the court, to the actual custody of the child.

(H) CARE AND SUPERVISION ORDERS

Provisional proposals with regard to care orders: approved on consultation

5.56 The Working Party noted that there was a disparity between the powers of the divorce court to commit children to care and those of the magistrates under the 1960 Act. Section 2(1)(*e*) of the 1960 Act enables a magistrates' court which considers that there are exceptional circumstances making it impracticable or undesirable for a child under 16 to be entrusted to either spouse or to any other individual, to commit the care of the child to a local authority; this order ends at 18 by virtue of section 3(4) of the Act. The parallel provision for the High Court enables the court to exercise this power if the child is under the age of 17; such an order also ends at 18 under section 43 of the Matrimonial Causes Act 1973. The Working Party saw no reason for having the different ages under these two provisions, and they suggested that the magistrates' power should be the same as that of the High Court[23]. The provisional proposal was generally approved in the consultation.

5.57 We should add that it was also suggested to us that the magistrates' powers to commit to care should be widened by substituting the words "appropriate circumstances" for "exceptional circumstances" in section 2(1)(*e*) of the 1960 Act. The argument put forward in support of this suggestion was that though courts should not lightly make orders which have the effect of removing children from both their parents, they ought not to feel inhibited from doing so in any proper case. We do not accept this suggestion. We agree, of course, that the power to commit to care should be exercisable in any proper case. But we have no evidence that the terms in which the power is at present conferred are unduly restrictive in practice. We think that the power should be regarded as a power of last resort and we think it right in principle that the magistrates' powers, like those of the divorce court, to commit to care should be exercisable only in exceptional circumstances.

Recommendation

5.58 *We accordingly recommend* that in matrimonial proceedings a magistrates' court should have power, where there are exceptional circumstances which make it impracticable or undesirable for a child under the age of 17 to be entrusted to either of the parties to the marriage or to any other individual, to order that he shall be committed to the care of a local authority, the order to come to an end when the child reaches 18.

Provisional proposal with regard to supervision orders

5.59 Another discrepancy noted by the Working Party between the powers of magistrates' courts and those of the divorce court concerned orders for supervision[24]. Whereas under the 1960 Act (sections 2(1)(f) and 3(9)) a supervision order cannot be made after the age of 16 and any order made before the age of

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[23] Working Paper No. 53. paras. 137–139.
[24] *ibid.*, para. 138.

16 ends at that age, under the equivalent provisions for the High Court (section 44(1) of the Matrimonial Causes Act 1973) the power to make a supervision order is exercisable so long as an order for custody of the child lasts, *i.e.*, up to the age of 18. The Working Party considered that if magistrates were to be given power explicitly to make orders for custody which will run to 18, and to make *de novo* orders after 16, it would also be useful for them to have the power to make supervision orders linked with such custody orders, since there might be circumstances in which it would be desirable for a local authority or probation officer to have a supervisory role in order to assist the parent or other person to whom custody had been awarded. They therefore suggested that the magistrates' power should be brought into line with that of the High Court.

5.60 The Working Party further proposed that this power should be exercisable without restriction on the term of a supervision order (subject to its terminating at the age of 18). The term of the order should be left to the discretion of the court, there being available a power subsequently to vary or revoke the order on the application of any interested party[25].

The results of consultation

5.61 These proposals were generally approved in the consultation, though it was pointed out that the making of a supervision order linked with a custody order made *de novo* in respect of a child after the age of 16 might cause resentment unless the court first satisfied itself that the arrangement contemplated met with the child's approval. As we have already said, we think it unlikely, in practice, that a court would ever make a custody order *de novo* in relation to a child over the age of 16 without first establishing that the child was content with the arrangements contemplated by the order. Similar considerations would apply to any supervision order made at the same time.

5.62 It was also suggested on consultation that difficulties have arisen in the past because of uncertainty about whether a probation officer or local authority social worker supervising a child by virtue of an order under section 2(1)(f) of the 1960 Act was entitled to apply to the court for variation or revocation of the supervision order. We were told that in some courts the supervising officer was required to obtain the written consent of both the mother and the father before the court would entertain an application from him for revocation of the order.

5.63 If this is the practice in some courts, we feel bound to say that in our view it is not in accordance with the relevant statutory provisions. Section 10(1)(*f*) of the 1960 Act provides that a complaint for the variation or revocation of a provision of a matrimonial or interim order that a child be under the supervision of a probation officer or local authority, may be made by that probation officer or local authority, or by any other person to whose legal custody the child is for the time being committed by the order or who by the same complaint also seeks the legal custody of the child. The parties to the marriage are also entitled to make a complaint for the variation or revocation of a supervision order. There is no mention in the 1960 Act of any requirement for the probation officer or local authority to obtain written consent to his application.

[25] Working Paper No. 53, para. 139.

Recommendation

5.64 *We recommend* that where a magistrates' court in matrimonial proceedings has made a custody order in respect of a child, the power of the court to make a supervision order shall be exercisable at any time while the custody order continues in effect and shall be exercisable notwithstanding that the child has attained the age of 16.

(I) MAINTENANCE ORDERS FOR CHILDREN

Nature of the orders to be the same as for adults

(a) The provisional proposals and the results of consultation

5.65 The Working Party proposed that magistrates should be able to make the same types of order for the maintenance of children as they can make in respect of spouses. Specifically, they proposed that magistrates should be able to order periodical payments at such intervals as they consider appropriate; and that the court should, in appropriate circumstances, have power to award lump sum payments for children[26]. They realised that the latter power might not be used frequently, but they thought it would be a useful addition to the magistrates' powers, for example, to help pay for school uniform. As to orders for secured periodical payments, they thought that the same considerations applied in relation to children as applied to adults, and they did not therefore recommend that the magistrates should be given powers equivalent to those conferred on the divorce court by section 27(6)(*e*) of the Matrimonial Causes Act 1973[27].

5.66 These proposals were generally approved in the consultation. Differing views were, however, expressed on how to frame any provision enabling the magistrates to order payment of a lump sum in respect of a child. Since these views repeated those which had been expressed earlier in relation to the Working Party's proposal[28] that magistrates should have power to order lump sum payments for adults, we do not consider it necessary to discuss them here. We note, however, that one of the purposes for which the power to order a lump sum is useful is to meet maintenance expenses incurred before the date of the order. It was not suggested, either by the Working Party or by any of those whom we consulted, that the power to order payment of a lump sum should extend to cases where a care order has been made and maintenance is payable to a local authority. We are not satisfied that the power is required in those cases and we do not recommend it.

(b) Recommendations

5.67 *We recommend* as follows:—

(*a*) A magistrates' court in matrimonial proceedings should be able to order that periodical payments for the maintenance of a child should be made at such intervals as the court considers appropriate.

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[26] Working Paper No. 53, para. 141.
[27] See para. 2.31 above.
[28] See para. 2.34 above.

(*b*) The court should have power to order payment of a lump sum of up to £500 in respect of any child of the family; there should be power to vary the limit of £500 by Order in Council; and it should be possible to make a lump sum order not only on the occasion when maintenance is first ordered, but also on a subsequent occasion when there has been some change in circumstances.

(*c*) The power to order a lump sum should not extend to cases where a care order has been made and maintenance is payable to a local authority.

The persons to whom maintenance can be ordered to be paid

(a) The provisional proposals and the results of consultation

5.68 Another proposal made by the Working Party[29] concerned the persons to whom payments can be ordered to be made for the maintenance of a child. The Working Party noted that, whereas under what is now section 27(6)(*d*) of the Matrimonial Causes Act 1973 periodical payments can be ordered to be made to such person as may be specified in the order for the benefit of the child, or to the child himself, the corresponding provisions of the 1960 Act were in rather different terms. Under section 2(1)(*h*) of the 1960 Act, while the child is under 16 payments of maintenance are to be made to the person who has legal custody of the child by virtue of a court order, or to a local authority if the child is committed to care. Where the child is over 16 and dependent, payments under section 2(1)(*h*) of the 1960 Act may be ordered to be made to such person as may be specified in the order, including the child himself or any local authority having the care of the child. The Working Party proposed for the sake of consistency that the magistrates' matrimonial law should be brought into line with the law administered by the divorce court in this respect; they proposed that a similar amendment should be made in the Guardianship of Minors Act 1971 and the Guardianship Act 1973.

5.69 We have reconsidered this proposal in the light of the views expressed to us. It seems to us that there are advantages in giving to the magistrates some statutory guidance as to the persons to whom payment may be ordered to be made for the maintenance of a child. It appears to us that those persons should be:—

(*a*) a party to the marriage who has successfully applied for a maintenance order for the child;

(*b*) the child himself;

(*c*) a parent of the child (not being a party to the marriage) to whom the legal custody of the child is committed by an order made on the application; and

(*d*) in a case when the order commits the child to the care of a local authority that authority.

5.70 We accordingly propose that the reformulated law should make provision on the above lines. Provision should be made for securing that when the actual custody of the child is committed to the respondent to the application, the

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[29] Working Paper No. 53, para. 142.

court may order the applicant to make payments to the respondent for the child's maintenance.

5.71 Where the periodical payments are ordered to be made to the child himself, there have generally in the past been significant tax savings, because the payments have been deductible from the total income of the payer and have been free of tax in the hands of the child to the extent of his personal allowance. For the tax years 1969–70 to 1971–72, however, the tax advantages of ordering the payments to be made to the child himself were affected by the rule that the payments were to be treated as the income of any parent of the child in whose actual custody he was. In his budget speech in March 1974 the Chancellor of the Exchequer stated that the rule was to be restored; but this has not yet been done[30]. Any tax savings which can be achieved can be of great importance to a broken family, and we think it is proper that magistrates should have such considerations in mind when making an order[31].

5.72 Section 13(2) of the 1960 Act provides that where a magistrates' court in matrimonial proceedings makes an order for periodical payments to be made to any person, it may order the payments to be made to a third party on that person's behalf. This provision is useful in various cases, including cases where payments are to be made to a child, and we propose that it should be retained.

(b) Recommendations

5.73 *We recommend* that where, in matrimonial proceedings, a magistrates' court orders payments to be made for the maintenance of a child, the court should have power to order those payments to be made:—

(*a*) to a party to the marriage who has successfully applied for maintenance for the child;

(*b*) to the child himself;

(*c*) to any parent of the child (not being a party to the marriage) to whom the legal custody of the child is committed by an order made on the application;

(*d*) to a local authority to whose care the child is committed by such an order.

5.74 *We further recommend* that where in such proceedings the actual custody of the child is given to the respondent to the application, the court should have power to order the applicant to make payments to the respondent for the child's maintenance.

Orders to take into account the financial needs of the child

(a) The provisional proposal

5.75 Another proposal made by the Working Party[32] was that where the magistrates propose to make a maintenance order in respect of a child of the

[30] See *Tolley's Income Tax* 1975–76, 60th ed., p. 70 and the Note to para. 6.
[31] We revert to these tax advantages in para. 5.106 below.
[32] Working Paper No. 53, para. 144.

family, they should have regard not only to the factors other than conduct which the Working Party proposed should apply where application is made for a maintenance order in favour of a spouse, but also, specifically, to the financial needs of the child.

(b) Our own view of the factors to be taken into account

5.76 We have recommended[33] that the statutory guidelines which should apply where the magistrates order maintenance for a spouse should be no less comprehensive than those set out in section 25(1) of the Matrimonial Causes Act 1973. We take a similar view of the guidelines which should govern the award of maintenance by the magistrates for children.

5.77 Under section 25(2) of the 1973 Act, the divorce court, in deciding whether to exercise its powers to order maintenance for a child of the family, is required to have regard to the following matters:—

(*a*) the financial needs of the child;
(*b*) the income, earning capacity (if any), property and other financial resources of the child;
(*c*) any physical or mental disability of the child;
(*d*) the standard of living enjoyed by the family before the breakdown of the marriage;
(*e*) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained.

The court is further required so to exercise its powers as to place the child, so far as is practicable and, having regard to the income, earning capacity, property and other financial resources of each of the parties, and their financial needs, obligations and responsibilities, just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.

5.78 In section 25(3) of the 1973 Act, certain additional factors are set out to which the court must have regard in deciding whether and, if so, in what manner to exercise its powers to award maintenance against a party to a marriage in favour of a child of the family who is not the child of that party. The court is to have regard:—

(*a*) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time that party discharged such responsibility;
(*b*) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
(*c*) to the liability of any other person to maintain the child.

5.79 Many of the marriages which come before the magistrates will not have reached the stage of irretrievable breakdown. The guidelines mentioned in

[33] See para. 2.29 above.

paragraph 5.77 above require adjustment to take account of that fact. We think that the court should be required to have regard to all the circumstances of the case including the following matters:—

(*a*) the financial needs of the child;

(*b*) the income, earning capacity (if any), property and other financial resources of the child;

(*c*) any physical or mental disability of the child;

(*d*) the standard of living enjoyed by the family before the occurrence of the conduct relied on as the ground of application;

(*e*) the manner in which the child was being and in which the parties to the marriage expected him to be educated or trained;

(*f*) the income, earning capacity, property and other financial resources of those parties, and their financial needs, obligations and responsibilities;

(*g*) where appropriate, the guidelines set out in paragraph 5.78 above.

(*c*) ***Recommendation***

5.80 *We accordingly recommend* that in awarding maintenance for a child in matrimonial proceedings the magistrates should have regard to the guidelines listed in paragraph 5.79 above.

The age to which an order for maintenance should run

(*a*) ***The alternative proposals canvassed in the working paper***

5.81 The final question considered by the Working Party was the age to which an order for maintenance of a child should run[34]. Section 2(1)(*h*) of the 1960 Act provides that maintenance may be ordered for a child of the family up to the age of 16 and in certain circumstances beyond 16 but not later than the age of 21. If the child is 16 or over but not yet 21, an order can be made if it appears to the court that the child is or will be a dependant. By virtue of the definition of "dependant" in section 16(1) of the 1960 Act the following persons who have attained the age of 16 but are under 21 are dependants:—

(*a*) a person receiving full-time instruction at an educational establishment or undergoing training for a trade, profession or vocation in such circumstances that he is required to devote the whole of his time to that training for a period of not less than 2 years; or

(*b*) a person whose earning capacity is impaired through illness or disability of mind or body.

5.82 In the Matrimonial Causes Act 1973 the matter is covered by the provisions of section 29. The effect of this section is that a maintenance order in respect of a child may not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age, unless the court thinks it right in the circumstances to specify

[34] Working Paper No. 53, paras. 145–153.

a later date. The order may not in any event extend beyond the child's eighteenth birthday unless it appears to the court that:—

(*a*) the child is or will be, or if such provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of such provision.

The court may make an order in respect of a child who has attained the age of 18 subject to the same conditions. An order extended beyond or made after the age of 18 may continue indefinitely.

5.83 In considering whether the magistrates' powers should be brought into line with those of the divorce court, the Working Party put forward two possible alternatives for discussion.

5.84 The first alternative was to preserve the existing position under the magistrates' matrimonial legislation, making only such modifications as are necessary to bring the provisions of section 2(1)(*h*) of the 1960 Act more closely into line with those of section 29 of the 1973 Act. Section 2(1)(*h*) might thus be replaced by a provision that a maintenance order in respect of a child should not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age unless the court thinks it right in the circumstances to specify a later date. The court should have power to specify a date later than 18, or to make an order in respect of a child over the age of 18 and under 21, if it appears to the court that:—

(*a*) the child is or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) the child's earning capacity is impaired through illness or disability of mind or body.

Under this proposal a maintenance order in respect of a child would not run beyond the age of 21.

5.85 The second alternative was to provide that the powers of the magistrates should be the same as those of the divorce court, *i.e.,* the magistrates should generally have power to award maintenance until the child's majority but they should be able to award maintenance beyond that age if the child is continuing his education or training or if there are "special circumstances".

5.86 The Working Party thought that, in principle, the second approach was to be preferred. It seemed right to them that the divorce courts and the magistrates' courts should have the same powers to make orders in respect of children and that whether a particular child of a broken marriage received maintenance or not should not depend upon which court deals with the matrimonial dispute. They noted that the Law Commission, when canvassing public opinion on a proposal that was to become section 8(3)(*b*) of the Matrimonial Proceedings and Property Act 1970 (now section 29(3)(*b*) of the Matrimonial

Causes Act 1973) had found public opinion strongly in favour of giving the divorce court in appropriate circumstances the power to order maintenance for adult children; and they thought it might be that public opinion would favour similar powers being conferred upon the magistrates. On the other hand, they were concerned lest objection might be raised to giving the magistrates a wide jurisdiction of this sort. It would be possible, the Working Party recognised, to give magistrates guidance as to what constituted "special circumstances", for example, impairment of earning capacity by disablement or illness. Another possibility which the Working Party discussed was to define precisely the circumstances in which magistrates should have power to award maintenance beyond the age of 18.

5.87 If magistrates' courts were given jurisdiction to award maintenance to a child beyond his majority either in special circumstances or in precisely defined circumstances such as where the child's earning capacity was impaired by disablement or illness, the magistrates would have power, at least in theory, to order a parent to maintain a child for the rest of his life. Moreover, in a case where the matrimonial breakdown occurred after the child had reached the age of 18, there would be power to award maintenance to an adult child whom the parents had not hitherto been maintaining. In view of these possible consequences of introducing consistency between the provisions of the magistrates' matrimonial legislation and the divorce legislation, the Working Party did not feel able to arrive at firm proposals. Instead, they invited views on the following questions: whether it was desirable or appropriate that the magistrates should have power to make or continue orders beyond the age of majority, and if so, whether those powers should be identical with those of the divorce court or more closely defined.

(*b*) *The results of consultation*

5.88 On consultation, there was fairly general agreement that magistrates should in appropriate circumstances have power:—

(*a*) in the case of a child under the age of 18, to make an order for maintenance for a period extending beyond that age; and

(*b*) in the case of a child over the age of 18, to make an order for his maintenance notwithstanding that he is over that age.

Most of those who commented on this subject thought that the powers of magistrates in these respects should be the same as those of the divorce court under what is now section 29 of the Matrimonial Causes Act 1973; some, however, thought that the powers should only be exercisable in circumstances precisely defined by statute. We think that the "special circumstances" provision of section 29(3)(*b*) of the 1973 Act is most likely to be used in cases where the child's earning capacity is impaired by disability. The provision does, however, allow for the possibility of other situations and so has the merit of flexibility. We think that that advantage, coupled with the obvious convenience of having the same code both for magistrates' courts and divorce courts, are sufficient reasons for providing that magistrates should have the same powers as the divorce court.

(*c*) *Recommendations*

5.89 *We recommend* that the provisions as to the duration of orders for the

maintenance of children made by magistrates in matrimonial proceedings should be modelled on section 29 of the Matrimonial Causes Act 1973; and that, subject to conditions similar to those prescribed in that section, magistrates should in such proceedings have power:—

(*a*) in the case of a child under the age of 18, to make an order for his maintenance for a period extending beyond that age;

(*b*) in the case of a child over the age of 18, to make an order for his maintenance notwithstanding that he is over that age.

The persons who may apply for maintenance

(a) No change proposed in the working paper

5.90 Before leaving the question of maintenance for children, there is one further point we must mention. This concerns the persons who may apply for an order for maintenance of a child. The Working Party did not propose any change in the law on this point; they thought that the persons entitled to apply for a maintenance order for a child should continue to be one or other of the parties to the marriage[35].

(b) Discussion of the views expressed on consultation

5.91 It was, however, pointed out to us on consultation that difficulties might occasionally be caused in cases where a child of the family over 18 had not been awarded maintenance prior to that age or, if so awarded, had good reason for seeking to vary an existing order made in his favour. It was suggested to us that, in order to provide a remedy for the situation where neither of the parties to the marriage would consent to take the necessary proceedings, consideration should be given to the possibility of enabling a child of the family over the age of 18 to take proceedings in his own right for maintenance or for variation of an existing order made in his favour.

5.92 There is no express provision in the Matrimonial Causes Act 1973 or in the Matrimonial Causes Rules 1973 to enable a child of the family who is of full age to apply for a maintenance order for himself or for variation of an existing order made in his favour[36]. However, in the recent case of *Downing* v. *Downing, (Downing intervening)*[37] Payne J. held that where the parents of a child had been divorced, the child herself, she being a person of full age who was receiving instruction at an educational establishment, might apply in the divorce proceedings for an order for maintenance against her parents. A precedent for an express statutory provision to enable a child over the age of 18 to apply for maintenance for himself is to be found in section 12(2) of the Guardianship of Minors Act 1971, which, so far as material, provides that where a person who has ceased to be a minor but has not attained the age of 21 had, while a minor, been the subject of an order under the Act, the court may, on the application of either parent of that person or of that person himself, make an order requiring either parent to pay:—

[35] Working Paper No. 53, para. 143.

[36] In paragraph 42 of our Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) we recommended that such express provision be made. This recommendation was not implemented.

[37] [1976] 3. W.L.R. 335.

(*a*) to the other parent;

(*b*) to anyone else for the benefit of that person; or

(*c*) to that person himself,

in respect of any period not extending beyond the date when he attains the age of 21, such weekly or other periodical sum towards his maintenance as the court thinks reasonable having regard to the means of the person on whom the requirement is imposed.

5.93 The question whether a child over 18 should have a general right to claim maintenance against his own parents raises questions of policy which extend beyond the scope of this report (which is primarily concerned with the matrimonial law administered in magistrates' courts) and which would require, for their full treatment, investigations substantially more extensive than we have undertaken. We do not think it would be right for us, in this report, to make a recommendation on such a point of principle, and we confine ourselves to dealing with the subsidiary point mentioned in the following paragraph.

5.94 The case which we have in mind as deserving of special attention is the case where a maintenance order made for the benefit of a child who is under 18 is to cease to have effect on his attaining that age. The order may have been made before there is any clear evidence as to how the child is going to shape his life on attaining the age of 18; but, at or about the time he attains that age, he may decide that he wishes to receive instruction at an educational establishment or to undergo training for a vocation. For that purpose he may require—

(*a*) a variation of the order to extend it beyond the age of 18, and

(*b*) a variation of the amount payable under the order.

But two difficulties may stand in his way. The first is that, unless special provision is made, he will not himself be able to apply for such variation while he is under the age of 18. The second is that, once he has attained the age of 18 the order will cease to have effect, and it may be said that the order having expired, it is too late to apply for it to be varied as to duration or as to amount. We think that provision should be made to remove both of these difficulties.

5.95 We therefore propose that where a maintenance order is in force for the benefit of a child who has attained the age of 16 years, he should himself be able to apply for a variation of the order. The powers of the court on such an application would include power to vary the order both as to amount and as to duration[38]. We further propose that where a maintenance order has ceased to have effect on a child attaining the age of 18 years or at any time within the two years preceding his attaining that age he may, at any time before attaining the age of 21, apply to the court to revive the order with variations; the variations which the court would have power to make would include variations both as to duration and as to amount[39].

[38] The court would of course have power on such an application to make other variations; for example, a variation requiring payments under the order to be made to the child himself instead of to a parent. Here and elsewhere, our references to "amount" and "duration" are not intended to imply a restriction, but merely to illustrate the kind of variation which may be needed.

[39] In paras. 9.23 and 9.24 below we propose amendments of the Matrimonial Causes Act 1973 to make similar provision in regard to orders made under s. 27 of that Act.

Recommendations

5.96 *We accordingly recommend* as follows:—

(*a*) Where a maintenance order made by a magistrates' court in matrimonial proceedings is in force for the benefit of a child who has attained the age of 16 years, he should himself be able to apply for a variation of the order. The powers of the court on such an application should include power to vary the order both as to amount and as to duration.

(*b*) Where such a maintenance order has ceased to have effect on a child attaining the age of 18 years or at any time within the two years preceding his attaining that age, he may, at any time before attaining the age of 21 apply to the court to revive the order with variations. The variations which the court should have power to make on such an application would include variations as to duration and as to amount.

(J) THE EFFECT OF COHABITATION ON ORDERS FOR THE MAINTENANCE, CUSTODY, CARE AND SUPERVISION OF CHILDREN

Introductory

5.97 In Part II of this report we have dealt with the provision of financial relief as between the spouses themselves and the effect of cohabitation in that context. We must now consider what should be the effect of cohabitation by the spouses upon an order for the maintenance or for the custody of children. We begin by stating the existing law.

5.98 Section 7(1) of the 1960 Act provides that a matrimonial or interim order made while the parties to the marriage are cohabiting is not to be enforceable until they have ceased to cohabit. It further provides that, if they continue to cohabit for the period of three months beginning with the date of making of a matrimonial order, the order shall cease to have effect at the expiration of that period. The expression "matrimonial order" means any order made under section 2(2) of the Act: it accordingly includes not only orders requiring one spouse to make payments for the maintenance of the other, but also orders relating to the custody of children and orders requiring one or both of the parties to pay maintenance for the children.

5.99 On the other hand the provisions of section 7(1) of the 1960 Act do not, unless the court otherwise directs, extend to any provision of an order:—

(*a*) committing a child to the custody of a person other than one of the parties, or for access to that child by either of the parties or a parent;

(*b*) committing a child to the care of a local authority, or providing for a child to be under the supervision of a probation officer or a local authority;

(*c*) requiring either or both of the parties to make payments for the maintenance of a child to a person other than one of the parties.

5.100 Section 7(2) of the 1960 Act provides that a matrimonial or interim order shall cease to have effect on the parties to the marriage resuming cohabitation. This does not, however, apply to any provision in the order of the kind described in paragraph 5.99 above.

Maintenance to be paid to a party to the marriage

(*a*) ***Our present view***

5.101 In paragraph 2.65 above we have recommended that an order requiring one spouse to pay maintenance to the other should be enforceable during a 6 months' period of cohabitation and in paragraph 2.57 we have recommended that after a continuous period of cohabitation for 6 months such an order should cease to have effect. We think it would be unrealistic to attempt to draw a distinction between the case where maintenance is payable in respect of a spouse and that where maintenance is payable in respect of a child; nor would any useful purpose be served by drawing this distinction.

(*b*) ***Recommendation***

5.102 *We therefore recommend* that where in matrimonial proceedings a magistrates' court makes an order requiring one spouse to pay to the other periodical payments for the maintenance of a child, the order should be enforceable while the parties are cohabiting except that if there is continuous cohabitation for a period exceeding 6 months after the date of the order, the order should cease to have effect.

Maintenance to be paid to a third party

(*a*) ***Our present view***

5.103 Where either or both of the parties to the marriage is required to make payments to a third party for the maintenance of a child different considerations apply. We deal later in paragraphs 5.106–5.107 below with the case where either or both of the parties is ordered to make payments for the maintenance of a child to the child himself. For the moment we are concerned with cases where the payments are required to be made to a person other than one of the parties to the marriage and other than the child himself, and we use the expression "third party" in that sense.

5.104 Under our recommendations in paragraph 5.73 above, there are two cases in which an order may require payments for the maintenance of a child to be made to a third party:—

(*a*) where the court orders that a parent of the child who is not a party to the marriage shall have the custody of the child, the court may order payment for the maintenance of the child to be made to that parent;

(*b*) where the court orders that a child shall be committed to the care of a local authority, the court may order payments for the maintenance of the child to be made to that authority.

These are cases in which the child is not intended by the court to be in the control of either party to the marriage. In such cases, for so long as the custody or care order itself remains in force, the fact that the parties to the marriage are or are not cohabitating will in many cases be irrelevant to the provision which needs to be made for the maintenance of the child. We therefore think that the general rules should be that cohabitation between the parties to the marriage should not affect either the duration of the maintenance order or its enforceability.

However, in order to secure a necessary degree of flexibility, the application of the general rule should be subject to any directions given by the court in individual cases.

(b) Recommendation

5.105 *We accordingly recommend* that where in matrimonial proceedings a magistrates' court, having made a custody order in favour of a parent of a child who is not a party to the marriage, or having made an order committing a child to the care of a local authority, makes an order requiring periodical payments for the maintenance of the child to be made by one of the parties to the marriage to that parent or authority, then, for so long as the custody or care order remains in force, cohabitation between the parties to the marriage should not, unless the court otherwise directs, affect the duration of the maintenance order or its enforceability.

Maintenance to be paid to the child himself

(a) Our present view

5.106 Where the court orders maintenance for a child, there are at least two possible reasons why the court may decide that the payments should be made to the child himself. One reason, explained in paragraph 5.71 above, is that payment to the child himself may have tax advantages. Another reason, which may exist in the case of some older children, is that the child is wholly or partly independent of his parents. If the child of a broken marriage is reasonably mature and responsible, and is living with a relative and embarking on a career of his own, it may well be appropriate that payments for his maintenance should be made to him. In such a case the fact that his parents are or are not cohabiting may be irrelevant to the provision which needs to be made for his maintenance. But there will be other cases where maintenance is payable to the child himself and where the continuation or resumption of cohabitation between his parents ought to affect the duration or enforceability of the maintenance order. The law should be sufficiently flexible to meet the various cases which may occur, and we think that to secure this result the court should have a discretion to give the appropriate direction in individual cases. We think that the appropriate provision is that, unless the court otherwise directs, cohabitation between the parties to the marriage shall not affect the duration or enforceability of an order for the maintenance of a child which requires periodical payments to be made to the child himself.

(b) Recommendation

5.107 *We accordingly recommend* that where a magistrates' court in matrimonial proceedings makes an order requiring periodical payments for the maintenance of a child to be made to the child himself, the order shall, unless the court otherwise directs, continue to have effect and be enforceable notwithstanding the continuation or resumption of cohabitation between the parties to the marriage.

Custody order to one of the parties to the marriage

(a) Our present view

5.108 In the case where the order commits the child to the custody of one of

the parties to the marriage, the fact that the parties are cohabiting is clearly relevant to the practical utility of the order. If the cohabitation between the parties to the marriage continues for a substantial period, that is, we think, evidence that they have become reconciled or at least are living in circumstances in which the continuation of a custody order in favour of one of the parties does not correspond with the reality of the circumstances in which the family are living. We think that after a period of six months during which the parties have continuously cohabited, a custody order made in favour of one of them in proceedings against the other should cease to have effect. On the other hand we see no reason why an order committing the child to the custody of one of the parties to the marriage should not be enforceable against all persons (including the other party to the marriage) for so long as it remains in effect.

(b) Recommendation

5.109 *We accordingly recommend:—*

(*a*) That an order made by magistrates in matrimonial proceedings committing a child to the custody of one of the parties to a marriage should cease to have effect if the parties cohabit for a continuous period exceeding 6 months after the date of the order.

(*b*) That for so long as the order remains in effect it should be enforceable against all persons, including the other party to the marriage.

Custody order to a parent who is not a party to the marriage and care and supervision orders

(a) Our present view

5.110 In the case where the court has made a custody order in respect of a child in favour of a parent who is not a party to the marriage, the court has made dispositions designed to withdraw the child from the control of both parties to the marriage. The circumstances in which those parties are living are, for the purposes of the custody order, likely to be irrelevant. There may, however, be exceptional cases in which it may be right to make the duration and enforceability of such a custody order dependent on whether the parties to the marriage are living with each other.

5.111 We therefore propose that the general rule should be that the enforceability and duration of such a custody order should not be affected by the continuation or resumption of cohabitation between the parties to the marriage, but that this general rule should be subject to any special direction which the court thinks it right to include in the order in any particular case.

5.112 Where the court has made a care order or a supervision order, we think that the continuation or resumption of cohabitation between the parties to the marriage will in many cases be irrelevant to the question whether the order ought to continue in effect and continue to be enforceable. We therefore propose that the general rule should be that the enforceability and duration of such an order should not be affected by the continuation or resumption of cohabitation between the parties to the marriage, but that this general rule should be subject to any special direction which the court thinks it right to include in the order in any particular case.

(*b*) *Recommendation*

5.113 *We accordingly recommend* that where in matrimonial proceedings a magistrates' court has made an order:—

(*a*) committing a child to the custody of a parent who is not a party to the marriage; or

(*b*) committing a child to care or providing that the child shall be under supervision;

then, unless the court otherwise directs, the duration and enforceability of the order shall not be affected by the continuation or resumption of cohabitation between the parties to the marriage.

(K) VARIATION AND REVOCATION OF ORDERS IN RESPECT OF CHILDREN

The views of the Working Party reconsidered

5.114 The Working Party referred to the wide power of magistrates' courts under their existing matrimonial jurisdiction to vary or revoke orders relating to children[40]. The Working Party saw no reason to limit the width of those powers, and we are in general agreement with that conclusion. We think that on an application to vary or revoke such an order the court should have a discretion to make whatever order it thinks appropriate having regard to all the circumstances, including any change in any of the matters to which the court was required to have regard when making the original order.

5.115 Section 10 of the 1960 Act makes provision as to the persons who may apply for the variation or revocation of orders made under the Act. So far as orders relating to children are concerned, the principle of the section is that the right to apply for variation or revocation should be conferred on all persons with a sufficient interest, including the child himself where maintenance payments have been ordered to be made to him or where he seeks an order that such payments should be made to him. We have set out in paragraph 5.96 above our recommendations as to the circumstances in which a child should himself be entitled to apply for the variation of a maintenance order made in his favour. Leaving aside applications by the child himself, we think that the reformulated law should, like section 10 of the 1960 Act, embody the principle that the right to apply for the variation or revocation of orders relating to children should be conferred on all persons with a sufficient interest. Some departures from section 10 are necessary because under our proposals a magistrates' court in matrimonial proceedings will not have power to give legal custody of a child to a person other than a party to the marriage or a parent of the child[41]. We think that the substance of section 10 should be reproduced with such modifications as are required for this reason.

5.116 We think it possible to achieve this result while at the same time adopting a somewhat simpler formulation than that which is embodied in section 10, and our proposals are as follows:—

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[40] Working Paper No. 53, para 164. The existing powers of variation and revocation are contained in the 1960 Act, ss. 4, 8 and 9.

[41] See paras. 5.36–5.38 above.

(*a*) the persons entitled to apply for the variation or revocation of an order relating to a child made by magistrates in matrimonial proceedings should include the parties to the marriage which was the subject of the original proceedings;

(*b*) where the child is not the natural child of both the parties to the marriage which was the subject of the original proceedings a natural parent of the child should be entitled to apply for the variation or revocation of any order providing for the custody, care or supervision of the child;

(*c*) where an order provides for a child to be under the supervision of a local authority or probation officer, that authority or officer should be entitled to apply for its variation or revocation;

(*d*) where an order commits a child to the care of a local authority, that authority should be entitled to apply for its variation or revocation;

(*e*) where an order provides for the making of periodical payments for the maintenance of a child whom the court has committed to the custody of a natural parent of the child, or to the care of a local authority, that parent or authority should be entitled to apply for variation or revocation of the order.

5.117 Where the court has ordered the payment of a lump sum for the benefit of a child of the family, it may have made an order for the payment of the sum by instalments. We think that an application for the variation of the instalments should be capable of being made by the person by whom or the person to whom the instalments are payable.

Recommendations

5.118 *We accordingly recommend* as follows:—

(*a*) On an application to vary or revoke an order relating to a child made by magistrates in matrimonial proceedings, the court should have a discretion to make whatever order it thinks appropriate having regard to all the circumstances including any change in any of the matters to which the court was required to have regard when making the original order.

(*b*) The following should be entitled to apply for the variation or revocation of such an order:—

(i) The parties to the marriage which was the subject of the original proceedings.

(ii) In the case of an order providing for the custody, care or supervision of the child, a natural parent of the child.

(iii) In the case of an order placing the child under the supervision of a local authority or probation officer, that authority or officer.

(iv) In the case of an order committing the child to the care of a local authority, that authority.

(v) In the case of an order providing for the making of periodical payments for the maintenance of a child whom the court has

committed to the custody of a natural parent of the child, or to the care of a local authority, the natural parent or local authority.

(*c*) In the case of an order providing for the payment of a lump sum for the benefit of a child and for the payment of the lump sum by instalments, an application for the variation of the instalments should be capable of being made by the person by whom or the person to whom the instalments are payable.

PART VI: ORDERS IN RESPECT OF CHILDREN IN GUARDIANSHIP PROCEEDINGS

(A) THE PROPOSALS IN WORKING PAPER NO. 53 RECONSIDERED

Introductory

6.1 The following are the provisions in the Guardianship of Minors Act 1971 which are relevant to the matters we deal with in this Part of our report:—

(*a*) section 9 provides for the making of a custody order on the application of either of the natural parents of a child, and it also empowers the court[1], where it has made a custody order under the section in relation to a legitimate child[2], to require a natural parent of the child to make periodical payments for the maintenance of the child;

(*b*) section 10 contains powers to make orders as to the custody and maintenance of a child in cases where the court has appointed a person to be the sole guardian of a child to the exclusion of the mother or father;

(*c*) section 11 contains powers to make orders as to custody and maintenance of a child where there is a disagreement between two or more persons who are joint guardians of the child and one of those persons is the child's mother or father.

6.2 It is apparent that there is a considerable overlap between the cases in which the powers conferred by section 9 of the 1971 Act are exercisable and the cases in which the magistrates have power to make orders as to the custody and maintenance of children in the exercise of their matrimonial jurisdiction. One consequence of the overlap is, as the Working Party pointed out[3], that the provisions of section 9 are at present capable of being used and frequently are used to resolve matrimonial disputes.

The general approach adopted by the Working Party

6.3 The Working Party did not think that there was anything necessarily wrong with this state of affairs. Under their own provisional proposals, there was to remain a large area of overlap between the cases in which jurisdiction

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[1] Under section 15 of the 1971 Act jurisdiction is given to the High Court, the county court and to magistrates' courts.

[2] If the child is illegitimate there is no such power: s. 14(2) of the 1971 Act. The mother must obtain an affiliation order.

[3] Working Paper No. 53, para. 154.

is exercisable under section 9 of the 1971 Act and the cases in which magistrates have jurisdiction to make orders in respect of the custody and maintenance of children in matrimonial proceedings. In those circumstances, they very naturally thought it right that magistrates should exercise much the same powers in respect of children whether the proceedings are brought under the matrimonial legislation or the guardianship legislation. With the object of bringing about a desirable measure of assimilation, the Working Party proceeded to examine the provisions of the Guardianship of Minors Acts 1971 and 1973 ("the Guardianship Acts"), which are concerned with the custody, care and maintenance of children.

The results of consultation

6.4 This general approach of the Working Party to the guardianship legislation was broadly approved on consultation. Two commentators questioned, however, whether it was right that jurisdiction under section 9 of the Guardianship of Minors Act 1971 should be narrower than under the matrimonial legislation, in that under section 9 an application as to custody can only be made by a natural parent of the child and an order for maintenance can only be made against such a parent; the conception of a "child of the family" is thus absent from the section. It was represented to us that where, for example, a widow with young children remarried and the children were maintained for years by her second husband, she ought to be able to obtain maintenance for them from him not only under the matrimonial legislation, but also under the guardianship legislation.

6.5 In the situation posed in the example put to us, it is almost certain that the children would be "children of the family" of the second marriage, and, if so, the wife would in a proper case be able to obtain a maintenance order against her second husband in respect of them from the magistrates in the exercise of their matrimonial jurisdiction. No practical purpose would be served by extending the guardianship legislation so as to produce precisely the same result. We therefore do not think it necessary to introduce the conception of a "child of the family" into the guardianship legislation. Nor is it within the scope of this report to embark on a general examination of the basis of the jurisdiction to make orders in respect of custody and maintenance under the guardianship legislation. In this report we are concerned with that legislation only in so far as it is necessary to avoid the creation of anomalies in consequence of our recommendations as to the matrimonial law administered by magistrates' courts. Our approach to the guardianship legislation is therefore in principle the same as that of the Working Party.

The scope of our recommendations

6.6 From what we have just said it follows that, if our recommendations for reform of the matrimonial law administered in magistrates' courts are acceptable, the changes which will be required for the sake of consistency in the custody and maintenance provisions of the guardianship legislation are, we think, largely self-evident. We are therefore able to deal with them comparatively briefly. We begin with changes in the substantive law.

(B) CUSTODY ORDERS

Age limits

6.7 Though the Guardianship Acts do not in terms provide that a custody order made under the Acts may continue until the minor attains his majority, it is clear beyond argument that this is the case, and we do not think that it is necessary to amend the Acts by including an express provision to this effect.

6.8 Section 15(2)(*a*) of the Guardianship of Minors Act 1971 provides that a magistrates' court shall not have power to make a new custody order relating to a minor who is 16 or over, unless the minor is physically or mentally incapable of self-support. The Working Party proposed[4] that the power to make custody orders relating to minors of 16 or over should no longer be subject to that restriction. This was generally approved on consultation. In paragraph 5.22 above we have recommended that the magistrates' matrimonial law should enable a custody order to be made *de novo* in respect of a child between the ages of 16 and 18. We think that the powers of magistrates under the guardianship law should be equally extensive, and we think that the restrictions imposed by section 15(2)(*a*) should be wholly removed.

Recommendation

6.9 *We accordingly recommend* that a magistrates' court should have power under the guardianship legislation to make a custody order *de novo* in respect of any child up to the age of 18, and that section 15(2)(*a*) of the Guardianship of Minors Act 1971 should be repealed.

Award of custody to a third party

6.10 Section 9 of the Guardianship of Minors Act 1971, as amended by the Guardianship Act 1973, expressly contemplated that an order might be made under the section awarding the custody of a child to a third party, that is to say, a person other than a natural parent of the child. The section has now been further amended by paragraph 75 of Schedule 3 to the Children Act 1975, and the result will be that the court will have no power under the section to award custody to a third party. These further amendments of the section are consequential on section 37 of the 1975 Act, which provides that where, on an application under section 9 of the 1971 Act, the court is of opinion that legal custody should be given to a person other than the mother or father, it may direct the application to be treated as if it had been made by that person under section 33 of the 1975 Act and (if such is not the case) he were qualified to apply for a custodianship order. It is therefore unnecessary for us to consider further the question of third parties in connection with section 9.

6.11 Sections 10 and 11 of the 1971 Act, to which we have referred in paragraph 6.1 above, remain unaffected by subsequent legislation. Under each of these sections there is power to award custody of a child to a third party. These powers are required as part of the guardianship code, and there is no occasion to modify them in consequence of our recommendations for reform of the magistrates' matrimonial law.

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[4] Working Paper No. 53, para. 155.

The nature of the custody orders which may be made

6.12 In sections (D) and (E) of Part V of this report, we have discussed the nature of the custody orders which a magistrates' court should have power to make in matrimonial proceedings. Our principal recommendations are set out in paragraphs 5.34(*a*) and 5.38. The essential feature of those recommendations is that where the court gives the legal custody of a child to any person (whether a party to the marriage or a third party), it should have power to order that any party to the marriage who does not have the legal custody of the child under the order shall retain parental rights and duties other than the right to actual custody of the child, and shall have those rights and duties jointly with the person who is given legal custody.

6.13 The guardianship legislation is not concerned with the rights and duties of the parties to a marriage as such, but with the rights and duties of the natural parents of a child. Making allowances for that difference, it seems to us that the powers of the court to make custody orders under sections 9, 10 and 11 of the 1971 Act should be framed on similar lines to those which we have recommended in paragraphs 5.34(*a*) and 5.38 above. They should be expressed in terms of "legal custody" as that expression is defined in section 86 of the Children Act 1975, and they should provide that where in the exercise of those powers the court gives the legal custody of a minor to any person, it may order that a parent of the minor who is not given the legal custody shall retain parental rights and duties other than the right to actual custody of the child, and shall have those rights and duties jointly with the person who is given legal custody.

Recommendations

6.14 *We accordingly recommend* as follows:—

(*a*) The powers of the court to make custody orders under sections 9, 10 and 11 of the Guardianship of Minors Act 1971 should be expressed in terms of "legal custody" as that expression is defined in section 86 of the Children Act 1975.

(*b*) It should be provided that where, in the exercise of those powers, the court gives the legal custody of a minor to any person, it may order that a parent of the minor not given the legal custody shall retain parental rights and duties other than the right to actual custody of the child, and shall have those rights and duties jointly with the person who is given legal custody.

(C) CARE AND SUPERVISION ORDERS

The present age limits

6.15 Section 2(2) of the Guardianship Act 1973 provides for the making of care and supervision orders on applications relating to the custody of minors under section 9 of the 1971 Act. Neither a care order nor a supervision order may be made under the powers conferred by the section if the child has attained the age of 16 years. A care order continues until the child attains the age of 18, but a supervision order ceases to have effect when the child attains 16.

6.16 These provisions are modelled on provisions of the 1960 Act which we have discussed in Section (H) of Part V above. Our recommendations as to amendment of the provisions of the 1960 Act are contained in paragraphs 5.58 and 5.64. It is sufficient to say that for similar reasons, and also for the sake of consistency, we think that the provisions of the 1971 Act should be similarly amended.

Recommendations

6.17 *We accordingly recommend* as follows:—

(*a*) The power of the court to commit a child to the care of a local authority under section 2(2) of the Guardianship Act 1973 should be exercisable in respect of children up to the age of 17.

(*b*) The power of the court to order supervision under that section should be exercisable in the case of any child under the age of 18 years, and a supervision order under the section should be capable of remaining in force until the child attains that age.

(D) MAINTENANCE FOR CHILDREN

Introductory

6.18 In Section (I) of Part V above, we have expressed our views on the powers of magistrates' courts to make orders for the maintenance of children in matrimonial proceedings. In dealing with the powers of the courts to make orders for the maintenance of children in proceedings under the guardianship legislation, we shall consider briefly the nature of the financial provision which may be ordered, the persons by and to whom maintenance may be ordered to be paid, the guidelines which should govern the making of orders, the age to which orders should run, and the persons who may apply for a maintenance order.

The nature of the financial provision which may be ordered

6.19 Under sections 9, 10 and 11 of the Guardianship of Minors Act 1971, the courts already have the power, which we have proposed should be conferred on magistrates' courts in matrimonial proceedings, to order periodical payments at such intervals as they consider appropriate. We have proposed that magistrates' courts in matrimonial proceedings should also have power to award a lump sum in respect of a child[5]. Such a power is not at present available where the court makes a custody order in respect of a child under the guardianship legislation. We think that, where a court has power to make a maintenance order under sections 9, 10 or 11 of the 1971 Act, it should have the like powers to order the payment of a lump sum for the benefit of the child as we have recommended should be conferred on magistrates' courts in matrimonial proceedings.

The persons by and to whom maintenance may be ordered to be paid

6.20 Under sections 9, 10 and 11 of the Guardianship of Minors Act 1971,

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[5] Para. 5.67 above.

the person who may be ordered to pay maintenance is a natural parent of the child. No change is necessary, except in one respect. Under section 9 in its present form, a maintenance order may only be made against a parent who is excluded from having the custody of the child. In paragraph 5.34(*a*) above we have recommended that the court should have power to make a form of "split" order under which a parent excluded from actual custody may nevertheless retain certain parental rights and duties. We think it necessary to make clear that an order for maintenance under section 9 may be made against such a parent, and we therefore propose that the section should be amended to provide that a maintenance order may be made against any parent excluded from actual custody of the child.

6.21 Under section 9 of the 1971 Act, maintenance payments are to be made to the person who is given the custody of the child under the court's order. Under section 10 of the Act maintenance payments are to be made to the child's guardian. There is no provision in section 11 as to the person to whom maintenance payments are to be made; no doubt they are intended to be made to the other joint guardian, and this should be made clear. The Act contains no provision for the making of maintenance payments to the child himself, except in the special case, dealt with in section 12, of a child between the ages of 18 and 21. In paragraph 5.73 above, we have recommended that a magistrates' court in the exercise of its matrimonial jurisdiction should have a general power to order payments for the maintenance of a child to be made to the child himself. We think that courts ordering the payment of maintenance under the guardianship legislation should have a similar general power.

Guidelines

6.22 In paragraph 5.80 above we have made recommendations as to the guidelines to which magistrates should have regard in awarding maintenance for a child in matrimonial proceedings. In awarding maintenance for a child under the guardianship legislation it is clearly right that the court should have regard to all the circumstances of the case, to the first three specific guidelines mentioned in paragraph 5.79, and to the financial resources, needs, obligations and responsibilities of the parents of the child. We think that those guidelines should be incorporated in the guardianship legislation.

The age to which maintenance orders should run

6.23 Under section 12(1) of the Guardianship of Minors Act 1971 a maintenance order made under the Act in respect of a child may continue until the child is 21 but not thereafter. If a child between the ages of 18 and 21 has been, while a minor, the subject of an order under the guardianship legislation, then, by virtue of section 12(2) of the Act, the court may make an order requiring either parent to make payments for his maintenance, but such an order must end at the age of 21. Moreover, the effect of section 15(2)(*a*) of the Act is that a magistrates' court has no power to make a fresh maintenance order in respect of a child of 16 or over unless he is incapable of self-support.

6.24 The Working Party commented adversely on these complex and irrational provisions[6], which in the course of our consultation found no

[6] Working Paper No. 53, para. 160.

supporters. In paragraph 5.89 above we have recommended that the provisions as to the duration of orders for the maintenance of children made by magistrates in matrimonial proceedings should be modelled on section 29 of the Matrimonial Causes Act 1973; and that in such proceedings, subject to conditions similar to those prescribed in that section, magistrates should have power:—

(*a*) in the case of a child under the age of 18, to make an order for his maintenance for a period extending beyond that age; and

(*b*) in the case of a child over the age of 18, to make an order for his maintenance notwithstanding that he is over that age.

6.25 In the case of a child over the age of 18, we do not think it necessary that the guardianship legislation should include power to make an order for his maintenance if there has been no such order before that age. Our proposals for cases where the child is over 18 and there has been such an order before that age are contained in paragraphs 6.26–6.30 below. So far as children under the age of 18 are concerned, we think that the provisions for the duration of maintenance orders made under the guardianship legislation should be modelled on section 29 of the Matrimonial Causes Act 1973, and that a court which makes a maintenance order under the guardianship legislation in the case of a child under the age of 18 should, subject to conditions similar to those prescribed in section 29, have power when making the order to direct that it shall continue in force after he has attained that age.

6.26 We now turn to children over the age of 18. The case which in our view deserves special attention is the case where a maintenance order made under the guardianship legislation for the benefit of a child who is under the age of 18 is to cease to have effect on his attaining that age. At or about the time when the child attains his majority, he may decide that he wishes to receive instruction at an educational establishment or to undergo training, and for that purpose he may require a continuation of the maintenance order, with or without modifications, for the period of his education or training. We think that the court should have power, on the application of the child himself, to make orders which will secure that result. In paragraphs 5.94–5.96 above we have discussed a similar problem in relation to orders for the maintenance of children made by magistrates in the exercise of their matrimonial jurisdiction, and we think that the problem with which we are now concerned can be dealt with on similar lines.

A child's right himself to apply for variation or revival of a maintenance order

6.27 We therefore propose that where a maintenance order made under the guardianship legislation is in force for the benefit of a child who has attained the age of 16 years, he should himself be able to apply for a variation of the order. The powers of the court on such an application would include power to vary the order both as to amount and as to duration.

6.28 We also propose that where a maintenance order under the guardianship legislation has ceased to have effect on the child attaining the age of 18 years or at any time within the two years preceding his attaining 18, he may, at any time before attaining the age of 21, apply to the court to revive the order with variations; the variations which the court would have power to make would include variation both as to duration and as to amount.

6.29 The power to order the continuation of a maintenance order after the age of 18 under the provisions which we now propose would be subject to the general restriction that such continuance could only be ordered for a period during which the child would be receiving education or training, or where there are special circumstances justifying the continuation. If the foregoing proposals are adopted the existing provisions of section 12 of the Guardianship of Minors Act 1971 will be superseded.

Recommendations

6.30 *We accordingly recommend* as follows:—

(*a*) Where a court has power to make a maintenance order under sections 9, 10 or 11 of the Guardianship of Minors Act 1971, it should have the like powers to order the payment of a lump sum for the benefit of the child as we have recommended should be conferred on magistrates' courts in matrimonial proceedings.

(*b*) Section 9 of the 1971 Act should be amended to provide that a maintenance order may be made against any parent excluded from actual custody of the child.

(*c*) Courts ordering the payment of maintenance under the guardianship legislation should have a general power to order the payments to be made to the child himself.

(*d*) The guardianship legislation should require the court, in awarding maintenance for a child, to have regard to all the circumstances of the case, to the first three specific guidelines mentioned in paragraph 5.79 above, and to the financial resources, needs, obligations and responsibilities of the parents of the child.

(*e*) The guardianship legislation should confer on courts a power, modelled on section 29 of the Matrimonial Causes Act 1973, to award maintenance for a child up to the age of 18 and a power, when making a maintenance order in the case of a child under 18, to direct that the order should continue in force beyond the age of 18 if the child is continuing his education or training or if there are special circumstances. However, there should be no power to make an order for the maintenance of a child who is over 18 at the time of the order, except in the cases provided for by our next recommendation.

(*f*) Provision should be made for enabling the child himself to apply for the variation or revival of a maintenance order made in his favour under the guardianship legislation, and such provision should be on the lines we have recommended, in respect of orders made in matrimonial proceedings by magistrates' courts, in paragraph 5.96 above.

(E) THE EFFECT OF COHABITATION ON ORDERS UNDER THE GUARDIANSHIP ACTS

Discussion of the problem

6.31 Under section 9(3) of the Guardianship of Minors Act 1971, as amended

by the Children Act 1975[7], a custody or maintenance order made under the section is not enforceable while the parents of the child are "residing together", and ceases to have effect if they continue to reside together for a period of 3 months after it is made. Section 5(2) of the Guardianship Act 1973 makes similar provision with respect to interim orders, and the 1973 Act also contains provisions whereby the enforceability and duration of supervision orders and of care orders may be affected if the parents of the child reside together[8].

6.32 The general policies and purposes of these provisions are similar to those of section 7 of the 1960 Act, which, in its application to orders in respect of children, we have discussed in Section (J) of Part V above. It is to be noted, however, that the provisions of the Guardianship Acts are expressed in terms of the parents "residing together". The concept of parents "residing together" is unsatisfactory for reasons similar to those discussed in paragraphs 2.51–2.54 above, and we think that the reformed law should be based on the concept of cohabitation as we have explained it in paragraph 2.54.

6.33 We are therefore concerned with what should be the effect of cohabitation between the parents of a child on orders for his custody, maintenance, care or supervision under the Guardianship Acts. When section 9 of the 1971 Act has been amended as proposed by paragraph 75 of Schedule 3 to the Children Act 1975, it will not be possible under the section to give custody of a child to any person other than the mother or father. It is our view that if the parents of a child cohabit for a continuous period of 6 months after the making of a custody order under the section with respect to their child, the order should cease to have effect. We do not think that anything less than 6 months' continuous cohabitation should be sufficient to produce this result, for we think that the period and nature of the cohabitation should be such as to provide some evidence of a settled intention on the part of the parents to live together permanently. Equally we think that where, after the making of an order under the section requiring one of the parents to make periodical payments to the other for the maintenance of a child, the parents cohabit for a continuous period of six months, the maintenance order should cease to have effect. The existing "three months rule" in the Guardianship Acts, like the corresponding rule in the 1960 Act, would be replaced by the rule which we now propose. We think that until a custody or maintenance order ceases to have effect under the rule it should be fully enforceable. In this respect also our proposals are consistent with our proposals in Section (J) of Part V above as to custody and maintenance orders made by magistrates in matrimonial proceedings.

6.34 Where a maintenance order made under the guardianship legislation provides for periodical payments to be made to the child himself, we think that the rule should be that the order should, unless the court otherwise directs, continue to have effect and be enforceable, notwithstanding the continuation or resumption of cohabitation between the child's parents. Where the court makes a supervision or care order with respect to a child under the 1973 Act, we think that the duration and enforceability of the order should not be

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[7] See para. 6.10 above.

[8] Section 3(2) (supervision orders) and section 4(3) (care orders). The relevant provisions of s. 4(3) will be repealed when para. 80(1) of Schedule 3 to the Children Act 1975 comes into operation, but we doubt whether it was the intention of Parliament that cohabitation of the parents should in all cases be irrelevant to the duration and enforceability of care orders under the Guardianship Acts.

affected by the continuation or resumption of cohabitation between the child's parents unless the court thinks it right to direct otherwise in any particular case.

Recommendations

6.35 *We accordingly recommend* as follows:—

(*a*) A custody order made under section 9(1) of the 1971 Act and an order under section 9(2) of the Act requiring periodical payments to be made to a parent for the maintenance of a child should cease to have effect if, after the making of the order, the parents of the child cohabit for a continuous period of 6 months.

(*b*) For so long as such a custody or maintenance order remains in effect, cohabitation between the parents of the child should not affect its enforceability.

(*c*) Where under the guardianship legislation the court orders periodical payments for the maintenance of a child to be made to the child himself, the order should, unless the court otherwise directs, continue to have effect and be enforceable notwithstanding the continuation or resumption of cohabitation between his parents.

(*d*) Where the court makes a supervision or care order with respect to a child under section 2(2) of the Guardianship Act 1973, then, unless the court otherwise directs, the duration and enforceability of the order should not be affected by the continuation or resumption of cohabitation between the child's parents.

(F) INTERIM ORDERS

The making and duration of interim orders

6.36 Section 2(4) of the Guardianship Act 1973 empowers the court, in any case in which it adjourns the hearing of an application under section 9 of the 1971 Act for more than seven days, to make an interim order as to maintenance and, where there are special circumstances, as to custody or access. Under section 2(5) of the Act a magistrates' court may also make an interim order where it refuses to make an order under section 9 on the ground that the matter is more suitable for the High Court. Interim orders made under these powers are subject to an overall time limit of 3 months. So far as matrimonial proceedings in magistrates' courts are concerned, our recommendations as to interim orders are set out in paragraph 4.34 above. We think that for the sake of consistency corresponding changes should be made in section 2(4) and section 2(5) of the 1973 Act.

Recommendations

6.37 *We accordingly recommend* as follows:—

(*a*) On an application under section 9 of the Guardianship of Minors Act 1971, the power to make an interim order should be capable of being exercised at any time before the final determination, and without having to adjourn the hearing in those cases where an adjournment is now required.

(*b*) The duration of such an interim order should not in the first instance extend beyond 3 months from the making of the order, but the court should have power to extend the order for a further period not exceeding 3 months.

Use of the means questionnaire

6.38 In connection with our discussion of interim orders in Section (C) of Part IV above, we consider the usefulness of a means questionnaire. In paragraph 4.28 above we expressed the view that the answers to such a questionnaire might be of assistance to a magistrates' court in matrimonial proceedings, and our recommendations on this matter are set out in paragraph 4.36. In our view the answers to such questionnaires may also be of value on applications to magistrates under section 9 of the Guardianship of Minors Act 1971. We think that provision should be made for the use of means questionnaires in proceedings before magistrates under that section, and that such provision should be on the lines we have proposed in paragraph 4.36.

Recommendation

6.39 *We therefore recommend* that, in the case of proceedings in magistrates' courts under section 9 of the Guardianship of Minors Act 1971, there should be provision for inviting the complainant and the respondent to answer a means questionnaire, and that accordingly the proposals set out in paragraph 4.36 above should apply in relation to such proceedings.

(G) THE EFFECTIVE DATE OF ORDERS FOR MAINTENANCE

Discussion of the problem

6.40 In paragraph 4.52 above we have made recommendations for clarifying and liberalising the powers of the courts as to the effective date of maintenance orders made under the magistrates' matrimonial law, and for enabling the High Court on appeal to make whatever orders may be proper to enable justice to be done. We think that similar provision should be made in relation to maintenance orders made in proceedings under the guardianship legislation.

Recommendations

6.41 *We accordingly recommend* as follows:—

(*a*) A court which makes an interim or final maintenance order in proceedings under the Guardianship Acts should have power to direct that the order shall take effect from such date, whether before or after the making of the order, as the court may determine, except that the date so fixed should not be earlier than the original application for the final order.

(*b*) A court should have power to direct that an order varying or revoking an interim or final maintenance order under the Guardianship Acts shall take effect from such date, whether before or after the making of the order for variation or revocation, as the court may determine, except that the date so fixed should not be earlier than the application for that order.

(*c*) On an appeal in a matter of maintenance under the Guardianship Acts the High Court should have power:—

(i) to direct that any maintenance order which it makes should take effect from such date, whether before or after the date of the making of the order, as the court may determine, except that the date so fixed shall not be earlier than that which the court appealed from could have fixed for such an order;

(ii) when making an order which is to take effect as from a date before the making of the order, to order that credit shall be given for any payments previously made under the magistrates' order;

(iii) to order repayment of some or all of any sums received by way of payment under the order appealed from, and to remit arrears under that order;

(iv) generally, to make such orders as may be necessary for the determination of the appeal and such consequential orders as may seem just.

(H) JURISDICTION

Discussion of the problem

6.42 In paragraph 4.90 we have recommended that the jurisdiction of a magistrates' court in matrimonial proceedings should be based on the county, and that rules should provide for the transfer of proceedings to another magistrates' court if that appears to be a more convenient forum. We think that similar provision should be made as to the jurisdiction of magistrates' courts in guardianship proceedings.

Recommendations

6.43 *We accordingly recommend* as follows:—

(*a*) A magistrates' court should have jurisdiction under the Guardianship Acts if its area falls within the county in which the applicant or the child or any of the respondents resides.

(*b*) There should be power conferred by rules to transfer the proceedings to another magistrates' court if that appears to be a more convenient forum.

(I) ENFORCEMENT OF ORDERS MADE ON APPEAL

Coombe* v. *Coombe

6.44 Where the High Court makes an order on appeal from a magistrates' court under the 1960 Act (other than an order for rehearing by the magistrates), the order is, for the purpose of enforcement, variation, and revocation, treated as if it were an order of the court from which the appeal was brought[9]. This extremely useful provision has no counterpart in the guardianship legislation, and the President of the Family Division has drawn attention to the resulting

[9] Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 11(2) and 6(4).

inconvenience in *Coombe* v. *Coombe*[10]. We think that the legislation which we are now proposing should include provision for repairing this omission.

Recommendation

6.45 *We accordingly recommend* that section 16 of the Guardianship of Minors Act 1971 should be amended by including a provision that any order of the High Court made on an appeal from a magistrates' court under the section (other than an order for rehearing) shall be treated for the purposes of enforcement, variation or discharge as if it were an order of the court from which the appeal is brought.

PART VII: ORDERS IN RESPECT OF CHILDREN UNDER THE CHILDREN ACT 1975

Introductory

7.1 By Part II of the Children Act 1975 magistrates' courts (and also the High Court and county courts) are given power to make "custodianship orders" vesting the legal custody of a child in a person other than the child's mother or father, and to make related orders as to access, maintenance, care and supervision on much the same basis as on an application under section 9 of the Guardianship of Minors Act 1971.

7.2 It is outside the scope of this report to undertake a detailed examination of the provisions of the 1975 Act, though in the course of our consideration of the Working Party's proposals as to orders in respect of children we have already had occasion to touch on some of them. We are, however, concerned to avoid significant inconsistencies between the Act of 1975 on the one hand and the law relating to children, as administered in matrimonial and guardianship proceedings, on the other. From this point of view there are two aspects of the Act of 1975 which require further examination. The first is the power to make financial orders under Part II of the Act. The second is the power to enforce orders made under the Act generally. We now deal with those two subjects in that order.

(A) ORDERS UNDER PART II OF THE 1975 ACT

Custodianship orders

7.3 Section 33 of the 1975 Act contains provisions empowering the court, on the application of a person who is not the mother or father of a child, to make a custodianship order vesting the legal custody of the child in the applicant. Section 35(6) provides that a custodianship order is to cease to have effect when the child attains the age of 18 years, and this is in no way inconsistent with the proposals we have made in this report for the amendment of the matrimonial and guardianship legislation.

Care orders

7.4 Section 34(4) of the 1975 Act provides for the making of care orders by

[10] 1974, unreported.

applying the provisions as to care orders in sections 2 and 4 of the Guardianship Act 1973. There are further provisions in section 36 of the 1975 Act for the making of a care order on the revocation of a custodianship order made under the Act.

Maintenance orders where there is a custodianship order

7.5 Provisions as to the maintenance of a child who is the subject of a custodianship order are contained in section 34(1) of the 1975 Act. The principal provision is section 34(1)(*b*), by which an "authorised court" (defined in section 100 of the Act) may on the application of the custodian make an order requiring the child's mother or father (or both) to make to the custodian such periodical payments for the maintenance of the child as it thinks reasonable. For the purposes of section 34(1) the child's mother or father includes any person in relation to whom the child was treated as a child of the family (as defined in section 52(1) of the Matrimonial Causes Act 1973); but the court in deciding whether to make a maintenance order against a person who is not the natural mother or father is required to have regard to the same considerations as are set out in section 25(3) of the Matrimonial Causes Act 1973. By virtue of section 35(6) of the Children Act 1975, a maintenance order made under section 34(1) of the Act ceases to have effect when the child attains 18.

7.6 There are other ways in which a child's custodian may obtain maintenance for the child. Section 34(1)(*d*) of the Act of 1975 enables certain persons, including the custodian, to apply to the court for an order varying an existing maintenance order (made otherwise than under section 34) requiring the mother or father to contribute towards the child's maintenance. The variation order may alter the amount of the contributions and may substitute the custodian for the person to whom the contributions were ordered to be made.

7.7 A maintenance order under section 34(1)(*b*) may not be made against the father of an illegitimate child. Where the child is illegitimate, there are two ways in which the custodian may obtain a maintenance order against the father. If there is an affiliation order in being, the custodian may apply for a variation order under section 34(1)(*d*) substituting himself for the person to whom payments under the affiliation order were to be made. If there is no affiliation order in being, then subject to certain restrictions the custodian may himself take affiliation proceedings under section 45 of the 1975 Act. We consider further, in Part VIII of this report, the orders which magistrates may make in affiliation proceedings.

Maintenance orders where there is a care order

7.8 Where a child is committed to the care of a local authority by virtue of the 1975 Act, the court has power to order that either of the natural parents of the child shall make periodical payments to the authority for the child's maintenance. Such payments will not continue after the care order ceases to be in force, and therefore they must at the latest come to an end when the child attains 18.

Reconsideration of the position as to maintenance orders

7.9 The proposals as to maintenance orders for children which we have

made in Parts V and VI of this report require, in our view, a reconsideration of the powers to order maintenance under section 34(1)(*b*) of the 1975 Act. They also require a reconsideration of the powers to order maintenance where a child is committed under the Act to the care of a local authority.

7.10 In our view the reasons which have led us to recommend that the court in matrimonial and guardianship proceedings should have power to award a lump sum apply with equal force where the court has power to make a maintenance order under section 34(1)(*b*) of the 1975 Act. We think that where the court has power to make an order under section 34(1)(*b*), it should have powers to award a lump sum similar to those which we have proposed in Parts V and VI of this report. We also think that, both in the case of orders under section 34(1)(*b*), and in the case of maintenance orders where a care order has been made under the 1975 Act, there should be power to order that maintenance payments should be made to the child himself.

7.11 In paragraph 6.30(*d*) above we have made recommendations as to the guidelines which should be provided for the court when considering the award of maintenance under the guardianship legislation. We think that similar guidelines are appropriate and should be provided for cases where the court is considering the award of maintenance under section 34(1)(*b*) of the 1975 Act, or the award of a lump sum under the Act, or the award of maintenance under the Act for a child committed to the care of a local authority. In considering a financial award against a person who is not a natural parent of the child, the court should also be required to have regard to the guidelines set out in section 34(2) of the Act[1].

7.12 In paragraph 6.30(*e*) above we have recommended that the guardianship legislation should confer on the courts a power, modelled on section 29 of the Matrimonial Causes Act 1973, to award maintenance for a child up to the age of 18 and a power when making a maintenance order in the case of a child under 18, to direct that the order should continue in force beyond the age of 18 if the child is continuing his education or training or if there are special circumstances.

7.13 We think that a court making a maintenance order under section 34(1)(*b*) of the Children Act 1975, or making an order for the maintenance of a child committed to the care of a local authority under that Act, should have similar powers. We also think that provision should be made for enabling the child himself to apply for the variation or revival of any such maintenance order, and that such provision should be on the lines we have recommended, in respect of orders made in matrimonial proceedings by magistrates' courts, in paragraph 5.96 above.

Recommendations

7.14 *We accordingly recommend* as follows:—

(*a*) Where the court has power to make a maintenance order under section 34(1)(*b*) of the Children Act 1975, it should have the like power to order the payment of a lump sum for the benefit of the child as we

[1] For the similar guidelines in section 25(3) of the Matrimonial Causes Act 1973, see para. 5.78 above.

have recommended should be conferred on magistrates' courts in matrimonial proceedings.

(*b*) Where the court has power to order maintenance for a child under section 34(1)(*b*) of the 1975 Act or for a child committed to the care of a local authority under that Act, it should have power to order the payments to be made to the child himself.

(*c*) In considering the award of maintenance for a child under section 34(1)(*b*) of the 1975 Act, the award of a lump sum under the Act, or the award of maintenance under the Act for a child committed to the care of a local authority, the court should be required to have regard to all the circumstances of the case including the following matters:—

(i) the financial resources, needs, obligations and responsibilities of the parents of the child;

(ii) the financial needs of the child;

(iii) the income, earning capacity (if any), property and other financial resources of the child;

(iv) any physical or mental disability of the child;

(v) where appropriate, the guidelines set out in section 34(2) of the Act.

(*d*) Fresh provision should be made as to the duration of maintenance orders made in respect of a child under section 34(1)(*b*) of the 1975 Act or made in respect of a child committed to the care of a local authority under that Act. The courts should have power, on the model of section 29 of the Matrimonial Causes Act 1973, to award maintenance for a child up to the age of 18, and power, when making a maintenance order in the case of a child under 18, to direct that the order should continue in force beyond the age of 18 if the child is continuing his education or training or if there are special circumstances.

(*e*) Provision should be made for enabling the child himself to apply for the variation or revival of any such maintenance order, and such provision should be on the lines we have recommended, in respect of orders made in matrimonial proceedings by magistrates' courts, in paragraph 5.96 above.

(B) ENFORCEMENT OF ORDERS

Discussion of the problem

7.15 As we have pointed out in paragraph 6.40, where the High Court makes an order on appeal from a magistrates' court under the 1960 Act (other than an order for rehearing by the magistrates), the order is, for the purposes of enforcement, variation and revocation, treated as if it were an order of the court from which the appeal was brought. The absence of a similar provision in the guardianship legislation has already given rise to difficulty. We think that a similar provision is also required in the 1975 Act, section 101 of which provides for an appeal from a magistrates' court to the High Court.

Recommendation

7.16 *We accordingly recommend* that section 101 of the Children Act 1975 should be amended by including a provision that any order of the High Court made on appeal from a magistrates' court under the section (other than an order for rehearing) shall be treated for the purposes of enforcement, variation or revocation as if it were an order of the court from which the appeal is brought.

PART VIII: ORDERS IN RESPECT OF CHILDREN—AFFILIATION PROCEEDINGS

Introductory

8.1 Our terms of reference require us, in formulating recommendations for reform of the matrimonial law administered by magistrates' courts, to bear in mind the need for avoiding the creation of anomalies in related legislation. This requires us to consider certain aspects of the Affiliation Proceedings Act 1957, although a review of that Act generally is not within the scope of our present task. We are concerned here with certain features of the 1957 Act, and in particular the provisions of the Act as to the orders which magistrates may make, which are related to the recommendations we have made in this report.

The provisional proposals

8.2 The Working Party noted that not infrequently couples break up who have lived together in a stable union for a number of years without being married and have had children. This is in effect a matrimonial breakdown, even though there is no remedy available to a woman when the man she is living with has ceased to maintain her. All she can do is apply for an affiliation order on behalf of her children. The Working Party saw no reason why the courts should not be able to exercise substantially the same powers in respect of illegitimate children, once paternity had been established, as they exercise in respect of legitimate children[1]. In another passage they suggested that whatever powers are to be available to the magistrates to order maintenance for the children of a marriage, the same powers should be available in respect of children born out of wedlock[2].

8.3 The Working Party made three specific proposals for the amendment of the 1957 Act:—[3]

(*a*) That the magistrates should have power to award periodical payments for the child at such intervals as they consider appropriate.

(*b*) That there should be power, in appropriate circumstances, to order a lump sum payment (beyond the provision, now contained in section 4(2)(*b*) and (*c*) of the 1957 Act, which enables the court to award small lump sums for birth or funeral expenses).

(*c*) That affiliation orders should have the same age limits as orders for legitimate children. At present an affiliation order ceases at 13 in the first instance, but, if the court so directs, may be continued until the child

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[1] Working Paper No. 53, para. 162.
[2] *ibid.*, para. 163.
[3] *ibid.*,

attains the age of 16 (section 6 of the 1957 Act), after which, on the mother's application, it may be extended by two-yearly periods up to the age of 21 if the child is engaged in a course of education or training (section 7(2) and (3)).

The results of consultation

8.4 The Working Party's general approach was approved in the consultation and the specific proposals in the foregoing paragraph were likewise approved. Several commentators, however, regretted that it had not been possible to include in the working paper a radical review of the Act's provisions. It was pointed out that the Act is anachronistic and unsatisfactory in a number of respects. For example, apart from one antiquated subsection of very limited application[4], the Act makes no provision for the making of custody orders, so that for practical purposes the court, on hearing an application under the Act, has no power to deal with custody and maintenance at the same time. Again, if the magistrates, when hearing proceedings for an affiliation order, think that the child needs additional protection, they have no power to commit the child to the care of a local authority or to order supervision.

8.5 We sympathise with these criticisms and we accept that the time is long overdue for a review of the law relating to the custody and maintenance of illegitimate children. Urgent though this task may be, however, it is clearly outside our terms of reference to undertake it; nor would we be justified in proposing fundamental reforms in this branch of the law without further consultation. Our proposals in this report are therefore limited in much the same way as those of the Working Party.

Our proposals

(a) The nature of the financial provision which may be ordered

8.6 As to the nature of the financial provision which may be ordered, we have little to add to the Working Party's proposals set out in paragraph 8.3(*a*) and (*b*) above. We think that one of the purposes for which the power to order a lump sum should be exercisable should be to meet maintenance expenses incurred before the date of the order, and we think that there should be power to order a lump sum not only when an affiliation order is first made, but also on a subsequent occasion on a change of circumstances. The amount of the lump sum which may be ordered should in our view be subject to the limitations we have recommended in paragraph 5.67 above.

(b) Orders for payment to the child himself

8.7 Section 5 of the 1957 Act provides that, as a general rule but subject to exceptions which are set out in the section, the person entitled to payments to be made under an affiliation order shall be the child's mother. In paragraph 5.73 above, we have recommended that a magistrates' court in matrimonial proceedings should have a general power to order payments for the maintenance of a child to be made to the child himself. We think that the courts should have a similar power in affiliation proceedings.

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[4] Section 5(4).

(c) Guidelines

8.8 We think it will be helpful to the courts if they are provided with guidelines as to the exercise of their powers to make affiliation orders. They should, we suggest, be required to have regard to all the circumstances of the case, to the financial resources, needs, obligations and responsibilities of the mother and of the putative father of the child, and to the first three specific guidelines mentioned in paragraph 5.79 above.

(d) The effective date of orders

8.9 Section 4(3) of the 1957 Act provides that where the application for an affiliation order is made before or within two months after the birth of the child, payments under the order may, if the court thinks fit, be made to run from the date of birth. We propose no change in this respect. We think, however, that it should be made clear that, independently of this rule, payments under any affiliation order may be made to run from the date of application for the order.

(e) The age to which orders should run

8.10 In paragraph 6.30(*e*) above we have recommended that the guardianship legislation should confer on the courts a power modelled on section 29 of the Matrimonial Causes Act 1973, to award maintenance for a child up to the age of 18 and a power when making a maintenance order in the case of a child under 18, to direct that the order should continue in force beyond the age of 18, if the child is continuing his education or training or if there are special circumstances. We think that the court in affiliation proceedings should have similar powers.

(f) Applications for the variation or revival of an affiliation order

8.11 There is no general provision in the 1957 Act for the variation or revival of affiliation orders, but general powers of variation and revival are available to the court under section 53 of the Magistrates' Courts Act 1952. Section 7 of the 1957 Act provides for the use of these general powers so as to extend the life of an affiliation order beyond the date when the child attains 16 (but not beyond the age of 21) where it appears to the court that the child is or will be engaged in a course of education or training. The application for extension may be made by the child's mother and by any person having the custody of the child legally or under an arrangement approved by the court (but not by a local authority in whose care the child is). If our proposals in paragraph 8.10 are accepted, we think that the right to apply for an extension should be retained but adapted to the new age limits which we propose. We further think that provision should be made for allowing the child himself to apply for the variation or revival of an affiliation order if he has attained the age of 16.

(g) Children over 16 who are in care

8.12 The general rule is that an affiliation order does not require payments to be made in respect of a child of 16 or over, for so long as he is in the care of a local authority[5]. This rule requires to be reconsidered, but its reconsideration involves the question whether the court should have power to make care orders in

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[5] Affiliation Proceedings Act 1957, s. 7(3)-(6).

affiliation proceedings, and other questions of a general nature relating to liability to make payments for a child in care. These questions fall outside the scope of our present report, and we therefore make no proposals.

(h) Jurisdiction

8.13 Under section 3(1) of the 1957 Act, the jurisdiction of a magistrates' court to make an affiliation order is based on the residence of the mother within the petty sessions area for which the court acts. Where the mother resides in Scotland or Northern Ireland and the person alleged to be the father resides in England, then under section 3(2) of the Maintenance Orders Act 1950, jurisdiction is based on the residence of the alleged father within the petty sessions area. In conformity with our recommendations in paragraphs 4.90 and 6.43 above, we think that residence within the county in which the court acts should be sufficient in both cases.

Recommendations

8.14 *We accordingly recommend* as follows:—

(*a*) The court should have power in affiliation proceedings to order payment of a lump sum of up to £500 for any child with respect to whom an affiliation order is made. There should be power to vary the limit of £500 by Order in Council. It should be possible to order a lump sum not only when an affiliation order is first made, but also on a subsequent occasion on a change of circumstances.

(*b*) The court should have power to direct that payments under an affiliation order should be made to the child himself.

(*c*) In considering what order to make in affiliation proceedings, the court should be required to have regard to all the circumstances of the case, including the following matters:—

(i) the financial resources, needs, obligations and responsibilities of mother and of the putative father of the child;

(ii) the financial needs of the child;

(iii) the income, earning capacity (if any), property and other financial resources of the child;

(iv) any physical or mental disability of the child.

(*d*) It should be made clear that payments under an affiliation order may be made to run from the date of application for the order. This will not affect the power to make the payments run from the birth of the child where the application is made within two months from the birth.

(*e*) The court in affiliation proceedings should have a power, on the model of section 29 of the Matrimonial Causes Act 1973, to award maintenance for a child up to the age of 18 and power when making a maintenance order in the case of a child under 18, to direct that the order should continue in force beyond the age of 18 if the child is continuing his education or training or if there are special circumstances.

(*f*) Provision should be made for allowing the child himself to apply for

the variation or revival of an affiliation order if he has attained the age of 16.

(*g*) The jurisdiction of a magistrates' court in affiliation proceedings should be based on the residence of the mother (or in a case to which section 3(2) of the Maintenance Orders Act 1950 applies, the alleged father) within the county in which the court acts.

PART IX

AMENDMENTS OF THE MATRIMONIAL CAUSES ACT 1973

The Working Party's proposals

9.1 In order to avoid the creation of anomalies the Working Party made three proposals for reform of the provisions, now contained in section 27 of the Matrimonial Causes Act 1973, under which the High Court or a divorce county court may make orders for financial provision on proof of wilful neglect to maintain a spouse or child of the family. These were:—

(*a*) that the section should be amended by removing the requirement to establish that the failure to maintain was wilful[1];

(*b*) that full equality in the obligation to maintain should be introduced as between husband and wife[2]; and

(*c*) that adultery should cease to be an absolute bar to the award of financial provision for a wife under the section but should be treated in the same way as other forms of misconduct[3].

9.2 These proposals, which correspond to three of the proposals made by the Working Party for reform of the matrimonial law administered by the magistrates, were approved in the consultation, and we concur in them. We are reinforced in our view that it is necessary to amend section 27 of the 1973 Act by the very recent decision in *Gray* v. *Gray*.[4] In that case a wife applied for maintenance under section 27 having committed adultery which had not been condoned, connived at or conduced to by the husband and the court was requested to decide, as a preliminary issue, whether such adultery was a bar to an application for maintenance under section 27 of the 1973 Act. Purchas J. after reviewing the effect of section 27 of the 1973 Act in the light of all the other relevant statutory provisions, dismissed the wife's application by reason of her adultery. The basis of the decision was that in order to obtain relief under the section the wife must establish wilful neglect to maintain and that she cannot establish such wilful neglect to maintain if she has been guilty of adultery which has not been condoned, connived at or conduced to by the husband. For so long as relief is based on wilful neglect to maintain, we think there is a clear possibility that the section may operate harshly in some cases.

9.3 There were, also, certain other proposals made by the Working Party for reform of the magistrates' matrimonial law in respect of which they did not give any indication whether they had in mind that a corresponding amendment

[1] Working Paper No. 53, para. 36.
[2] *ibid.*, para. 34.
[3] *ibid.*, para. 45.
[4] *The Times*, 11 March 1976.

should be made to section 27 of the 1973 Act. These included the following:—

(*a*) the proposal for statutory guidelines to be formulated;

(*b*) the proposal that a maintenance order should cease to have effect if the parties continue to cohabit, or resume cohabitation, for 6 months;

(*c*) the proposal for an enforceable "housekeeping order";

(*d*) the proposal that provision should be made for an order by consent; and

(*e*) the proposal to enlarge the circumstances in which an interim order for maintenance may be made.

9.4 We consider each of these proposals below and indicate whether we think a corresponding amendment ought to be made to section 27. Before doing so, however, we think it may be appropriate to refer to the history of the section, in order that what we have to propose may be set in its appropriate context.

History of section 27 of the 1973 Act

9.5 Under section 22 of the Matrimonial Causes Act 1965, a wife could apply for an order that the husband make periodical payments to her. As we noted in our *Report on Financial Provision in Matrimonial Proceedings*[5], although this section appeared in Part II of that Act under the heading "Ancillary Relief" it was not in fact ancillary to anything but an independent proceeding entitling the wife to obtain financial provision without asking for any other form of relief. We further noted that surprisngly little use had been made of section 22, so that if it had remained in its then form it seemed likely that even less use would be made following the removal (by the Maintenance Orders Act 1968) of the financial limits imposed on magistrates in the award of maintenance. We considered whether the section ought not to be repealed altogether, leaving the whole matter to be dealt with under the magistrates' jurisdiction. We concluded, however, that this would not be a satisfactory solution because secured provision cannot be awarded under a magistrates' order and such secured provision has great advantages from the point of view of the payee since it is unlikely to give rise to any problems of enforcement.

9.6 In the light of these considerations, we decided to propose the retention of the provision contained in section 22 of the 1965 Act. We thought, however, that if greater use was to be made of the provision in the future, it would be important to remove a number of weaknesses from which the section suffered. The weaknesses to which we drew attention were as follows:—

(*a*) There was no power to award maintenance pending suit, so that a woman without means was unable to obtain financial relief at once. To meet this point, we recommended that the court should be empowered to make an award of maintenance pending suit.

(*b*) In no circumstances could the wife be ordered to provide for the husband. Our recommendation on this point was that the section should be amended by enabling the court to make an order in favour of the husband to the same extent as a magistrates' court already can

[5] Law Com. No. 25, para. 18.

under sections 1(1)(i) and 2(1)(*c*) of the 1960 Act. We recognised that logically we should have gone further and enabled the husband to apply in all circumstances, since we had recommended as regards ancillary provision that there should be no distinction between husband and wife. We thought, however, that without a complete re-casting of the section and a complete reformulation of mutual obligations to maintain, this would hardly be practicable.

(*c*) There was no power under the section to award a lump sum. We recommended that there should be, and that any secured provision awarded under the section should be capable of lasting for the life of the payee.

(*d*) No order could be made under the section unless it was proved that the husband had been guilty of wilful neglect to provide reasonable maintenance. We regarded this position as less than satisfactory, but we made no recommendation for reform because we thought that this must await a reformulation of the whole basis of the duty to maintain in relation both to the divorce court and the magistrates' courts.

9.7 Our recommendations for reform were given effect by section 6 of the Matrimonial Proceedings and Property Act 1970. This section has now been replaced by section 27 of the 1973 Act.

Further consideration of section 27

9.8 Against this background, we now consider whether the specific proposals mentioned in paragraph 9.3 above should be carried over into section 27 of the 1973 Act.

(a) Statutory guidelines

9.9 The Working Party proposed that the factors (apart from conduct) that the magistrates should take into account in making a maintenance order should be as follows:—

(*a*) the income, earning capacity, property and other financial resources of each of the parties; and

(*b*) the financial needs, obligations and responsibilities of each of the parties.

We have, however, taken the view, in the light of the consultation, that such guidelines would not be sufficiently comprehensive and that the right course is to reproduce, as far as possible, the guidelines contained in section 25 of the 1973 Act, modifying them only so far as is necessary to reflect the rather different circumstances of parties bringing their marital difficulties to the magistrates' courts.

9.10 In our Report on Financial Provision in Matrimonial Proceedings, we did not include any recommendation as to the insertion of statutory guidelines in section 22 of the Matrimonial Causes Act 1965. It is clear, however, that the reason for this was that we did not think it possible for formulate such guidelines until the whole basis of the duty to maintain had been reformulated, in

relation both to the divorce court and the magistrates' courts. In this present report, we have carried out such a reformulation, and we have proposed that the magistrates' jurisdiction to award maintenance should be exercised in the light of the guidelines referred to in paragraphs 2.29 and 5.79 above. We think that the same guidelines should govern the award of maintenance by the High Court under section 27 of the Matrimonial Causes Act 1973.

9.11 We therefore now propose that the same statutory guidelines as will apply to the magistrates' jurisdiction to award maintenance in matrimonial proceedings should apply to the jurisdiction of the High Court under section 27 of the 1973 Act.

(b) Automatic cessation where cohabitation continued or resumed for 6 months

9.12 We have recommended that there should be automatic cessation of a maintenance order made by a magistrates' court in the exercise of its matrimonial or guardianship jurisdiction if there has been cohabitation for a continuous period of 6 months after the order, whether the cohabitation is continued or resumed.

9.13 Cohabitation by the parties, whether continued or resumed, does not affect the operation of an order made under section 27 of the 1973 Act. It might be argued that, in the interests of maintaining consistency between the two jurisdictions, it would be desirable to introduce some such provision into section 27.

9.14 Though there is a difference in this respect between the two jurisdictions we know of no evidence which would suggest that the absence of such a provision has led to practical difficulties in the divorce court. We therefore make no recommendation on this point.

(c) The enforceable "housekeeping order"

9.15 We have recommended, on the assumption that a maintenance order made by a magistrates' court will remain in effect when the parties are still cohabitating for a period of 6 months, that such an order should be enforceable throughout that 6 months' period.

9.16 As we noted in paragraph 2.58 of this report, section 27 of the 1973 Act contains no restriction, similar to that in section 7(1)(*a*) of the 1960 Act, on the enforceability of an order whilst the parties are cohabitating. An order for financial provision made under the section therefore continues in force until it is revoked, subject to the court's power under section 31 of the 1973 Act to suspend any provision of the order temporarily and to revive the operation of any provision so suspended. Thus, so far as enforceability during cohabitation for the 6 months' period is concerned, orders under section 27 of the 1973 Act are already in the position we recommend for the orders made by magistrates' courts.

(d) Provision for orders by consent

9.17 We have recommended that provision should be made in the magistrates' matrimonial law for the making of an order by consent in cases where the couple are in agreement about the amount of maintenance one should pay the

other and they wish to have this agreement given legal force as a maintenance order.

9.18 Section 27 of the 1973 Act does not contain provisions for orders by consent corresponding to those which we propose should be included in the magistrates' matrimonial law. By section 35 of the Act, however, a divorce court and, subject to certain limitations, a magistrates' court are empowered to alter the financial arrangements contained in an agreement to which the section applies. The section applies to agreements which contain financial arrangements and which have been made in writing between the parties to a marriage, whether during the continuance or after the dissolution or annulment of the marriage. Section 35 confers on the court wide powers to alter such agreements in the light of changed circumstances, and even without a change of circumstances where an alteration is needed to make proper provision for a child of the family.

9.19 Given the existence of these provisions, we can see no need to introduce in section 27 provisions on the lines of those we have recommended for magistrates' courts dealing with the making of orders by consent. We therefore make no recommendation on this point. If in the future a husband enters into an agreement to pay his wife maintenance whilst they are living apart, and then refuses to make the maintenance payments, the wife will not necessarily be in a worse position than if she had obtained a consent order and it will be open to her to ask the High Court or a divorce county court to alter the agreement by inserting a provision for the securing of the periodical payments previously agreed to by her husband

(e) Interim orders

9.20 We have recommended that the existing power of magistrates in matrimonial proceedings to make an enforceable interim order should be capable of being exercised at any time before the final determination, and without having to adjourn the hearing in those cases where an adjournment is now required.

9.21 Section 27(5) of the 1973 Act provides that where on an application under the section it appears to the court that the applicant or any child of the family is in immediate need of financial assistance, but it is not yet possible to determine what order, if any, should be made on the application, the court may make an interim order for maintenance. Such an order continues until the determination of the application.

9.22 The existence of this provision makes it unnecessary for us to carry over into the 1973 Act our recommendations as to interim orders made by the magistrates. We therefore make no recommendation on this point.

The rights of a child to apply for the variation or revival of a maintenance order

9.23 In paragraph 5.96 above we have recommended that where a maintenance order has been made by a magistrates' court in matrimonial proceedings for the benefit of a child, the child himself should be able, in prescribed circumstances, to apply for a variation of the order and, where the maintenance order has ceased to have effect, to apply for the revival of the order with variations. For the sake of consistency we think that a child should be given similar

rights to apply himself for the variation or revival of a maintenance order made for his benefit under section 27 of the 1973 Act, subject to the difference that it should not be possible for the child to apply for the revival of a maintenance order under section 27 for secured periodical payments. By the time the child makes his own application for variation, the property on which the periodical payments were secured may have been disposed of and accordingly it would not be appropriate to permit the revival of this type of order. We make recommendations to the foregoing effect in paragraph 9.24(*f*) and (*g*) below.

Recommendations

9.24 *We accordingly recommend* as follows:—

(*a*) Section 27 of the Matrimonial Causes Act 1973 should be amended by removing the requirement to establish that the failure to maintain was wilful.

(*b*) The section should embody the principle that it is the duty of each spouse to support the other and that the nature of the duty is the same in the case of each spouse.

(*c*) Adultery should not be an absolute bar to an order for financial provision under the section, but in determining whether to make an order in favour of a spouse and, if so, for how much, the court should be enabled to have regard to the conduct of the parties. In no circumstances, however, should the conduct of the spouses towards each other affect the award of maintenance for the children of the family.

(*d*) In determining whether and, if so, how, to exercise its powers under the section in favour of a spouse, the court should be required to have regard to all the circumstances of the case, and the matters set out in (*a*) to (*g*) of paragraph 2.29 above.

(*e*) In determining whether and, if so, how, to exercise its powers under the section in favour of a child of the family, the court should be required to have regard to all the circumstances of the case, including the matters set out in (*a*) to (*g*) of paragraph 5.79 above.

(*f*) Where a maintenance order made under section 27 for secured or unsecured periodical payments is in force for the benefit of a child who has attained the age of 16 years, he should himself be able to apply for a variation of the order. The powers of the court on such application should include power to vary the order both as to amount and as to duration.

(*g*) Where a maintenance order made under section 27 for unsecured periodical payments has ceased to have effect on a child attaining the age of 18 years or at any time within the two years preceding his attaining that age, he should be able, at any time before attaining the age of 21, to apply to the court to revive the order with variations. The variations which the court should have power to make on such an application should include variations as to duration and as to amount.

PART X:

OTHER PROPOSALS FOR THE PROTECTION OF CHILDREN

Introductory

10.1 In Parts V, VI, VII and VIII above we have dealt with the principal matters relating to orders in respect of children which arise from our terms of reference. We now turn to other proposals for the protection of children which were canvassed in Working Paper No. 53 or suggested to us on consultation.

A. PROHIBITION BY MAGISTRATES OF REMOVAL FROM THE JURISDICTION

The views expressed in Working Paper No. 53

10.2 The Working Party considered the question whether magistrates' courts should be given power to prohibit the removal of a minor from the United Kingdom without the consent of the court, in the light of the anxiety which had been expressed during the proceedings in Parliament on the Guardianship Bill 1973 about the apparent ease with which parties could flout an order as to custody by removing the child from England and Wales[1]. The Working Party further noted that an amendment was put down at Report stage in the House of Commons aimed at giving magistrates' courts power, on granting a stay of execution or otherwise, to prohibit the removal of a minor from the United Kingdom without the consent of the court. The Government successfully resisted the amendment but undertook that the matter would be more fully considered by the Law Commission[2].

10.3 Magistrates' courts have at present no power to prohibit the removal of a child from England and Wales. The High Court possesses such a power in the exercise of both its wardship and its matrimonial jurisdiction. A ward of court may not be removed out of the jurisdiction without the leave of the court even though no specific prohibitory order has been made. In matrimonial proceedings in the High Court either party may at any time after the presentation of the petition apply for an order prohibiting the removal of a child out of the jurisdiction without the leave of the court[3]. The court may also grant an injunction restraining the removal of a child in anticipation of the commencement of wardship or matrimonial proceedings[4]. A divorce county court has power to grant an injunction restraining the removal of a child from the jurisdiction[5]. Where in matrimonial proceedings the High Court or a county court makes an order relating to the custody or care and control of a child, the order must, unless the court otherwise directs, provide that the child shall not be removed out of England and Wales without the leave of the court except on such terms as may be specified in the order[6].

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[1] Working Paper No. 53, paras. 133–136.

[2] See *Hansard* (House of Commons), 22 June 1973, Vol. 858, Cols. 1083–1090.

[3] Matrimonial Causes Rules 1973, r. 94(1).

[4] *In Re N.* [1967], Ch. 512; *L.* v. *L.* [1969] P. 25.

[5] County Courts Act 1959, s. 74, as amended by the Administration of Justice Act 1969, s.6.

[6] Matrimonial Causes Rules 1973, r. 94(2).

10.4 In addition to the judicial sanctions available to the High Court and divorce county court to enforce their orders, there are in existence administrative arrangements designed to prevent a child being taken abroad out of the jurisdiction in contravention of an order. Thus, in certain circumstances, the Passport Office will accept a caveat against the issue of a passport in respect of a child. In addition, the assistance of the Home Office may be invoked to prevent the removal of a child from the jurisdiction in contravention of a court order in cases where it is known that there is a real risk of such removal[7].

10.5 The Working Party doubted whether in practice much useful purpose would be served by conferring on magistrates' courts the power to prohibit the removal of a child from the jurisdiction. They adverted to the risk of placing too great a strain on the administrative arrangements to which we have referred. On the other hand they observed that such a power in the magistrates' court might be useful and convenient "even though it would have to be recognised that it could not be effectively enforced". They made no recommendation but invited views.

The results of consultation

10.6 Opinions were sharply divided in the consultation. The majority view was in favour of giving magistrates a power to prohibit the removal of children from the jurisdiction. The principal argument advanced in support of this view was the broad and simple one that if the divorce court had such a power and found it useful, then magistrates' courts ought not to be in any less favourable position.

10.7 There was, however, a substantial body of opinion which was opposed to giving this power to magistrates and two main arguments were put forward. First, it was suggested that people might be encouraged to think that the making of such an order offered more effective protection against removal than, in fact, it did, and that they might for that reason fail to take the necessary practical precautions. Secondly, it was pointed out that if magistrates were given power to prohibit the removal of children from the jurisdiction, it would probably also be necessary to give them power to deal with applications for leave to remove a child from the jurisdiction. In the High Court, such applications are regarded as of such difficulty that they are in many cases reserved to the judge[8]. Moreover, the power of a divorce county court to deal with such applications is limited[9]. It was also pointed out that the fact that magistrates have no power to prohibit removal from the jurisdiction does not cause difficulty in practice because any parent who hears that his or her child is to be removed from the jurisdiction can always apply to the High Court for the child to be made a ward of court, in which event the child would immediately become a ward of the court and would remain so pending the application.

Our present views

10.8 We have no doubt that cases will occur where, on making an interim

[7] The arrangements which involve taking precautions at the ports are described in the notes to R.S.C. Order 90, r. 3; see The Supreme Court Practice (1976) Vol. 1, p. 1308. It is only in a minority of cases that the assistance of the Home Office is invoked: see para. 10.9 below.

[8] Matrimonial Causes Rules 1973, r. 94(3).

[9] *ibid.*, r. 97(2).

or final custody order, a magistrates' court thinks it desirable to prohibit or restrict the removal of the child out of England and Wales without the leave of the court. Where such a situation arises, we think it right that a magistrates' court should have power to make an order imposing such a prohibition or restriction. We do not suggest that the exercise of this power should be the general rule in cases where a magistrates' court makes a custody order; but we think that this power should be conferred on magistrates so that they may exercise it in those cases where they consider that there is a substantial risk of the child being taken out of England and Wales in order to frustrate the custody order which the magistrates have made.

10.9 As to the effectiveness of orders made by magistrates in the exercise of the power we propose, we think it is possible to take too pessimistic a view. Where such an order is disobeyed, the magistrates will have the powers of punishment conferred by section 54(3) of the Magistrates' Courts Act 1952 and in paragraph 5.53 above we recommend the strengthening of section 54. Where an order of the High Court or of a county court prohibits the removal of a child from England and Wales, we believe that in the vast majority of cases no attempt is made to disobey the order. We find support for this belief in figures supplied to us by the Home Office, which show that precautions at the ports are instituted in about four hundred cases a year. Compared with the total number of custody orders made by the High Court and county courts in each year[10], this figure is small indeed. Moreover, it is only in about ten cases a year that an actual attempt at removal is made and the Home Office inform us that over half the attempts which are made are frustrated. We think these figures demonstrate that the orders of the High Court and of county courts are in general observed, and we doubt whether the orders of magistrates' courts would be treated with significantly less respect. We agree that this may depend to some extent on whether the administrative precautions which we have mentioned in paragraph 10.4 above will be available for the reinforcement of magistrates' court orders. We should welcome the extension of the existing administrative precautions to orders of magistrates' courts if this can be done without placing too great a burden on the system[11].

10.10 If, as we propose, power is conferred on magistrates' courts to make orders prohibiting or restricting the removal of children from England and Wales, it follows in our opinion that they should also have power to grant leave for the removal of a child where they have imposed such a prohibition or restriction. We agree that such a power needs to be exercised with care, but we have no reason to doubt that if it is entrusted to magistrates it will be so exercised.

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[10] We are informed by the Principal Registry of the Family Division that the normal form of custody or care and control order (D. 324 in the High Court and D. 325 in the county court) contains a prohibition on removal. No precise figures are available for the number of custody orders. However, on the statistics of divorces which involve children, it is roughly estimated that custody orders in the normal form in both the High Court and county court affect some 100,000 children annually.

[11] As to the administrative precautions, see further our Working Paper No. 68 on Conflicts of Jurisdiction respecting Children, paras. 6.1–6.49.

Recommendations

10.11 *We accordingly recommend* as follows:—

(*a*) That on making an interim or final order for the custody of a child, a magistrates' court should have power, if it thinks it desirable to do so, to make an order prohibiting or restricting the removal of the child out of England and Wales without the leave of the court.

(*b*) That where a magistrates' court has imposed such a prohibition or restriction, it should have power to grant leave for the removal of the child from England and Wales.

(B) REPORTS ON CHILDREN IN MAGISTRATES' COURTS

The provisional proposals

10.12 The Working Party pointed out that section 4(2) of the 1960 Act provides that, after the court has decided any question as to the inclusion in a matrimonial order of a non-cohabitation provision or a provision for the maintenance of a spouse and so is free to consider the question of the children, the court may, if it has insufficient information for that purpose, call for a report by a probation officer or officer of a local authority on the relevant circumstances. Section 4(3) of the 1960 Act further provides that the report shall be made orally or read aloud in court and that if any party to the proceedings objects to anything in it the court shall require the author to give evidence on oath.

10.13 The Working Party noted that these subsections have been criticised on a number of grounds, of which the most important is that if either party objects to anything in the report, the court must require the reporting officer to give evidence on oath. The court has no discretion, not even to disregard a point which is in error and not disputed by either party, or a point which is of little relevance or importance. The Working Party also drew attention to a suggestion that the requirement that the report should be read aloud in every case is unnecessarily restrictive, and that section 4 should be amended to allow reports to be read silently if this is more appropriate.

10.14 To meet these criticisms, the Working Party provisionally proposed that section 4(3) of the 1960 Act should be amended so as to provide the court with discretion to dispense with the reporting officer's giving evidence, unless one of the parties specifically wished to call him, and to enable reports to be read silently if the court thought this more appropriate—subject to copies being provided for the parties[12].

The Children Act 1975 implements the provisional proposals

10.15 The provisional proposals by the Working Party have been generally welcomed in the consultation, and we are pleased to say that section 91 of the Children Act 1975 has already given effect to them. Section 90 of the Children Act 1975 also makes a corresponding amendment to section 6(2) of the Guardianship Act 1973.

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[12] Working Paper No. 53, para. 140.

The Magistrates' Courts Act 1952, section 60(2)

10.16 Section 60(2) of the Magistrates' Courts Act 1952, which concerns reports by a probation officer on the means of the parties, is in terms similar to section 4(3) of the 1960 Act as originally enacted. We think that section 60(2) of the 1952 Act should be amended in the same way as section 4(3) of the 1960 Act, and for the same reasons.

Recommendation

10.17 *We therefore recommend* that section 60(2) of the Magistrates' Courts Act 1952 should be amended in a similar manner to section 4(3) of the 1960 Act.

The extended use of welfare reports suggested on consultation

10.18 Notwithstanding that the Working Party's proposals referred to in paragraphs 10.12–10.14 above concerning reports on children were welcomed in the consultation, some concern was expressed that the provisions in the 1960 Act and also in the Guardianship Act 1973, which enable magistrates' courts to call for reports on matters relevant to a child's welfare, do not provide a satisfactory means of protecting the interests of children before the courts. Two suggestions were made for the extended use of welfare reports:—

(*a*) first, that before determining questions as to custody, the court should in all cases, or in the majority of cases, or in all cases where a non-cohabitation order is to be made, be required to call for a welfare report;

(*b*) secondly, that in matrimonial cases the court should have power to call for a report at an earlier stage of the proceedings, rather than having to wait until it has decided any question as to the inclusion in a matrimonial order of a non-cohabitation provision or a provision for the maintenance of a spouse.

Discussion of the use of welfare reports

10.19 Section 40 of the Children Act 1975 provides a precedent for requiring that a welfare report shall be made to the court in proceedings where the custody of a child is in issue. The section provides that a custodianship order (that is, an order vesting the legal custody of a child in a person other than one of the child's parents) is not to be made unless notice of the application for the order has been made to the local authority; the section then imposes a duty on the authority to arrange for a welfare report to be made to the court. For our part we have no doubt that ideally there should be statutory provision for securing that a welfare report is before the court in every case (whatever the nature of the proceedings) in which the court has to consider making a custody order in respect of a child. We accept that the ideal is impossible of attainment at present, because the demand for the services of social workers and probation officers has grown so rapidly that, for the time being, it would not be practicable for any major additional burden to be placed upon them. In this report, therefore, we make no recommendation for extending the cases in which the courts are required by statute to have a welfare report before them when considering the making of a custody order in respect of a child.

10.20 As to the suggestion that a magistrates' court hearing a matrimonial case should be enabled to call for a report at an earlier stage of the proceedings, section 4(2) of the 1960 Act, as we have noted, enables a court to call for a welfare report only after it has decided any question as to the inclusion in a matrimonial order of a non-cohabitation provision or a provision for the maintenance of a spouse. We have been told that this may mean in practice that there will be a delay of several weeks before the court has an opportunity to consider the position of the children. Thus, the children may be subjected to a longer period of strain and uncertainty than would otherwise be the case.

10.21 This criticism seems to us to have considerable force. One of the primary objectives of the magistrates' matrimonial law must be to provide for the welfare and support of the children during a period of family breakdown. A provision which may leave the children exposed to avoidable strain and uncertainty is not consistent with this objective. There will be cases where it will be obvious to the court from the outset that the issue of custody will be strongly contested and that it will be convenient for all concerned to call for a welfare report at an early stage. We therefore think that in matrimonial proceedings where children are involved a magistrates' court should have power to call for a welfare report at any stage of the proceedings. As the demands which are made on the limited resources of the welfare services are heavy, we hope that the power will be exercised only in those cases where it is clear that the court is likely to be in difficulties unless a report is available.

10.22 We also think that a single justice or the justices' clerk should be empowered to call for a report in advance of the hearing. Such a power will be valuable in cases where consultation with the parties' solicitors suggests there will be a contest as to custody and that the court will require further information on specific aspects of the child's situation. We note, in this connection, that section 90(2) of the Children Act 1975 adds a new subsection to section 6 of the Guardianship Act 1973, empowering a single justice to request a welfare report before the hearing. We understand that the Government's intention, in bringing forward this provision, was to pave the way for rules to be made under section 5 of the Justices of the Peace Act 1968 enabling the justices' clerk to exercise this power. The Government did not propose a corresponding amendment to section 4(3) and (4) of the 1960 Act, but we understand that this was because they did not wish to anticipate our general conclusions on the shape of this provision.

Recommendations

10.23 *We therefore recommend* that the reformulated magistrates' matrimonial law should provide a discretionary power for magistrates dealing with an application for a matrimonial order (or for variation or revocation of a provision of such an order) to call for a welfare report on the children at any stage of the proceedings. The power should be capable of being exercised by a single justice in advance of the hearing, and ultimately rules should be made under section 5 of the Justices of the Peace Act 1968, enabling the justices' clerk also to call for a report in advance of the hearing.

10.24 *We further recommend* that the reformulated provisions should follow existing law in requiring the court (including a single justice and a justices'

clerk) to specify the relevant matters which are to be investigated. This will help to limit the burden placed on the social services by the provision.

(C) SEPARATE REPRESENTATION FOR CHILDREN IN MAGISTRATES' COURTS

The arguments in favour

10.25 It was also suggested by those who commented on Working Paper No. 53 that, in certain circumstances, separate representation (whether by a lawyer or a social worker or both), should be available in magistrates' courts for children whose welfare is affected by matrimonial proceedings.

10.26 The main argument advanced in favour of this suggestion was that because of the partisan nature of custody disputes between parents, there is a danger of the child's own interests, particularly where the child is under 12 years old, going by default. The child is not a party to the matrimonial dispute between his parents, but this does not mean that the child's wishes and feelings ought not to be taken into consideration. It was suggested that, even where a welfare report has been called for and a social worker is in court, the danger of the child's interests being overlooked still exists because the social worker is likely to feel inhibited from entering into argument with the parties' legal representatives. Another argument in favour of separate representation by a lawyer was that in a relatively small number of cases difficult questions of law arise which may have a profound effect opon the future of the child.

The Children Act 1975 and separate representation for children

10.27 Since Working Paper No. 53 was published, there has been extensive debate, both in the press and in Parliament, about the need to make further provision for the protection of children's interests in the courts. The main stimulus for the debate was the public concern aroused by the tragic case of Maria Colwell. The enquiry into her death[13] which was instituted by the Rt. Hon. Sir Keith Joseph M.P., then the Secretary of State for Social Services, attributed the failure to protect her largely to a breakdown in communication between those who were responsible for her care. But the report of the inquiry also drew attention to the need to strengthen the machinery for the representation of children in court in cases where their interests may be at risk.

10.28 The court proceedings which were involved in the Maria Colwell case were proceedings under section 21 of the Children and Young Persons Act 1969 for revocation of a care order. But the scope of the public debate about the protection of the interests of children before the courts had been widened to include all proceedings involving children.

10.29 The Bill which became the Children Act 1975, as originally introduced, contained a provision to enable courts in care and related proceedings, where there is or may be a conflict of interest between the parents and child, to order that the parents should not represent the child, and, if appropriate, to grant legal aid so that they may be separately represented. In such cases the court was to be able to appoint a guardian *ad litem* to act for the child.

[13] Care and supervision provided in relation to Maria Colwell. *Report of Committee of Inquiry*, 3 May 1974 (Chairman T. G. Field-Fisher Esq. Q.C.). (D.H.S.S.–I.S.B.N. 0 11 320596 1).

10.30 At Report Stage on the Children Bill the House of Lords accepted, on a division, an amendment moved by Baroness Masham, which substituted for the Government's proposed provision regarding conflicts of interest between parent and child in care and related proceedings, a clause providing that in any proceedings relating to a minor in any court, the court might, and in any contested proceedings relating to adoption, guardianship, custodianship, custody or upbringing should (in the absence of exceptional circumstances), make provision for the child's representation by an officer of a local authority or a solicitor or both.

10.31 The new clause was carried in the House of Lords against the strongly expressed advice of the Government spokesman, Lord Wells-Pestell. The main objection which the Government put forward was that the manpower resources in the form of social workers and of lawyers, which would be required to operate it effectively, did not exist and were not likely to come into being in the foreseeable future[14].

10.32 The Bill, as originally introduced, would have confined provision for separate representation of parent and child to applications for care orders, revocation of care orders and some related situations: it was not expected to involve more than 2500 cases a year at most.[15] This provision had been aimed at reducing the possibility (which cannot be eliminated by any legislation) of another case like that of Maria Colwell.

10.33 The new clause by contrast extended provision for separate representation to a wide range of other proceedings in which it had not hitherto been demonstrated that children are at substantial risk of their interests being overlooked. The clause also affected juvenile court proceedings for delinquency and Lord Wells-Pestell expressed the opinion that it could involve upwards of 300,000 children[16].

10.34 On its return to the House of Commons the Bill was further amended and Baroness Masham's clause deleted[17]. In the result the principal provisions of the Children Act 1975 relating to the appointment of a guardian *ad litem* for a child are section 20 (adoption) and sections 58 and 64 (care and related proceedings). Provision for the appointment of a guardian *ad litem* in adoption proceedings has for long existed[18]; but sections 58 and 64 represent a new departure.

Conclusions: no recommendation made

10.35 The Parliamentary debate on the Children Bill from which we have quoted in the foregoing paragraphs demonstrates that over-generous provision for the separate representation of children before the courts will inevitably involve an unacceptably heavy burden being placed on the welfare services.

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[14] *Hansard* (House of Lords), 6 March 1975, Vol. 357, Cols, 1413–1414.

[15] *ibid.*, Col. 1414.

[16] The Civil Judicial Statistics show that the proceedings covered by the new clause are indeed extremely numerous. They could include, for example, 117,017 divorces (in 1974), 4865 guardianship orders by magistrates (in 1973) and 13,657 maintenance orders for women by magistrates (in 1973).

[17] *Hansard* (House of Commons), 31 July 1975, Standing Committee "A", Cols. 668–670.

[18] See the Adoption Act 1958, s. 9(7) repealed by the Children Act 1975, s. 108(1) and Schedule 4, Part VIII.

Any measure which causes the welfare services to be over-burdened will be self-defeating, and this must be a consideration of vital importance to children. The whole problem has recently been the subject of very full consideration by Parliament, and in the result Parliament has selected care and related proceedings as the area in which a fresh approach is most immediately needed. This being so, we think it would not be right for us to suggest that Parliament should depart from a policy to which it has so recently given effect. Accordingly we make no proposal for the separate representation of children beyond the provisions contained in sections 20, 58 and 64 of the Children Act 1975.

10.36 We would add that it is our belief that, in most contested matrimonial proceedings where the custody of a child is in issue, the trial of the issues between the spouses, together with the welfare reports which should be called for when there is any difficulty, will themselves bring to notice all the facts relevant to the welfare of the child. Moreover, we believe that acceptance of our own recommendation in paragraph 10.23 above will further improve existing arrangements. A discretionary power in the court (exercisable also by a single justice) to call for a welfare report on the children at any stage of the proceedings will introduce an improved means of ensuring that the interests of the child himself are taken fully into account.

(D) THE INTERVIEWING OF CHILDREN BY THE COURT

The arguments in favour

10.37 Giving judgment in the case of *In re T.* (an infant)[19] Sir George Baker, President of the Family Division, said that there was no statutory authority which allowed justices to see children in custody cases in their private rooms, and that he could not agree with a suggestion in a note in *Clarke Hall and Morrison on Children*[20] that justices should adopt the practice of seeing children in private to ascertain their wishes. The practice used by judges in the wardship jurisdiction did not apply to justices. Several commentators on Working Paper No. 53 referred to this judgment and there was a suggestion that it should be reversed and the law changed so as to enable the justices in appropriate cases to interview children privately.

10.38 The main argument in favour of the suggestion was that, where the magistrates attach very great importance to the expressed wishes of a child in a custody case, and they decide to question the child themselves, the questioning ought not to be done in open court because the child would be placed in the difficult position of having to reply in front of parents who are competing for his custody.

Discussion of the problem

10.39 In deciding our own attitude, we have had the benefit of the President's views. He told us that he personally tends to be against seeing a child unless he is satisfied that it may be beneficial to do so. Moreover, he suggested it should be made clear that magistrates have no power to see a child privately.

10.40 We are doubtful of the wisdom of giving magistrates the power to

[19] *The Times*, 16 January 1974.
[20] 8th Ed. 1972, p. 1198.

interview children in private in disputed custody cases. We accept that where a child is old enough to have wishes and feelings of his own, the magistrates ought to know what those wishes and feelings are and to give them every consideration. We think, however, that a social worker is in the best position to ascertain the child's views because he can do so by less formal methods than the court and at greater leisure.

10.41 It can be argued that, if the judges of the Family Division have power to interview children privately and find the power helpful on occasion, then it is illogical to deprive the justices, who have to take the same sort of decisions about the custody of children, of a similar power. We understand, however, that the power of the judges of the Family Division is exercised sparingly.

10.42 We think, in any event, that there are objections to conferring on magistrates the power of judges to see children privately. The exercise of such a power in practice would mean three justices and a justices' clerk retiring with the child (not to mention any social worker who might be in attendance); such a gathering would scarcely be likely to put the child at his ease. Moreover, if the child said anything prejudicial about his parents, we think that magistrates might find greater difficulty than a judge in deciding what course to adopt so as to ensure fairness to all parties.

Conclusion: no statutory power to be given to magistrates

10.43 Our conclusion, for the above reasons, is that the magistrates should not be given power to interview children privately. We do not consider that an express statutory provision is necessary to make this clear, in view of the judgment in *In re T.*

PART XI: THE PRESENTATION OF THE LAW ON THE CUSTODY AND MAINTENANCE OF CHILDREN AND THE NEXT STEPS IN REFORM

A suggestion by the Working Party reconsidered

11.1 The draft Bill annexed to this report is designed to replace the 1960 Act by a new code for matrimonial proceedings in magistrates' courts. All the major reforms which the draft Bill embodies have been the subject of discussion and recommendations in the foregoing parts of this report. In designing those recommendations one of our principal objectives has been to eliminate as far as possible unnecessary differences between the magistrates' matrimonial law and the matrimonial law administered in the divorce court and so far as practicable to assimilate the powers of various courts concerned with the custody, maintenance, care and supervision of children. In seeking those ends we have had to take account of factors which have supervened since Working Paper No. 53 was published, including the enactment of the Children Act 1975, Part II of which contains substantial additions to the law relating to the custody and maintenance of children. These factors, of which the Working Party was of course unable to take account, have influenced our views on the question how the law relating to the custody and maintenance of children can be presented with the maximum of clarity and simplicity.

11.2 The Working Paper concluded with a suggestion that, in order to avoid the repetition of provisions relating to the custody and maintenance of children in five statutes (the Affiliation Proceedings Act 1957, the 1960 Act, the Guardianship of Minors Act 1971, the Guardianship Act 1973 and the Matrimonial Proceedings and Property Act 1970), the powers of the courts to deal with the custody and maintenance of children might be incorporated in a single common code. The Working Party suggested that there might be four separate Acts providing for some form of "substantive" relief, that is to say, divorce, financial provision, appointment of guardians and determination of paternity, and that each of these Acts would provide that where such substantive relief was given the court should exercise its powers in respect of any children involved under a uniform child custody and maintenance statute[1].

11.3 Further examination of the proposal for a uniform child custody and maintenance statute has led us, however, to doubt both its practicality and its usefulness. In the case of the Guardianship of Minors Act 1971, for instance, the powers of the court to award custody in disputes between parents under section 9 of that Act do not result from any substantive powers as to the appointment of guardians which could be put into a separate Act. The same applies to custodianship orders under Part II of the Children Act 1975. As for the statutory provisions under which powers relating to children become exercisable because of proceedings taken by one of the parties to a marriage on some marriage breakdown (that is, proceedings under Part I of the Matrimonial Causes Act 1973, under section 27 of that Act or under Part I of the draft Bill appended to this report), division of the legislation might not simplify matters for the users of statutes concerned. Although we have made proposals for assimilation wherever we think it practicable, differences would remain between the powers of the court to make financial orders under the three sets of provisions. Magistrates would have to look at two Acts to find out their powers in matrimonial cases and would have to find some of their powers among provisions relating only to the High Court.

Our view of the next steps in reform

11.4 What is needed is a comprehensive family law code, as the President of the Family Division and other authorities have frequently emphasised. In our view the code should consist of a series of statutes of manageable size, each of them gathering together provisions which, from the point of view of the convenience of the user (the predominant consideration), should be found in a single document. One of those statutes would, we suggest, comprise the provisions of Part I of the Bill annexed to our report. Another would be a new Matrimonial Causes Act containing the provisiions of the 1973 Act amended as we have proposed in this report. Another would be an adoption statute. A Bill prepared by us to consolidate the law relating to adoption has already been introduced. From the point of view of the presentation of the law, what is now urgently needed is a consolidation of the Guardianship of Minors Act 1971, the Guardianship Act 1973, and Part II of the Children Act 1975. These provisions are already much in need of consolidation and the need will be greater if they are further amended as proposed in the draft Bill annexed to this report.

[1] Working Paper No. 53, paras. 165–167, recommendation (45).

11.5 The substance and content of the affiliation law are overdue for review. We hope to see this task undertaken as soon as possible; and when it has been done a modern statute dealing with the determination and responsibilities of paternity would take its place in the code which we envisage. We accept that in such a code provisions relating to the custody and maintenance of children would be found in more than one statute. That, we think, will be for the convenience of the user rather than otherwise, provided that there are no differences between the relevant provisions except where differences are needed.

PART XII: SUMMARY OF RECOMMENDATIONS

12.1 The following gives a summary of the recommendations in this report with cross-references to the clauses which implement them in the draft Bill annexed at Appendix 1.

PART II: THE PROVISION OF FINANCIAL RELIEF BETWEEN SPOUSES

The three grounds on which magistrates should be able to make an order

(1) The long list of grounds provided in section 1 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 should be replaced by three grounds on which the magistrates should be able to make an order for financial provision, namely:—

(*a*) that the respondent has failed to provide such maintenance for the applicant or for any children as is reasonable in all the circumstances; or

(*b*) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or

(*c*) that the respondent is in desertion. (Paragraph 2.13 and see Clause 1.)

Maintenance on basis of equality

(2)(*a*) The magistrates' matrimonial law should embody the general principle that it is the duty of each spouse to support the other on a basis of equality;

(*b*) the grounds of application and the guidelines for the court should be the same whichever spouse applies for maintenance;

(*c*) the court should then determine the application in the light of the particular circumstances of the case. (Paragraph 2.14 and see Clauses 1 and 3.)

Adultery not to be an absolute bar to financial relief

(3) The magistrates' matrimonial law should be reformulated so as to make adultery no longer an absolute bar to financial relief. (Paragraph 2.16 and see Clause 59(1) and Schedule 2, repealing section 2(3) of the 1960 Act.)

Conduct should be relevant to both liability and quantum

(4) In deciding whether to order one party to a marriage to make financial provision for the other, and if so what provision to order, magistrates should be required to have regard to the conduct in relation to the marriage of the parties to the extent to which it is just to do so. In no circumstances should the conduct of the parties towards each other affect the maintenance ordered for children of the family. (Paragraph 2.25 and see Clauses 3(1)(*g*) and 3(2)(*f*).)

The statutory guidelines proposed

(5) The factors other than conduct which should be taken into account by the court should be set out in the form of statutory guidelines and should be as follows:—

(*a*) the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future;

(*b*) the financial needs, obligations and responsibilities which each of the parties has or is likely to have in the foreseeable future;

(*c*) the standard of living enjoyed by the parties to the marriage before the occurrence of the conduct which is alleged as the ground of application;

(*d*) the age of each party to the marriage and the duration of the marriage;

(*e*) any physical or mental disability of either of the parties to the marriage;

(*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(*g*) any other matter which in the circumstances of the case the court may consider relevant, including, so far as it is just to take it into account, the conduct of each of the parties in relation to the marriage. (Paragraph 2.29 and see Clause 3(1)(*a*)–(*g*).)

Orders for lump sums and for periodical payments at discretionary intervals

(6) Magistrates should be given power to order the payment of a lump sum of up to £500 and the exercise of this power should not be limited to a single occasion. (Paragraph 2.39(*a*) and see Clauses 2(1)(*b*), 2(3) and 15(3).)

(7) It should be made clear that, when the magistrates have ordered payment of a lump sum by instalments, they have power to vary the instalments. (Paragraph 2.39(*b*) and see Clause 16.)

(8) There should be an express statutory provision whereby periodical payments can be ordered for such term and at such intervals as may be specified in the order. (Paragraph 2.39(*c*) and see Clause 2(1)(*a*).)

Variation or revocation at the court's discretion

(9) On an application for the variation or revocation of a maintenance order for periodical payments made in favour of a husband or wife, the court should

have the discretion to make whatever order it thinks appropriate having regard to all the circumstances including any change in any of the matters to which the court was required to have regard when making the original order. (Paragraph 2.45 and see Clauses 15(1) and 15(6).)

No compulsory revocation for adultery

(10) There should be no rule of law making it compulsory for the order to be revoked on the ground of adultery. (Paragraph 2.46 and see Clause 59(1) and Schedule 2, repealing section 8(3) of the 1960 Act.)

Automatic cessation only on cohabitation for a continuous period of 6 months: a court declaration

(11) There should be automatic cessation of an order requiring one spouse to make periodical payments for the maintenance of the other only if there has been cohabitation for a continuous period of 6 months after the order, whether the cohabitation is continued or resumed. (Paragraph 2.57(*a*) and see Clause 19(1).

(12) There should be a general provision that where an order has ceased to be in force by reason of cohabitation, the court may on application make a declaration to that effect and may specify the date on which the order ceased to be in force. (Paragraph 2.57(*b*) and see Clause 19(3).)

Order to be enforceable during the 6 month period of cohabitation

(13) On the assumption that an order requiring one spouse to make periodical payments for the maintenance of the other will remain in effect when the parties are cohabiting for a period of 6 months as recommended, the order should be enforceable throughout that 6 months period. (Paragraph 2.65 and see Clause 19(1).)

PART III: THE PROVISION OF OTHER RELIEF

Personal protection orders and exclusion orders

(14) *Personal protection orders.* A magistrates' court should have power, if it is satisfied by evidence of violent behaviour or threat of violent behaviour on the part of the respondent against the complainant or a child of the family that it is necessary to do so for the protection of the complainant or a child of the family, to make one or both of the following orders:—

(*a*) an order that the respondent shall not use or threaten violence against the complainant;

(*b*) an order that the respondent shall not use or threaten violence against a child of the family. (Paragraph 3.40(*a*) and see Clause 13(2).)

(15) *Exclusion orders.* A magistrates' court should have power, if it is satisfied that the complainant or a child of the family is in danger of being physically injured by the respondent and that the respondent has used violence against the complainant or a child of the family, or that the respondent has threatened violence against the complainant or a child of the family and also has used violence against some other person or that the respondent has

disobeyed a personal protection order by threatening violence, to make one or both of the following orders:—

(*a*) an order that the respondent should vacate the matrimonial home;

(*b*) an order that the respondent should not enter the matrimonial home. (Paragraph 3.40(*b*) and see Clause 13(3).)

(16) The court should have power to include in a personal protection order a provision that the respondent shall not incite or assist any other person to use or threaten violence against the complainant or a child of the family. (Paragraph 3.40(*c*) and see Clause 13(7).)

(17) In making an exclusion order the court should have power to authorise entry into the home for a temporary and limited purpose, such as, for example, the collection and removal of personal belongings. (Paragraph 3.40(*d*) and see Clause 13(6).)

(18) Either of the above orders should be capable of being made generally or subject to exemptions and conditions and for an indefinite period or such period as is specified in the order. (Paragraph 3.41 and see Clause 13(6).)

(19) Application should be made by way of complaint and as a standard procedure the matter should be dealt with by a full bench after the issue of a summons served and returnable in accordance with the ordinary rules. (Paragraph 3.42 and see Clause 13(8).)

(20) If it appears to the court to be essential to do so in order to prevent physical injury to the applicant or a child, the court should be able to make an expedited personal protection order (but not an expedited exclusion order), notwithstanding that the respondent has not been served with the summons or that some other requirement of normal procedure has not been complied with. (Paragraph 3.43 and see Clause 13(4).)

(21) An expedited personal protection order as specified above should be capable of being made either by a single justice or a full bench. (Paragraph 3.44 and see Clause 13(5).)

(22) An exclusion order should not be made otherwise than by a full bench after a hearing in accordance with the ordinary rules. (Paragraph 3.45 and see Clause 13(5).)

(23) Rules should provide generally for the detailed matters relating to the making of the above mentioned orders and in particular should provide:—

(*a*) that a respondent should be given notice of any expedited order and that such an order should take effect on the date of the notice thereof or such later date as the court may specify;

(*b*) for the duration of an expedited order and also for conferring on the court a power to make a further temporary order for a specified period;

(*c*) for the hearing of an application for an exclusion order by a full bench with the minimum of delay. (Paragraph 3.46 and see Clause 13.8.)

(24) Legislation should specifically provide that an exclusion order should not for the purpose of divorce proceedings stop the party against whom the order was made from being in desertion. (Paragraph 3.47 and see Clause 48.)

(25) Existing non-cohabitation orders should continue in force until brought to an end in accordance with the present law, but the court may in future treat a period during which such a non-cohabitation order is in force as a period during which the respondent has deserted the petitioner. (Paragraph 3.48 and see Clause 48.)

PART IV: PROCEDURAL AND RELATED MATTERS

A consent order for maintenance

(26) Provision should be made for an order by consent in cases where the husband and wife are in agreement about the amount of maintenance and wish to have this agreement given legal force as a maintenance order. (Paragraph 4.8(*a*) and see Clause 6(1).)

(27) The court should have discretion to refuse to make the order if it considers that it would be contrary to the interests of justice for the order to be made. (Paragraph 4.8(*b*) and see Clause 6(1).)

(28) With regard to consent orders in respect of a child, the court should not make an order unless it considers that the payments provide, or make a proper contribution towards, reasonable maintenance for that child. (Paragraph 4.8(*c*) and see Clause 6(1) and 6(2).)

(29) A consent order should not be made except by a full court of two or three magistrates. (Paragraph 4.8(*d*) and see Clause 6(1).)

(30) As a general rule, both parties should be present or legally represented in court. Exceptionally, a consent order may be made against a respondent who is not present in court either personally or through a legal representative, provided that there is sufficient evidence of his consent to the making of the order and of his financial resources. The nature of such evidence should be prescribed by rules of court. (Paragraph 4.8(*e*) and see Clause 6(8).)

(31) On an application to vary or revoke the consent order the court should be entitled to re-examine the whole case on the merits. (Paragraph 4.8(*f*) and see Clause 15(6).

(32) In the exercise of its powers to vary or revoke maintenance orders, the court should be required to have regard to any agreement made between the parties as to maintenance payments and to give effect to the agreement so far as it appears to the court to be just to do so. (Paragraph 4.8(*g*) and see Clause 15(6).)

The statutory provisions proposed regarding reconciliation

(33) The reformulated magistrates' matrimonial law should place on the courts a duty to consider the possibility of reconcilation and to direct the parties' attention to this possibility; and it should be expressly provided that if a magistrates' court dealing with an application for a maintenance order (other than an order by consent) considers at any stage in the proceedings that there is a reasonable possibility of a reconciliation, the court may adjourn the proceedings and, either separately or in addition, may request a probation officer or other person to attempt to effect a reconciliation between the parties. (Paragraph 4.16 and see Clauses 20(1) and 20(2).)

The reconciliation procedure

(34) Where the court requests a probation officer or other person to attempt a reconciliation, the report to the court should consist simply of a statement as to whether the attempted reconciliation has succeeded. (Paragraph 4.17(*a*) and see Clause 20(2).)

(35) Sections 59 and 62 of the Magistrates' Courts Act 1952 should be repealed. (Paragraph 4.17(*b*) and see Clause 59(1) and Schedule 2.)

Power to make interim orders and the duration of such orders

(36) The powers of magistrates to make interim orders in matrimonial proceedings (whether for maintenance or for custody) should be exercised in accordance with a scheme incorporating the following main features:—

(*a*) The power to make an interim order will be capable of being exercised at any time before the final determination, and without having to adjourn the hearing in those cases where an adjournment is now required.

(*b*) The power to make an interim order will only be exercisable by a bench of at least two justices.

(*c*) The duration of the interim order will not in the first instance extend beyond 3 months from the making of the order but the court will have power to extend the order for a further period not exceeding 3 months. (Paragraph 4.34 and see Clauses 14(1)(*a*) and 14(3).)

(37) The provisions for the duration of interim orders set out in 36(*c*) above should also apply to interim orders made by the High Court in the circumstances envisaged by section 6 of the 1960 Act. (Paragraph 4.35 and see Clause 14(1)(*b*).)

Use of the means questionnaire

(38) Magistrates' courts rules should provide that a complainant in matrimonial proceedings will on making her complaint be invited to answer a simple means questionnaire which will include a question about her husband's earnings and employment. (Paragraph 4.36(*a*).)

(39) The wife's completed questionnaire should be served on the husband with the summons, and he should be invited to complete a simple questionnaire about his means. (Paragraph 4.36(*b*).)

(40) The admissibility in evidence of the answers to the questionnaires, both on applications for an interim order and on applications for a final order, should not be the subject of special provisions but should be governed by the ordinary rules of evidence. (Paragraph 4.36(*c*).)

The effective date of a maintenance order now proposed: powers of the High Court on appeal

(41) A magistrates' court should have power to direct that any interim or final maintenance order shall take effect from such date, whether before or after the making of the order, as the court may determine, except that the date

so fixed should not be earlier than the original application for the final order. (Paragraph 4.52(*a*) and see Clauses 4(1) and 14(2).)

(42) A magistrates' court should have power to direct that any order varying or revoking an interim or final maintenance order shall take effect from such date, whether before or after the making of the order for variation or revocation, as the court may determine, except that the date so fixed should not be earlier than the application for that order. (Paragraph 4.52(*b*) and see Clause 15(4).)

(43) On an appeal from a magistrates' court in a matter of maintenance the High Court should have power:—

(*a*) to direct that any interim or final order which it makes should take effect from such date, whether before or after the date of the making of the order, as the court may determine, except that the date so fixed should not be earlier than that which the magistrates themselves could have fixed for such an order;

(*b*) when making an order which is to take effect as from a date before the making of the order, to order that credit shall be given for any payments previously made under the magistrates' order;

(*c*) to order repayment of some or all of any sums received by way of payments under a magistrates' maintenance order, and to remit arrears under such an order;

(*d*) generally, to make such orders as may be necessary for the determination of the appeal and such consequential orders as may seem just. (Paragraph 4.52(*c*) and see Clauses 23(2), 23(3) and 14(2).)

A power temporarily to suspend a maintenance order

(44) Section 53 of the Magistrates' Courts Act 1952 should be amended so as to provide that where a magistrates' court has made an order for the periodical payment of money, it may on application suspend the operation of the order and subsequently revive it. (Paragraph 4.56 and see Clauses 15(2) and 41.)

Power to revive orders to be confined to cases provided by statute

(45) Where an order made by magistrates in the exercise of their matrimonial jurisdiction has wholly ceased to have effect, the power to revive it should be confined to cases where the specific statutory provision has been made for the purpose. (Paragraph 4.60 and see Clauses 15(2), 15(5) and 17(3).)

A simple form of "pleadings"

(46) It should be provided by rules of court that there should be introduced into the magistrates' matrimonial procedure a very simple form of "pleadings". The summons should inform the respondent of the ground on which the applicant is applying for an order and should, where unreasonable behaviour is the ground, state briefly the facts on which the applicant intends to rely. The respondent should be requested to indicate whether he proposes to contest the application and, if so, on what grounds. (Paragraph 4.66.)

An improved method of recording reasons for decisions

(47) In prescribed classes of domestic proceedings rules should require the justices, before announcing their decision, to draw up in consultation with the clerk a note of reasons for the decision. A copy of the note would not be supplied automatically to the parties, but a copy should be available as of right to either party for the purposes of an appeal or for the purpose of considering whether or not to appeal. (Paragraph 4.76(*a*) and see Clause 56(1).)

(48) A copy of the note would be made available to any magistrates' court which hears subsequent proceedings in relation to the order, as part of the machinery provided by rule 34 of the the Magistrates' Courts Rules 1968. The copy should be admissible in any subsequent proceedings as evidence of those reasons. (Paragraph 4.76(*b*) and see Clause 56(2).)

The rules for jurisdiction now proposed

(49) A magistrates' court should have jurisdiction in matrimonial proceedings if its area falls within the county in which the complainant or the respondent ordinarily resides. (Paragraph 4.90(*a*) and see Clause 24(1).)

(50) There should be power to transfer the proceedings to another magistrates' court if that appears to be a more convenient forum. (Paragraph 4.90(*b*).)

(51) The reformulated law as to matrimonial proceedings in magistrates' courts should contain provisions corresponding to sections 1(3), 9(1), 14(1) and 14(3) of the 1960 Act. (Paragraph 4.90(*c*) and see Clauses 24(2)–(6).)

(52) Section 44 of the Magistrates' Courts Act 1952 should be amended so that jurisdiction under its provisions is based on the county and not on the petty sessions area. (Paragraph 4.90(*d*) and see Clause 40.)

(53) Provision to give effect to our proposals under paragraphs 49, 51 and 52 above should be made by Act of Parliament. Provision to give effect to our proposals under paragraph 50 should be made by rules. (Paragraph 4.90(*e*) and see Clauses 24 and 40.)

The relationship between magistrates' courts and the Divisional Court: three proposals of detail

(54) Section 5 of the 1960 Act which gives the magistrates power to refuse jurisdiction should be re-enacted in the reformulated magistrates' matrimonial law. (Paragraph 4.100(*a*) and see Clause 21.)

(55) Where matrimonial proceedings are pending in a divorce court when an application for a matrimonial order is due to be heard by a magistrates' court, the magistrates should be entitled to hear the case before them or to adjourn it as they may think fit. (Paragraph 4.100(*b*).)

(56) Where after magistrates have made a matrimonial order containing a money provision, or an interim order, proceedings between, and relating to the marriage of, the parties are commenced in a divorce dourt, the discretionary power of the divorce court to discharge the magistrates' order under section 7(3) of the 1960 Act should be retained. (Paragraph 4.100(*c*) and see Clause 22.)

PART V: ORDERS IN RESPECT OF CHILDREN IN MAGISTRATES' MATRIMONIAL PROCEEDINGS

Definition of "child of the family"

(57) The existing definition of "child of the family" in the 1960 Act should be replaced by that in the Matrimonial Causes Act 1973. (Paragraph 5.17 and see Clause 58(1).)

Custody orders to last until the child is 18: custody orders *de novo* for children between 16 and 18

(58) The magistrates' matrimonial law should make express provision for custody orders to last until the child reaches the age of 18, and should also enable a custody order to be made *de novo* in respect of children between the ages of 16 and 18. (Paragraph 5.22 and see Clauses 7(1) and 7(2).)

Custody orders in favour of husband or wife: "the split order"

(59) A magistrates' court in matrimonial proceedings should have power to order that one of the parties to the marriage shall have the legal custody of any child of the family. When the court gives legal custody to one of the parties to the marriage, it should have power to order that the other party shall retain all or any of the parental rights and duties comprised in legal custody (other than the right to actual custody of the child) and should have those rights and duties jointly with the person who is given legal custody. The court should also have power to confer rights of access to the child on the party not entitled to actual custody and on any natural parent. (Paragraph 5.34(*a*) and see Clauses 7(2) and 7(4).)

(60) Separate provision should be made, on the lines of section 1(3) of the Guardianship Act 1973, for the resolution by a court of disputes between the parties to a marriage about the exercise or performance of a parental right or duty which they share. (Paragraph 5.34(*b*), and see Clause 12(1).)

Custody orders in favour of third parties

(61) The reformulated magistrates' matrimonial law should contain a provision empowering the court to give the legal custody of a child to a parent of that child who is not a party to the marriage. (Paragraph 5.38(*a*) and see Clause 7(3).)

(62) When the court exercises that power, it should have power to confer rights of access to the child on either party to the marriage and power to direct that either party to the marriage shall retain all or any of the rights and duties comprised in legal custody (other than the right to the actual custody of the child) and shall have those rights and duties jointly with the natural parent. There should be provision for the resolution of disputes on the lines of section 1(3) of the Guardianship Act 1973 as recommended under paragraph 60 above. (Paragraph 5.38(*b*) and see Clauses 7(4) and 12(1).)

(63) Where the court is minded to award legal custody to a person who is neither a parent nor a party to the marriage, it should have power to direct that person shall be treated as if he had applied for a custodianship order under

section 33 of the Children Act 1975 and (if such is not the case) as if he were qualified to apply for such an order. (Paragraph 5.38(*c*) and see Clause 7(3).)

Discretion to postpone the coming into effect of custody orders

(64) Where a magistrates' court makes an interim or final custody order in matrimonial proceedings or in proceedings under the Guardianship of Minors Acts 1971 and 1973 the court should have power to postpone the coming into effect of the order for such period or until the occurrence of such event as may be specified in the order. It should be possible for the court to exercise its powers either on application or of its own motion, and the court should be able to extend the period of postponement in appropriate circumstances. (Paragraph 5.47 and see Clause 7(6).)

A strengthening of the magistrates' powers to enforce orders other than for the payment of money

(65) Section 54 of the Magistrates' Courts Act 1952 should be amended as follows:—

(*a*) the financial penalties specified in subsection (3) should be increased to £10 for the daily penalty and £400 for the cumulative limit;

(*b*) subsection (3) should be reformulated so as to enable further penalties to be imposed for breaches of an order subsequent to a breach for which penalties have already been imposed under the subsection;

(*c*) subsection (4) should be amended to provide for sums ordered to be paid under subsection (3) to be treated for enforcement purposes as sums adjudged to be paid on a conviction. (Paragraph 5.53 and see Clause 42.)

Enforcement under the 1960 Act and the guardianship legislation

(66) Section 13(3) of the 1960 Act and section 13(1) of the Guardianship of Minors Act 1971 should be amended so as to provide that the person on whose behalf enforcement proceedings may be brought is the person entitled, under the order of the court, to the actual custody of the child. (Paragraph 5.55 and see Clause 29.)

Power to make a care order if a child is under 17

(67) In matrimonial proceedings a magistrates' court should have power, where there are exceptional circumstances which make it impracticable or undesirable for a child under the age of 17 to be entrusted to either of the parties to the marriage or to any other individual, to order that he shall be committed to the care of a local authority, the order to come to an end when the child reaches 18. (Paragraph 5.58 and see Clauses 9(1) and 9(5).)

Power to make a supervision order in respect of a child

(68) Where a magistrates' court in matrimonial proceedings has made a custody order in respect of a child, the power of the court to make a supervision order shall be exercisable at any time while the custody order continues in

effect and shall be exercisable notwithstanding that the child has attained the age of 16. (Paragraph 5.64 and see Clause 8(1).)

Orders for periodical payments at discretionary intervals and lump sums

(69) A magistrates' court in matrimonial proceedings should be able to order that periodical payments for the maintenance of a child should be made at such intervals as the court considers appropriate. (Paragraph 5.67(*a*) and see Clause 2(1)(*c*).)

(70) The court should have power to order payment of a lump sum of up to £500 in respect of any child of the family; there should be power to vary the limit of £500 by Order in Council; and it should be possible to make a lump sum order not only on the occasion when maintenance is first ordered, but also on a subsequent occasion where there has been some change in circumstances. (Paragraph 5.67(*b*) and see Clause 2(1)(*d*), 2(3) and 15(3).)

(71) The power to order a lump sum should not extend to cases where a care order has been made and maintenance is payable to a local authority. (Paragraph 5.67(*c*) and see Clause 10(3).)

The persons to whom payments for the maintenance of a child can be ordered

(72) Where, in matrimonial proceedings, a magistrates' court orders payments to be made for the maintenance of a child, the court should have power to order those payments to be made:—

(*a*) to a party to the marriage who has successfully applied for maintenance for the child;

(*b*) to the child himself;

(*c*) to any parent of the child (not being a party to the marriage) to whom the legal custody of the child is committed by an order made on the application;

(*d*) to a local authority to whose care the child is committed by such an order. (Paragraph 5.73 and see Clauses 2(1)(*c*), 2(1)(*d*), 10(2) and 10(3).)

(73) Where in such proceedings the actual custody of the child is given to the respondent to the application, the court should have power to order the applicant to make payments to the respondent for the child's maintenance. (Paragraph 5.74 and see Clause 10(1).)

The guidelines for maintenance for a child to be the same as in section 25(2) and (3) of the Matrimonial Causes Act 1973

(74) In awarding maintenance for a child in matrimonial proceedings the magistrates should have regard to the following guidelines:—

(*a*) the financial needs of the child;

(*b*) the income, earning capacity (if any), property and other financial resources of the child;

(*c*) any physical or mental disability of the child;

(*d*) the standard of living enjoyed by the family before the occurrence of the conduct relied on as the ground of application;

(*e*) the manner in which the child was being and in which the parties to the marriage expected him to be educated or trained;

(*f*) the income, earning capacity, property and other financial resources of those parties, and their financial needs, obligations and responsibilities;

(*g*) and, in deciding whether and in what manner to award maintenance for a child of the family against a party to the marriage who is not the parent of that child, the following additional guidelines:—

(i) whether that party had assumed responsibility for the maintenance of the child and if so the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time that party discharged such responsibility;

(ii) whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;

(iii) the liability of any other person to maintain the child.
(Paragraphs 5.78, 5.79 and 5.80) and see Clauses 3(2) and 3(3).)

The magistrates' powers should be assimilated to those of the divorce court

(75) The provisions as to the duration of orders for the maintenance of children made by magistrates in matrimonial proceedings should be modelled on section 29 of the Matrimonial Causes Act 1973; and, subject to conditions similar to those prescribed in that section, magistrates should in such proceedings have power:—

(*a*) in the case of a child under the age of 18, to make an order for his maintenance for a period extending beyond that age;

(*b*) in the case of a child over the age of 18, to make an order for his maintenance notwithstanding that he is over that age.

(Paragraph 5.89 and see Clause 5.)

The rights of a child to apply for the variation or revival of a maintenance order

(76) Where a maintenance order made by a magistrates' court in matrimonial proceedings is in force for the benefit of a child who has attained the age of 16 years, he should himself be able to apply for a variation of the order. The powers of the court on such an application should include power to vary the order both as to amount and as to duration. (Paragraph 5.96(*a*) and see Clause 15(8).)

(77) Where such a maintenance order has ceased to have effect on a child attaining the age of 18 years or at any time within the two years preceding his attaining that age, he may, at any time before attaining the age of 21 apply to the court to revive the order with variations. The variations which the court should have power to make on such an application would include variations as to duration and as to amount. (Paragraph 5.96(*b*) and see Clause 15(5).)

Maintenance ordered to be paid to a party to the marriage to be enforceable during 6 months cohabitation and shall cease to have effect if there is continuous cohabitation exceeding 6 months

(78) Where in matrimonial proceedings a magistrates' court makes an order requiring one spouse to pay to the other periodical payments for the maintenance of a child, the order should be enforceable while the parties are cohabiting except that if there is continuous cohabitation for a period exceeding 6 months after the date of the order, the order should cease to have effect. (Paragraph 5.102 and see Clause 19(1).)

Cohabitation between parties to the marriage to have no effect on maintenance ordered to be paid to a third party

(79) Where in matrimonial proceedings a magistrates' court, having made a custody order in favour of a parent of a child who is not a party to the marriage, or having made an order committing a child to the care of a local authority, makes an order requiring periodical payments for the maintenance of the child to be made by one of the parties to the marriage to that parent or authority, then, for so long as the custody or care order remains in force, cohabitation between the parties to the marriage should not, unless the court otherwise directs, affect the duration of the maintenance order or its enforceability. (Paragraph 5.105 and see Clause 19(2).)

Cohabitation between the parties to have no effect on maintenance order to be paid to a child himself unless the court otherwise directs

(80) Where a magistrates' court in matrimonial proceedings makes an order requiring periodical payments for the maintenance of a child to be made to the child himself, the order shall, unless the court otherwise directs, continue to have effect and be enforceable notwithstanding the continuation or resumption of cohabitation between the parties to the marriage. (Paragraph 5.107 and see Clause 19(2).)

Custody order in favour of one of the parties to be enforceable during cohabitation and should cease to have effect after 6 months

(81) An order made by magistrates in matrimonial proceedings committing a child to the custody of one of the parties to a marriage should cease to have effect if the parties cohabit for a continuous period exceeding 6 months after the date of the order. (Paragraph 5.109(*s*) and see Clause 19(1).)

(82) So long as the order remains in effect, it should be enforceable against all persons, including the other party to the marriage. (Paragraph 5.109(*b*) and see Clause 19(1).)

Custody, care or supervision order in favour of third party not to be affected by cohabitation of the parties unless the court otherwise directs

(83) Where in matrimonial proceedings a magistrates' court has made an order:—

(*a*) committing a child to the custody of a parent who is not a party to the marriage; or

(*b*) committing a child to care or providing that the child shall be under supervision;

then, unless the court otherwise directs, the duration and enforceability of the order shall not be affected by the continuation or resumption of cohabitation between the parties to the marriage. (Paragraph 5.113 and see Clause 19(2).)

The court to have discretion to vary or revoke orders in respect of children: the persons entitled to apply

(84) On an application to vary or revoke an order relating to a child made by magistrates in matrimonial proceedings, the court should have a discretion to make whatever order it thinks appropriate having regard to all the circumstances including any change in any of the matters to which the court was required to have regard when making the original order. (Paragraph 5.118(*a*) and see Clause 15(6).)

(85) The following should be entitled to apply for the variation or revocation of such an order:—

(*a*) the parties to the marriage which was the subject of the original proceedings;

(*b*) in the case of an order providing for the custody, care or supervision of the child, a natural parent of the child;

(*c*) in the case of an order placing the child under the supervision of a local authority or probation officer, that authority or officer;

(*d*) in the case of an order committing the child to the care of a local authority, that authority;

(*e*) in the case of an order providing for the making of periodical payments for the maintenance of a child whom the court has committed to the custody of a natural parent of the child, or to the care of a local authority, the natural parent or local authority. (Paragraph 5.118(*b*) and see Clause 15(8).)

(86) In the case of an order providing for the payment of a lump sum for the benefit of a child and for the payment of the lump sum by instalments, an application for the variation of the instalments should be capable of being made by the person by whom or the person to whom the instalments are payable. (Paragraph 5.118(*c*) and see Clause 16.)

PART VI: ORDERS IN RESPECT OF CHILDREN IN GUARDIANSHIP PROCEEDINGS

Age limits for custody orders now proposed; repeal of 1971 Act, section 15(2)(a)

(87) A magistrates' court should have power under the guardianship legislation make a custody order *de novo* in respect of any child up to the age of 18, and section 15(2)(*a*) of the Guardianship of Minors Act 1971 should be repealed. (Paragraph 6.9 and see Clauses 31(1) and 31(2).)

The nature of the custody orders which may be made

(88) The powers of the court to make custody orders under sections 9, 10

and 11 of the Guardianship of Minors Act 1971 should be expressed in terms of "legal custody" as that expression is defined in section 86 of the Children Act 1975. (Paragraph 6.14(*a*) and see Clause 29.)

(89) It should be provided that where, in the exercise of those powers, the court gives the legal custody of a minor to any person, it may order that a parent of the minor not given the legal custody shall retain parental rights and duties other than the right to actual custody of the child, and shall have those rights and duties jointly with the person who is given legal custody. (Paragraph 6.14(*b*) and see Clause 30(11A).)

The age limits proposed for care and supervision orders

(90) The power of the court to commit a child to the care of a local authority under section 2(2) of the Guardianship Act 1973 should be exercisable in respect of children up to the age of 17. (Paragraph 6.17(*a*) and see Clauses 31(2) and (4).)

(91) The power of the court to order supervision under that section should be exercisable in the case of any child under the age of 18 years, and a supervision order under the section should be capable of remaining in force until the child attains that age. (Paragraph 6.17(*b*) and see Clause 31(3).)

The rules regarding maintenance for children and other orders under the Guardianship Acts

(92) Where a court has power to make a maintenance order under section 9, 10 or 11 of the Guardianship of Minors Act 1971, it should have the like powers to order the payment of a lump sum for the benefit of the child as are recommended should be conferred on magistrates' courts in matrimonial proceedings. (Paragraph 6.30(*a*) and see Clause 33.)

(93) Section 9 of the 1971 Act should be amended to provide that a maintenance order may be made against any parent excluded from actual custody of the child. (Paragraph 6.30(*b*) and see Clause 33(2).)

(94) Courts ordering the payment of maintenance under the guardianship legislation should have a general power to order the payments to be made to the child himself. (Paragraph 6.30(*c*) and see Clause 33.)

(95) The guardianship legislation should require the court, in awarding maintenance for a child, to have regard to all the circumstances of the case, to the first three specific guidelines mentioned in paragraph 5.79 of the report, and to the financial resources, needs, obligations and responsibilities of the parents of the child. (Paragraph 6.30(*d*) and see Clause 35.)

(96) The guardianship legislation should confer on courts a power, modelled on section 29 of the Matrimonial Causes Act 1973, to award maintenance for a child up to the age of 18 and a power, when making a maintenance order in the case of a child under 18, to direct that the order should continue in force beyond the age of 18 if the child is continuing his education or training or if there are special circumstances. However, there should be no power to make an order for the maintenance of a child who is over 18, at the time of the order, except in the cases provided for by the recommendation under (97) below. (Paragraph 6.30(*e*) and see Clause 34.)

(97) Provision should be made for enabling the child himself to apply for the variation or revival of a maintenance order made in his favour under the guardianship legislation, and such provision should be on the lines recommended, in respect of orders made in matrimonial proceedings by magistrates' courts, in paragraph 5.96 of the report. (Paragraph 6.30(*f*) and see Clauses 35(12B (7)), 35(12B (8)) and 36(2).)

(98) A custody order made under section 9(1) of the 1971 Act and an order under section 9(2) of the Act requiring periodical payments to be made to a parent for the maintenance of a child should cease to have effect if, after the making of the order, the parents of the child cohabit for a continuous period of 6 months. (Paragraph 6.35(*a*) and see Clause 38(5A (1)).)

(99) For so long as such custody or maintenance order remains in effect, cohabitation between the parents of the child should not affect its enforceability. (Paragraph 6.35(*b*) and see Clause 38(5A (1)).)

(100) Where under the guardianship legislation the court orders periodical payments for the maintenance of a child to be made to the child himself, the order should, unless the court otherwise directs, continue to have effect and be enforceable notwithstanding the continuation or resumption of cohabitation between his parents. (Paragraph 6.35(*c*) and see Clause 38(5A (2)).)

(101) Where the court makes a supervision or care order with respect to a child under section 2(2) of the Guardianship Act 1973, then, unless the court otherwise directs, the duration and enforceability of the order should not be affected by the continuation or resumption of cohabitation between the child's parents. (Paragraph 6.35(*d*) and see Clause 38(5A(2)).)

Powers of the court to make interim orders and the duration of such orders

(102) On an application under section 9 of the Guardianship of Minors Act 1971, the power to make an interim order should be capable of being exercised at any time before the final determination, and without having to adjourn the hearing in those cases where an adjournment is now required. (Paragraph 6.37(*a*) and see Clause 37(2).)

(103) The duration of such an interim order should not in the first instance extend beyond three months from the making of the order, but the court should have power to extend the order for a further period not exceeding 3 months. (Paragraph 6.37(*b*) and see Clause 37(4).)

The use of the means questionnaire

(104) In the case of proceedings in magistrates' courts under section 9 of the Guardianship of Minors Act 1971, there should be provision for inviting the complainant and the respondent to answer a means questionnaire, and that accordingly the proposals set out in paragraph 4.36 of the report should apply in relation to such proceedings. (Paragraph 6.39.)

The effective date of a maintenance order in guardianship proceedings

(105) A court which makes an interim or final maintenance order in proceedings under the Guardianship Acts should have power to direct that the order shall take effect from such date, whether before or after the making of

the order, as the court may determine, except that the date so fixed should not be earlier than the original application for the final order. (Paragraph 6.41(*a*) and see Clause 34.)

(106) A court should have power to direct that an order varying or revoking an interim or final maintenance order under the Guardianship Acts shall take effect from such date, whether before or after the making of the order for variation or revocation, as the court may determine, except that the date so fixed should not be earlier than the application for the order. (Paragraph 6.41(*b*) and see Clause 35(12B(6)).)

(107) On an appeal in a matter of maintenance under the Guardianship Acts the High Court should have power:—

(*a*) to direct that any maintenance order which it makes should take effect from such date, whether before or after the date of the making of the order, as the court may determine, except that the date so fixed shall not be earlier than that which the court appealed from could have fixed for such an order;

(*b*) when making an order which is to take effect as from a date before the making of the order, to order that credit shall be given for any payments previously made under the magistrates' order;

(*c*) to order repayment of some or all of any sums received by way of payment under the order appealed from, and to remit arrears under that order;

(*d*) generally, to make such orders as may be necessary for the determination of the appeal and such consequential orders as may seem just. (Paragraph 6.41(*c*) and see Clauses 39(6) and 39(7).)

The rules for jurisdiction in guardianship proceedings now proposed

(108) A magistrates' court should have jurisdiction under the Guardianship Acts if its area falls within the county in which the applicant or the child or any of the respondents resides. (Paragraph 6.43(*a*) and see Clause 59(1) and Schedule 1, paragraphs 1, 4 and 14.)

(109) There should be power conferred by rules to transfer the proceedings to another magistrates' court if that appears to be a more convenient forum. (Paragraph 6.43(*b*).)

Amendment of section 16 of the 1971 Act

(110) Section 16 of the Guardianship of Minors Act 1971 should be amended by including a provision that any order of the High Court made on an appeal from a magistrates' court under the section (other than an order for rehearing) shall be treated for the purposes of enforcement, variation or discharge as if it were an order of the court from which the appeal is brought. (Paragraph 6.45 and see Clause 39(8).)

PART VII: ORDERS IN RESPECT OF CHILDREN UNDER THE CHILDREN ACT 1975

Amendments to the Children Act 1975

(111) Where the court has power to make a maintenance order under section 34(1)(*b*) of the Children Act 1975, it should have the like power to order the payment of a lump sum for the benefit of the child as is recommended should be conferred on magistrates' courts in matrimonial proceedings. (Paragraph 7.14(*a*) and see Clause 50.)

(112) Where the court has power to order maintenance for a child under section 34(1)(*b*) of the 1975 Act or for a child committed to the care of a local authority under that Act, it should have power to order the payments to be made to the child himself. (Paragraph 7.14(*b*) and see Clauses 50(*a*) and 53.)

(113) In considering the award of maintenance for a child under section 34(1)(*b*) of the 1975 Act, the award of a lump sum under the Act, or the award of maintenance under the Act for a child committed to the care of a local authority, the court should be required to have regard to all the circumstances of the case including the following matters:—

(*a*) the financial resources, needs, obligations and responsibilities of the parents of the child;

(*b*) the financial needs of the child;

(*c*) the income, earning capacity (if any), property and other financial resources of the child;

(*d*) any physical or mental disability of the child;

(*e*) where appropriate, the guidelines set out in section 34(2) of the Act. (Paragraph 7.14(*c*) and see Clauses 51(34A) and 53(5B).)

(114) Fresh provision should be made as to the duration of maintenance orders made in respect of a child under section 34(1)(*b*) of the 1975 Act or made in respect of a child committed to the care of a local authority under that Act. The courts should have power, on the model of section 29 of the Matrimonial Causes Act 1973, to award maintenance for a child up to the age of 18, and power when making a maintenance order in the case of a child under 18, to direct that the order should continue in force beyond the age of 18 if the child is continuing his education or training or if there are special circumstances. (Paragraph 7.14(*d*) and see Clause 51(34B).)

(115) Provision should be made for enabling the child himself to apply for the variation or revival of any such maintenance order, and such provision should be on the lines recommended, in respect of orders made in matrimonial proceedings by magistrates' courts, in paragraph 5.96 of the report. (Paragraph 7.14(*e*) and see Clause 52.)

Enforcement, variation and revocation of orders under the Children Act 1975 made on appeal

(116) Section 101 of the Children Act 1975 should be amended by including a provision that any order of the High Court made on an appeal from a magis-

trates' court under the section (other than an order for rehearing) shall be treated for the purposes of enforcement, variation or revocation as if it were an order of the court from which the appeal is brought. (Paragraph 7.16 and see Clause 55.)

PART VIII: ORDERS IN RESPECT OF CHILDREN—AFFILIATION PROCEEDINGS

Financial provision by a lump sum payment

(117) The court should have power in affiliation proceedings to order payment of a lump sum of up to £500 for any child with respect to whom an affiliation order is made. There should be power to vary the limit of £500 by Order in Council. It should be possible to order a lump sum not only when an affiliation order is first made, but also on a subsequent occasion on a change of circumstances. (Paragraph 8.14(*a*) and see Clauses 44(1), 44(5) and 47.)

Payments should be able to be made to the child himself

(118) The court should have power to direct that payments under an affiliation order should be made to the child himself. (Paragraph 8.14(*b*) and see Clause 45(1).)

Guidelines for affiliation orders

(119) In considering what order to make in affiliation proceedings, the court should be required to have regard to all the circumstances of the case, including the following matters:—

(*a*) the financial resources, needs, obligations and responsibilities of the mother and of the putative father of the child;

(*b*) the financial needs of the child;

(*c*) the income, earning capacity (if any), property and other financial resources of the child;

(*d*) any physical or mental disability of the child. (Paragraph 8.14(*c*) and see Clause 44(2).)

Effective date of orders for financial provision

(120) It should be made clear that payments under an affiliation order may be made to run from the date of application for the order. This will not affect the power to make the payments run from the birth of the child where the application is made within 2 months from the birth. (Paragraph 8.14(*d*) and see Clause 46.)

The age to which maintenance payments should run

(121) The court in affiliation proceedings should have a power, modelled on section 29 of the Matrimonial Causes Act 1973, to award maintenance for a child up to the age of 18 and power when making a maintenance order in the case of a child under 18, to direct that the order should continue in force beyond

the age of 18 if the child is continuing his education or training or if there are special circumstances. (Paragraph 8.14(*e*) and see Clause 46.)

Variation or revival of an affiliation order

(122) Provision should be made for allowing the child himself to apply for the variation or revival of an affiliation order, if he has attained the age of 16. (Paragraph 8.14(*f*) and see Clause 47(6A(3)).)

Jurisdiction in affiliation proceedings

(123) The jurisdiction of a magistrates' court in affiliation proceedings should be based on the residence of the mother (or in a case to which section 3(2) of the Maintenance Orders Act 1950 applies, the alleged father) within the county in which the court acts. (Paragraph 8.14(*g*) and see Clause 59(1) and Schedule 1 paragraphs 1, 4 and 14.)

PART IX: AMENDMENTS TO MATRIMONIAL CAUSES ACT 1973

The grounds for an order under section 27

(124) Section 27 of the Matrimonial Causes Act 1973 should be amended by removing the requirement to establish that the failure to maintain was wilful. (Paragraph 9.24(*a*) and see Clause 49(1).)

Duty to support to be on basis of equality

(125) The section should embody the principle that it is the duty of each spouse to support the other and that the nature of the duty is the same in the case of each spouse. (Paragraph 9.24(*b*) and see Clause 49(1).)

Adultery not an absolute bar to financial provision: conduct generally

(126) Adultery should not be an absolute bar to an order for financial provision under the section, but in determining whether to make an order in favour of a spouse and, if so, for how much, the court should be enabled to have regard to the conduct of the parties. In no circumstances however should the conduct of the spouses towards each other affect the award of maintenance for the children of the family. (Paragraph 9.24(*c*) and see Clause 49(2).)

Amendment of guidelines for financial provision

(127) In determining whether and, if so, how, to exercise its powers under the section in favour of a spouse, the court should be required to have regard to all the circumstances of the case, including the conduct of the parties and the matters set out in (*a*) to (*g*) of paragraph 2.29 of the report. (Paragraph 9.24(*d*) and see Clause 49(2).)

Guidelines for financial provision for a child

(128) In determining whether and, if so, how, to exercise its powers under the section in favour of a child of the family, the court should be required to have regard to all the circumstances of the case, including the matters set out in (*a*) to (*g*) of paragraph 5.79 of the report. (Paragraph 9.24(*e*) and see Clause 49(2).)

The rights of a child to apply for the variation or revival of a maintenance order

(129) Where a maintenance order made under section 27 for unsecured or secured periodical payments is in force for the benefit of a child who has attained the age of 16 years, he should himself be able to apply for a variation of the order. The powers of the court on such application should include power to vary the order both as to amount and duration. (Paragraph 9.24(*f*) and see Clause 49(4).)

(130) Where a maintenance order made under section 27 for unsecured periodical payments has ceased to have effect on a child attaining the age of 18 years or at any time within the two years preceding his attaining that age, he should be able, at any time before attaining the age of 21, to apply to the court to revive the order with variations. The variations which the court should have power to make on such application should include variations as to duration and amount. (Paragraph 9.24(*g*) and see Clause 49(4).)

PART X: OTHER PROPOSALS FOR THE PROTECTION OF CHILDREN

Prohibition by magistrates of removal from the jurisdiction

(131) On making an interim or final order for the custody of a child, a magistrates' court should have power, if it thinks it desirable to do so, to make an order prohibiting or restricting the removal of the child out of England and Wales without the leave of the court. (Paragraph 10.11(*a*) and see Clauses 27, 32 and 54).

(132) Where a magistrates' court has imposed such a prohibition or restriction, it should have power to grant leave for the removal of the child from England and Wales. (Paragraph 10.11(*b*) and see Clauses 27, 32 and 54.)

Probation officer's report on the means of the parties

(133) Section 60(2) of the Magistrates' Courts Act 1952 should be amended in a similar manner to section 4(3) of the 1960 Act. (Paragraph 10.17 and see Clause 43.)

A discretionary power to call for a welfare report at any stage: power to be exercisable by a single justice

(134) The reformulated magistrates' matrimonial law should provide a discretionary power for magistrates dealing with an application for a matrimonial order (or for variation or revocation of a provision of such an order) to call for a welfare report on the children at any stage of the proceedings. The power should be capable of being exercised by a single justice in advance of the hearing, and ultimately rules should be made under section 5 of the Justices of The Peace Act 1968, enabling the justices' clerk also to call for a report in advance of the hearing. (Paragraph 10.23 and see Clause 11(9).)

(135) The reformulated provisions should follow existing law in requiring the court (including a single justice and a justices' clerk) to specify the relevant matters which are to be investigated. This will help to limit the burden placed

on the social services by the provision. (Paragraph 10.24 and see Clause 11(3).)

(*Signed*) Samuel Cooke, *Chairman*.
Aubrey L. Diamond.
Stephen Edell
Derek Hodgson.
Norman S. Marsh.

J. M. Cartwright Sharp, *Secretary*.

28 *June* 1976.

Domestic Proceedings and Magistrates' Courts Bill

ARRANGEMENT OF CLAUSES

Part I

Matrimonial Proceedings in Magistrates' Courts

Powers of court to make orders with respect to financial provision for parties to a marriage and children of family

Clause
1. Grounds of application for financial provision.
2. Powers of court to make orders for financial provision.
3. Matters to which court is to have regard in exercising its powers under s. 2.
4. Duration of orders for financial provision for a party to a marriage.
5. Age limit on making orders for financial provision for children and duration of such orders.
6. Orders for periodical payments which have been agreed by the parties.

Powers of court as to the custody of children

7. Orders for the custody of children.
8. Powers of court to provide for supervision of children.
9. Powers of court to commit children to care of local authority.
10. Provision for maintenance for children in case of certain orders under ss. 7 and 9.
11. Supplementary provisions with respect to powers of court under ss. 7 to 9.
12. Disputes between persons holding parental rights and duties jointly.

Powers of court to make orders for the protection of a party to a marriage or a child of the family

13. Powers of court to make orders for the protection of a party to a marriage or a child of the family.

Interim orders

14. Interim orders.

Clause

Variation, revocation and cessation of orders

15. Variation and revocation of orders.
16. Variation of instalments of lump sum.
17. Supplementary provisions with respect to variation and revocation of orders.
18. Proceedings by or against a person outside England and Wales for variation or revocation of orders.
19. Effect on orders of parties living together.

Reconciliation

20. Reconciliation.

Provisions relating to the High Court and county court

21. Refusal of order in case more suitable for the High Court.
22. Powers of High Court and county court in relation to orders under ss. 2, 6 and 14.
23. Appeals.

Provisions relating to procedure, jurisdiction and enforcement

24. Procedure and jurisdiction.
25. Enforcement etc. of orders for payment of money.
26. Enforcement of orders for custody.
27. Restriction on removal of child from England and Wales.
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DRAFT

OF A

BILL

TO

A.D. 1976

MAKE fresh provision for matrimonial proceedings in magistrates' courts; to amend enactments relating to other proceedings so as to eliminate certain differences between the law relating to those procedings and the law relating to matrimonial proceedings in magistrates' courts; to extend section 15 of the Justices of the Peace Act 1949; to amend sections 44 and 54 of the Magistrates' Courts Act 1952; and for purposes connected with those matters.

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

PART I

MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

Powers of court to make orders with respect to financial provision for parties to a marriage and children of the family

Grounds of application for financial provision.

1. Either party to a marriage may apply to a magistrates' court for an order under section 2 of this Act on the ground that the other party to the marriage (in this Part of this Act referred to as "the respondent")—

(*a*) has failed to provide reasonable maintenance for the applicant;

(*b*) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family;

(*c*) has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or

(*d*) has deserted the applicant.

The Bill generally

1. The broad objectives of the Bill, as indicated in paragraph 1.1 of the report, are:—

(*a*) to bring the family law administered by the magistrates' courts, so far as can appropriately be done, into line with the law administered by the divorce court, as enacted in the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970 (now consolidated as the Matrimonial Causes Act 1973);

(*b*) to introduce in related legislation such changes as are called for in order to avoid the creation of anomalies.

2. The provisions relating to the first objective are in Part I of the Bill and those relating to the second objective are in Parts II and III. Part IV of the Bill contains Supplementary provisions and Schedules 1 and 2 set out minor and consequential amendments and enactments repealed.

3. The Matrimonial Proceedings (Magistrates' Courts) Act 1960 is repealed and replaced by Part I of the Bill. Certain provisions in the 1960 Act are, however, preserved by re-enactment as is explained in the Notes on the relevant clauses below.

Clause 1

1. This clause implements the recommendation in paragraph 2.13 by providing three grounds on which an application may be made to the magistrates' court for financial provision for one of the spouses or any child of the family. The three grounds replace the long list of grounds provided in section 1 of the 1960 Act.

2. Under this clause the applicant may be either party to the marriage whether the financial provision sought relates to one of the spouses or to any child of the family. The opening words "Either party to a marriage. . ." gives effect to the recommendation in paragraph 2.14 that the magistrates' matrimonial law should embody the general principle that it is the duty of each spouse to support the other on a basis of equality. At present, under section 2(1)(*c*) of the 1960 Act the magistrates are empowered to order a wife to pay maintenance to her husband only if he is disabled from maintaining himself.

3. For the definition of a "child of the family" in respect of whom an application for financial provision may be made, see clause 58(1) below and the Note thereon.

Powers of court to make orders for financial provision.

2.—(1) Where on an application for an order under this section the applicant satisfies the court of any ground mentioned in section 1 of this Act, the court may, subject to the provisions of this Act, make any one or more of the following orders, that is to say—

(*a*) an order that the respondent shall make to the applicant such periodical payments, and for such term, as may be specified in the order;

(*b*) an order that the respondent shall pay to the applicant such lump sum as may be so specified;

(*c*) an order that the respondent shall make to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such periodical payments, and for such term, as may be so specified;

(*d*) an order that the respondent shall pay to the applicant for the benefit of a child of the family to whom the application relates, or to such a child, such lump sum as may be so specified.

(2) Without prejudice to the generality of subsection (1)(*b*) or (*d*) above, an order under this section for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the applicant, or any child of the family to whom the application relates, before the making of the order to be met.

(3) The amount of any lump sum required to be paid by an order under this section shall not exceed £500 or such larger sum as Her Majesty may from time to time by Order in Council fix for this purpose.

Any Order in Council under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.

EXPLANATORY NOTES

Clause 2

1. This clause deals with the nature of the orders for financial provision which the magistrates may make where the applicant has satisfied the court of any ground specified in clause 1.

Clause 2(1)

2. Under this subsection magistrates are given wider powers than exist at present to order periodical payments and a new power to order a lump sum. Paragraphs (*a*) and (*b*) relate to financial provision for one of the parties to the marriage. Paragraphs (*c*) and (*d*) relate to financial provision for a child of the family.

3. Paragraph (*a*) implements the recommendation in paragraph 2.39(*c*): the magistrates are no longer restricted to ordering weekly periodical payments but may order maintenance to be paid for such term and at such intervals as may be specified.

Paragraph (*b*) implements the recommendation in paragraph 2.39(*a*) and, for the reasons explained in paragraphs 2.34–2.35, magistrates are given a new power to order a lump sum. As to the number of the occasions on which the lump sum may be ordered, see clause 15(3) and the Note thereon.

4. Paragraphs (*c*) and (*d*) implement the recommendation in paragraphs 5.67(*a*) and (*b*) that magistrates should be able to make the same types of orders for the maintenance of a child of the family as may be made under paragraphs (*a*) and (*b*) for the maintenance of spouses.

5. The provisions in paragraphs (*c*) and (*d*) that the maintenance payment may be ordered to be paid either to the applicant (*i.e.*, one of the parties to the marriage) or to the child himself give effect to the recommendations in paragraphs 5.73(*a*) and (*b*) of the report.

Clause 2(2)

6. This subsection amplifies subsections (1)(*b*) and (1)(*d*) providing for the award of a lump sum: it makes clear that such an award may be made in order to meet, so long as they are reasonable, liabilities and expenses incurred before the making of the order. Paragraph 2.34 of the report indicates the kind of factual situations in which it is intended that magistrates should be able to award a lump sum, for example, to cover expenses such as an outstanding hire-purchase bill, removal expenses or maintenance expenses incurred before the date of the order.

Clause 2(3)

7. This subsection gives further effect to the recommendations in paragraphs 2.39(*a*) and 5.67(*b*) by providing that, where a lump sum is ordered under subsections 1(*b*) and 1(*d*), it shall not exceed £500 or such larger amount as may from time to time be prescribed by Order in Council, as is explained in paragraph 2.35.

Matters to which court is to have regard in exercising its powers under s. 2.

3.—(1) Where an application is made for an order under section 2 of this Act, the court, in deciding whether to exercise its powers under subsection (1)(*a*) or (*b*) of that section and, if so, in what manner, shall have regard to the following matters, that is to say—

(*a*) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(*b*) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(*c*) the standard of living enjoyed by the parties to the marriage before the occurrence of the conduct which is alleged as the ground of the application;

(*d*) the age of each party to the marriage and the duration of the marriage;

(*e*) any physical or mental disability of either of the parties to the marriage;

(*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(*g*) any other matter which in the circumstances of the case the court may consider relevant, including, so far as it is just to take it into account, the conduct of each of the parties in relation to the marriage.

(2) Where an application is made for an order section 2 of this Act, the court, in deciding whether to exercise its powers under subsection 1(*c*) or (*d*) of that section and, if so, in what manner, shall have regard to all the circumstances of the case including the following matters, that is to say—

(*a*) the financial needs of the child;

(*b*) the income, earning capacity (if any), property and other financial resources of the child;

(*c*) any physical or mental disability of the child;

(*d*) the standard of living enjoyed by the family before the occurrence of the conduct which is alleged as the ground of the application;

(*e*) the manner in which the child was being and in which the parties to the marriage expected him to be educated or trained;

(*f*) the matters mentioned in relation to the parties to the marriage in paragraphs (*a*) and (*b*) of subsection (1) above.

Clause 3

1. This clause, while providing that the court shall have regard to all the circumstances of the case, lays down guidelines on the matters to which the magistrates' court is to have regard in making orders for financial provision under clause 2. As explained in paragraph 2.27 of the report, the aim is to reproduce, as far as possible, the guide-lines for the divorce court contained in section 25 of the Matrimonial Causes Act 1973 with only such modifications as are necessary to reflect the different circumstances of matrimonial disputes in the magistrates' court.

Clause 3(1)

2. This subsection lays down the guidelines for maintenance claims in respect of spouses and implements the recommendation in paragraph 2.29.

3. Paragraph (*g*) implements the recommendation in paragraph 2.25 that in determining a claim for maintenance, the court should have regard, in relation to both liability and quantum, to the conduct of the parties in relation to the marriage to the extent which it is just to do so. See also paragraph 2.23 for the approval given in the report to the decision of the Court of Appeal in *Wachtel* v. *Wachtel* [1973] Fam. 72. The intention of this provision, which is as close as can be to the 1973 Act provision, is that it should be construed in accordance with *Wachtel* v. *Wachtel.*

4. The provision in paragraph (*g*), coupled with the repeal of section 2(3) of the 1960 Act (the whole of that Act being repealed by this Bill as shown in Schedule 2) whereby adultery unless condoned at or conduced to by the respondent is a bar to a claim for financial relief, gives effect to the recommendation in paragraph 2.16 that in the magistrates' matrimonial law adultery should no longer be an absolute bar to financial relief.

Clause 3(2)

5. This subsection lays down the guidelines for maintenance claims in respect of children. It implements the recommendation in paragraph 5.80 by providing that the matters to which the court should have regard include, in addition to the financial circumstances of the parents, the financial needs of the child. Magistrates will thus apply the guidelines for the divorce court contained in section 25(2) of the Matrimonial Causes Act 1973 with the one difference that the provision that the court should seek to place the child in the same position as obtained before the parents' marriage broke down, will not apply.

(3) The court, in deciding whether to exercise its powers under section 2(1)(*c*) or (*d*) of this Act in favour of a child of the family who is not the child of the respondent and, if so, in what manner, shall in addition to the matters mentioned in subsection (2) above have regard (among the circumstances of the case)—

(*a*) to whether the respondent had assumed any responsibility for the child's maintenance and, if he did, to the extent to which, and the basis on which he assumed that responsibility and to the length of time during which he discharged that responsibility;

(*b*) to whether in assuming and discharging that responsibility the respondent did so knowing that the child was not his own child;

(*c*) to the liability of any other person to maintain the child.

Clause 3 *(continued)*

6. Paragraph (*f*) provides that the parents' financial resources and needs shall be relevant to the child's maintenance claim but does not attract any of the guidelines relating to the behaviour of the parties to the marriage. It thus gives effect to the recommendation in paragraph 2.25 that the conduct of the parties towards each other should not affect maintenance ordered for children.

7. By paragraph (*c*) the standard of living enjoyed by the family is one of the factors which the court must take into account in determining maintenance for a child, since in this case it is right that the court should consider the position of the family as a whole. By contrast, where maintenance is claimed only for one of the spouses and no maintenance is claimed for a child, the relevant guideline under section 3(1)(*c*) is properly expressed as being the standard of living enjoyed by the two parties to the marriage.

Clause 3(3)

8. This subsection lays down the guidelines (in addition to those under subsection (2)) for maintenance claims in respect of a child of the family who is not the child of the respondent.

9. By the definition of a "child of the family" in clause 58(1), as explained in the Note thereon, this Bill defines a "child of the family" not as in section 16(1) of the 1960 Act but in the same way as in section 54(1) of the Matrimonial Causes Act 1973 and the definition thus implements the recommendation in paragraph 5.17.

10. Accordingly, this subsection provides (as is explained in paragraph 5.16 and as is intended by the recommendation in paragraph 5.17) that the guidelines on the matters to which the court should have regard when determining maintenance for a child of the family who is not a child of the respondent are the same as the guidelines for the divorce court in section 25(3) of the Matrimonial Causes Act 1973.

Duration of orders for financial provision for a party to a marriage.

4.—(1) The term to be specified in any order made under section 2(1)(*a*) of this Act shall be such term as the court thinks fit except that the term shall not begin earlier than the date of the making of the application for the order and shall not extend beyond the death of either of the parties to the marriage.

(2) Where an order is made under the said section 2(1)(*a*) and the marriage of the parties affected by the order is subsequently dissolved or annulled but the order continues in force, the order shall, notwithstanding anything in it, cease to have effect on the remarriage of the party in whose favour it was made, except in relation to any arrears due under it on the date of the remarriage.

Clause 4

1. Subsection (1) gives a magistrates' court express power to order maintenance to be paid from a date earlier than the hearing, but not earlier than the date of the application for the order, or from a future date. It implements the recommendation in paragraph 4.52(*a*) of the report. It also makes clear that the order ceases on the death of either of the parties to the marriage.

2. Subsection (2) provides that maintenance is to cease on the remarriage of the applicant. It makes no change in the present law but re-enacts the existing provision in section 7(4) of the 1960 Act, which was inserted by section 30 of the Matrimonial Proceedings and Property Act 1970.

Age limit on making orders for financial provision for children and duration of such orders.

5.—(1) Subject to subsection (3) below, no order shall be made under section 2(1)(*c*) or (*d*) of this Act in favour of a child who has attained the age of eighteen.

(2) The term to be specified in an order made under section 2(1)(*c*) of this Act in favour of a child may begin with the date of the making of an application for the order in question or any later date but—

(*a*) shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age (that is to say, the age that is for the time being that limit by virtue of section 35 of the Education Act 1944 together with any Order in Council made under that section) unless the court thinks it right in the circumstances of the case to specify a later date; and

(*b*) shall not in any event, subject to subsection (3) below, extend beyond the date of the child's eighteenth birthday.

Clause 5

1. This clause deals with the age up to which an order in magistrates' matrimonial proceedings for the maintenance of children should run, which is discussed in paragraphs 5.81–5.88 of the report. It implements the recommendation in paragraph 5.89 that provisions as to the duration of orders for the maintenance of children made by magistrates in matrimonial proceedings should be modelled on section 29 of the Matrimonial Causes Act 1973 and that, subject to conditions similar to those prescribed in that section, magistrates should have power:—

(*a*) in the case of a child under the age of 18, to make an order for his maintenance for a period extending beyond that age;

(*b*) in the case of a child over the age of 18, to make an order for his maintenance, notwithstanding that he is over that age.

2. The clause thus changes the present position under the 1960 Act. Section 2(1)(*h*) of the Act provides that maintenance may be ordered for a child of the family up to the age of 16 and in certain circumstances beyond 16 but not later than the age of 21. If the child is 16 and over but not yet 21, maintenance may be ordered if it appears to the court that the child is or will be a dependant as defined in the 1960 Act (see paragraph 5.81 of the report for the definition of "dependant" in the Act).

Clause 5(1)

3. This subsection provides that, unless as provided in clause 5(3) there are special circumstances, a new order shall not be made in favour of a child who has attained 18.

Clause 5(2)

4. This subsection provides that a maintenance order in favour of a child may begin with the date of the application for the order or any later date but:—

(*a*) shall not in the first instance extend beyond the date of the birthday next following his attaining the upper limit of the compulsory school leaving age; and

(*b*) shall not (save in the case governed by clause 5(3)) extend beyond the age of 18.

5. The subsection enacts as part of the magistrates' matrimonial law the corresponding provision in section 29(2) of the 1973 Act.

(3) The court—

(*a*) may make an order under section 2(1)(*c*) or (*d*) of this Act in favour of a child who has attained the age of eighteen, and

(*b*) may include in an order made under section 2(1)(*c*) of this Act in relation to a child who has not attained that age a provision for extending beyond the date when the child will attain that age the term for which by virtue of the order any payments are to be made to or for the benefit of that child,

if it appears to the court—

(i) that the child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(ii) that there are special circumstances which justify the making of the order or provision.

(4) Any order made under section 2(1)(*c*) of this Act in favour of a child shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order, except in relation to any arrears due under the order on the date of the death.

Clause 5(3)

6. The subsection enables magistrates, if it is shown that a child is undergoing further education or training or if there are special circumstances, to make and continue maintenance orders for the child after and beyond the age of 18. It enacts as part of the magistrates' matrimonial law the corresponding provision in section 29(3) of the 1973 Act.

Clause 5(4)

7. This subsection enacts as part of the magistrates' matrimonial law the corresponding provision in section 29(4) of the 1973 Act. It has been included in the Bill to bring the matrimonial law administered by magistrates into line with that administered by the divorce court and makes it clear that the order ceases on the death of the person liable to make payments thereunder except in relation to arrears due on the date of the death.

Orders for periodical payments which have been agreed by the parties.

6.—(1) Either party to a marriage may apply to a magistrates' court for an order under this section on the ground that the other party to the marriage has agreed to make to the applicant or to a child of the family, or to the applicant for the benefit of the child, such periodical payments as may be specified in the application, and, subject to subsection (2) below, the court on such an application may—

(*a*) if it is satisfied that the respondent has agreed to make those payments, and

(*b*) if it is unaware of any reason why it would be contrary to the interests of justice to exercise its powers hereunder,

order those payments to be made by the respondent.

(2) The court shall not make an order under this section in respect of a child of the family unless it is of the opinion that the payments to be made under the order provide, or make a proper contribution towards, reasonable maintenance for that child.

(3) Where an application has been made for an order under section 2 of this Act then, at any time before the hearing of that application, an application may be made for an order under this section; and if an order is made under this section the application made for an order under the said section 2 shall be treated as if it had been withdrawn.

(4) Where on an application under this section the court by reason of subsection (1)(*b*) or (2) above decides not to make an order for the making of the payments specified in the application, then, if the respondent agrees to make other periodical payments and the court is of the opinion that it would not be contrary to the interests of justice to make an order for the making of those other payments and, in the case of an application relating to a child of the family, that those other payments would provide, or make a proper contribution towards, reasonable maintenance for that child, the court may exercise its powers under this section as if those other payments had been specified in the application.

Clause 6

1. This clause empowers magistrates to make maintenance orders by way of periodical payments in terms which have been agreed between the parties and contains provisions regarding the manner in which such orders may be made.

2. As explained in paragraph 4.4 of the report the objective in legislating specifically on this matter is to provide an effective means by which, when a marriage has temporarily broken down, the parties can obtain the assistance of the courts in regulating their financial arrangements without having to parade before the court their marital difficulties.

Clause 6(1)

3. This subsection implements the recommendations in paragraphs 4.8(*a*) and 4.8(*c*) by making specific provision for a maintenance order by consent.

4. Paragraphs (*a*) and (*b*) specify the conditions which must be satisfied before the consent order may be made and implements the details of the recommendations in paragraphs 4.8(*a*) and 4.8(*b*).

5. By using the expression "court" the subsection makes clear that, as is recommended in paragraph 4.8(*d*), a consent order should only be made by a full bench of two or three justices and not by a single justice.

Clause 6(2)

6. This subsection implements the recommendation in paragraph 4.8(*c*) by specifying the matters as to which the court must be satisfied before a consent order is made in respect of a child.

Clause 6(3)

7. This subsection deals with the situation where an application for maintenance has been made under clause 2 and is then overtaken by an application for an order by consent under this clause. If an application is made by consent the application under clause 2 is to be treated as withdrawn.

Clause 6(4)

8. Under this subsection the court, although it considers that no order should be made for the agreed amount set out in the application, may nonetheless make a consent order where, on the hearing of the application, the respondent offers to pay a sum other than that stated in the application. The court should not make the consent order for the latter sum if it considers it would be contrary to justice to do so and, where the application relates to maintenance for a child, if it considers that such sum does not constitute reasonable maintenance or a proper contribution toward maintenance.

(5) Where on an application for an order under this section the court decides not to make such an order, the court may treat that application as if it had been an application for an order under section 2 of this Act.

(6) The provisions of section 4 of this Act shall apply in relation to an order under subsection (1) above which requires periodical payments to be made to the applicant for his own benefit as they apply in relation to an order under section 2(1)(*a*) of this Act.

(7) The provisions of section 5 of this Act shall apply in relation to an order under subsection (1) above which requires periodical payments to be made to or for the benefit of a child of the family as they apply in relation to an order under section 2(1)(*c*) of this Act.

(8) Where the respondent is not present or represented by counsel or solicitor at the hearing of an application for an order under this section, the court shall not make an order unless there is produced to the court such evidence of the consent of the respondent to the making of the order and of his financial resources as may be prescribed by rules.

Clause 6(5)

9. This subsection contains a procedural provision under which the court, if it refuses the application for a maintenance order by consent, may nonetheless proceed to determine the matter as if the application had been made under clause 2.

Clause 6(6)

10. This subsection provides that the provisions of clause 4 regarding the duration of maintenance orders in respect of spouses shall apply to the making of consent orders under this clause in the same way as they apply to maintenace orders made under clause 2.

Clause 6(7)

11. This subsection provides that the provision of clause 5 regarding the age up to which an order for the maintenance of children should run shall apply to the making of consent orders under this clause in the same way as they apply to maintenance orders made under clause 2.

Clause 6(8)

12. This subsection implements by implication the recommendation in paragraph 4.8(*e*) that, as a general rule for the making of a maintenance order by consent, both parties should be present or legally represented in court. It implements the further recommendation in paragraph 4.8(*e*), by specifically providing that the court may only proceed to make the order in the absence of the respondent where the respondent has produced, as provided by rules, sufficient evidence of his consent to the making of the order and of his financial resources.

Powers of court as to the custody of children

Orders for the custody of children.

7.—(1) Where an application is made by a party to a marriage for an order under section 2 or 6 of this Act, then, if there is a child of the family who is under the age of eighteen, the court shall not dismiss or make a final order on the application until it has decided whether to exercise its powers under this section and, if so, in what manner.

(2) On an application for an order under section 2 or 6 of this Act the court, whether or not is makes an order under the said section 2 or 6, shall have power to make such order regarding—

(*a*) the legal custody of any child of the family who is under the age of eighteen, and

(*b*) the right of access to any such child of either of the parties to the marriage or any other person who is a parent of that child,

as the court thinks fit.

(3) An order shall not be made under subsection (2) above giving legal custody of a child to a person other than a party to the marriage or a parent of the child; but, where the court is of opinion that legal custody should be given to a person who is not a party to the marriage or a parent of the child, it may direct that that person shall be treated as if he had applied for a custodianship order under section 33 of the Children Act 1975.

1975 c.72.

Where a direction is given under this subsection in respect of a person who is not qualified to apply for a custodianship order under the said section 33, that person shall be treated as if he were so qualified and Part II of that Act (except section 40) shall have effect accordingly.

1952 c. 55.

Clause 7(1)

1. This subsection reflects the provision expressly made by subsection (2) that, as recommended in paragraph 5.22 of the report, a custody order may be made in respect of a child up to the age of 18. At present under section 2(1)(*d*) of the 1960 Act a custody order may only be made in respect of a child up to the age of 16.

2. Otherwise this subsection re-enacts the corresponding part of section 4(1) of the 1960 Act in providing that the court is under a duty, before it dismisses or finally determines any claim for maintenance, to consider whether it should make an order for the custody of any child of the family.

Clause 7(2)

3. This subsection empowers the magistrates to make an order in respect of any child of the family (as defined in clause 58(1)) regarding the custody of and access to the child. It implements the recommendation in paragraph 5.22 that a custody order may be made in respect of a child up to the age of 18.

4. The power to make an order regarding the right of access to the child re-enacts the substance of section 2(1)(*g*) of the 1960 Act.

5. The concluding words, "as the court thinks fit", make clear that subject to the principle that the welfare of the child is the first and paramount consideration to which the court must have regard, the making of custody orders is a matter on which the court may exercise its discretion according to the facts of the case.

Clause 7(3)

6. At present, as discussed in paragraph 5.35 of the report, it is possible for a magistrates' court, by implication under section 2(1)(*e*) of the 1960 Act, to award custody of a child to a person other than one of the parties to the marriage. This subsection implements the recommendation in paragraph 5.38(*a*) that the magistrates' matrimonial law should contain a provision empowering the court to give the legal custody of a child to a parent of that child who is not a party to the marriage.

7. The subsection also implements the recommendation in paragraph 5.38(*c*) that where the court is minded to award legal custody to a person who is neither a parent nor a party to the marriage, it shall have power to direct that that person shall be treated as if he had applied for a custodianship order under section 33 of the Children Act 1975, even if that person would not be qualified to apply for a custodianship order under the provisions of section 33. The reason why this recommendation is included in the report is explained in paragraph 5.37.

(4) Without prejudice to the generality of subsection (2) above, where the court gives the legal custody of a child to any person under this section, it may order that a party to the marriage in question who is not given the legal custody of the child shall retain all or such as the court may specify of the parental rights and duties comprised in legal custody (other than the right to the actual custody of the child) and shall have those rights and duties jointly with the person who is given the legal custody of the child.

(5) An order made under subsection (2) above shall cease to have effect as respects any child when he attains the age of eighteen.

(6) Where an order is made under subsection (2) above the court may direct that the order, or such provision thereof as the court may specify shall not have effect until the occurrence of an event specified by the court or the expiration of a period so specified; and where the court has directed that the order, or any provision thereof, shall not have effect until the expiration of a specified period, the court may, at any time before the expiration of that period, direct that the order, or that provision thereof, shall not have effect until the expiration of such further period as the court may specify.

Clause 7(4)

8. As mentioned in Note 5 above the magistrates have a discretion in the nature of the custody orders which they make. This subsection confers on magistrates, in the exercise of that discretion, a power which they possess under section 9(1) of the Guardianship of Minors Act 1971 but not under the 1960 Act to make what is colloquially called a "split order". The subsection thus implements the recommendations in paragraphs 5.34(*a*) and 5.38(*b*) of the report.

9. It has to be noted that this subsection has had to be formulated having regard to section 87(2) in Part IV of the Children Act 1975 which provides "while a person not having legal custody of a child has actual custody of the child he has the like duties in relation to the child as a custodian would have by virtue of his legal custody". For an explanation of the terms "actual custody" and "legal custody" in the Children Act 1975, see paragraphs 5.7–5.11 of the report.

10. The resulting effect of subsection (4) can most conveniently be shown by an example. Under the subsection the magistrates have power to order that the father shall retain some of the rights comprised in legal custody of the child but that the child shall live with the mother who will thus be the person entitled to the actual possession of the child. In this illustrative situation, however, the mother through having actual possession of the child has, by virtue of section 87(2) of the Children Act 1975, the like duties in relation to the child as a custodian would have by virtue of his legal custody. In the above example the practical result of the magistrates' order will be that while the child will live with the mother, rights and duties attached to legal custody may be exercised jointly by the mother and father.

Clause 7(5)

11. The subsection implements the recommendation in paragraph 5.22 that express provision should be made for custody orders to remain in effect until the child is 18.

Clause 7(6)

12. This subsection implements the recommendation in paragraph 5.47, which is made for the reasons explained in paragraphs 5.39–5.46, that legislation should expressly confer on the court, wherever it makes an order regarding the custody of a child, power to postpone the coming into effect of the order for a specified period or until the happening of a specified event.

13. The subsection makes clear that, as is also recommended in paragraph 5.47, the court is able to exercise the above-mentioned power either on application or of its own motion and the court is also empowered to extend the period of postponement in appropriate circumstances.

(7) The court shall not have power to make—

(*a*) an order under subsection (2) above with respect to a child in respect of whose custody an order made by a court in England and Wales is for the time being in force;

(*b*) an order under subsection (2)(*b*) above with respect to a child who is already for the purposes of Part II of the Children Act 1948 in the care of a local authority.

1948 c.43.

(8) In any proceedings in which the powers conferred on the court by subsection (2) above are or may be exercisable, the question whether, and if so in what manner, those powers should be exercised shall be excepted from the issues arising in the proceedings which, under the proviso to section 60(1) of the Magistrates' Courts Act 1952, must be determined by the court before the court may direct a probation officer to make to the court under that section a report on the means of the parties.

1952 c.55.

Clause 7(7)

14. This subsection re-enacts the substance of sections 2(4)(*a*) and (*b*) of the 1960 Act.

Clause 7(8)

15. This subsection re-enacts the substance of section 4(8) of the 1960 Act, the effect of which is that the court, when considering an application for custody, is entitled to call for a report by a probation officer on the means of the parties before it finally determines the custody application.

Powers of court to provide for supervision of children.

8.—(1) Where the court makes an order under section 7(2) of this Act regarding the legal custody of a child and it appears to the court that there are exceptional circumstances which make it desirable that the child should be under the supervision of an independent person, the court may order that the child shall be under the supervision of a local authority specified by the court or under the supervision of a probation officer.

(2) Where the court decides to make an order under this section providing for supervision by a probation officer, it shall provide for supervision by a probation officer appointed for or assigned to the petty sessions area in which, in the opinion of the court, the child is or will be resident, and the officer responsible for carrying out the order shall be selected in like manner as if the order were a probation order.

(3) An order made under this section shall cease to have effect as respects any child when he attains the age of eighteen.

(4) The court shall not have power to make an order under this section in respect of any child who is already for the purposes of Part II of the Children Act 1948 in the care of a local authority.

1948 c. 43.

Clause 8(1)

1. This subsection, in empowering the court, when making an order for the custody of a child, also to make an order for the supervision of that child by a local authority or a probation officer re-enacts the substance of section 2(1)(*f*) of the 1960 Act. For the definition of "local authority" see clause 58(1) and the Note thereon.

2. The subsection changes, however, the age-limit for the making of a supervision order. As explained in paragraph 5.59 of the report the present age limit is 16. The subsection implements the recommendation in paragraph 5.64 that the power to make a supervision order shall be exercisable at any time while the custody order continues in effect and shall be exercisable notwithstanding that the child has attained the age of 16. This recommended change is effected in the clause by relating the making of a supervision order to a custody order made under clause 7(2), since clause 7(2) enables a custody order to be made until the child attains the age of 18.

Clause 8(2)

3. This subsection provides that an order for supervision by a probation officer means a probation officer of the petty sessions area where the child is or will be resident and that the responsible officer is to be selected as if the order were a probation order. Thus the subsection re-enacts the substance of section 2(1)(*f*)(i) and section 3(6) of the 1960 Act. For the definition of "petty sessions area" see clause 58(1) and the Note thereon.

Clause 8(3)

4. This subsection, further reflecting the recommendation in paragraph 5.64, which is implemented by subsection (1) above, makes clear that a supervision order may continue until, but will cease to have effect when, the child attains the age of 18.

Clause 8(4)

5. This subsection, which provides that a supervision order shall not be made where there already exists an order committing the child to the care of a local authority, re-enacts the substance of section 2(4)(*b*) of the 1960 Act.

(5) Without prejudice to section 15 of this Act, for the purposes of any order made under this section providing for a child to be under the supervision of a local authority or a probation officer, provision may be made by rules for substituting from time to time a different local authority or, as the case may be, a probation officer appointed for or assigned to a different petty sessions area, if in the opinion of the court the child is or will be resident in the area of that authority or, as the case may be, that petty sessions area.

Clause 8(5)

6. This subsection re-enacts the substance of section 3(8) of the 1960 Act in providing that, where a child has been placed under the supervision of a probation officer or local authority, provision may be made by rules for substituting a different local authority or the probation officer of a different petty sessions area to supervise the child where the child is or will be resident in the area of that local authority or that petty sessions area.

7. The subsection is also similar to section 3(8) of the 1960 Act in that its provisions are without prejudice to the requirements relating to the variation and revocation of orders—clause 15 in this Bill and section 8 in the 1960 Act.

Powers of court to commit children to care of local authority.

9.—(1) Where a court has power by virtue of section 7(2) of this Act to make an order regarding the legal custody of a child and it appears to the court that there are exceptional circumstances which make it impracticable or undesirable for the child to be entrusted to either of the parties to the marriage or to any other individual, the court may, if it thinks fit, make an order committing the care of the child to such local authority as may be specified in the order.

(2) The authority specified in an order under this section shall be the local authority for the area in which the child was, in the opinion of the court, resident immediately before the order committing the child to the care of a local authority was made, and the court shall before making an order under this section hear any representations from the local authority, including any representations as to the making of an order under section 10(3) of this Act for the making of periodical payments.

(3) On the making of an order under this section—

1948 c. 43.

(*a*) Part II of the Children Act 1948 (which relates to the treatment of children in the care of a local authority) except section 17 thereof (which relates to arrangements for the emigration of such children); and

(*b*) for the purposes only of contributions by the child himself at a time when he has attained the age of sixteen and is engaged in remunerative full-time work, Part III of that Act (which relates to contributions towards the maintenace of children in the care of a local authority),

shall apply as if the child had been received by the local authority into their care under section 1 of that Act.

(4) While an order made under this section is in force with respect to a child, the child shall continue in the care of the local authority notwithstanding any claim by a parent or other person.

(5) An order made under this section shall cease to have effect as respects any child when he attains the age of eighteen, and the court shall not make an order committing a child to the care of a local authority under this section after he has attained the age of seventeen.

(6) The court shall not have power to make an order under this section with respect to a child who is already for the purposes of Part II of the Children Act 1948 in the care of a local authority.

Clause 9(1)

1. This subsection, which empowers magistrates to make an order committing a child to the care of a local authority, re-enacts the substance of section 2(1)(*e*) of the 1960 Act. For the definition of "local authority" see clause 58(1) and the Note thereon.

Clause 9(2)

2. This subsection, which provides that before a care order is made the court shall notify the relevant authority and hear any representations from the authority including any relating to any periodical payments to be made in respect to the child, re-enacts the substance of section 3(1) of the 1960 Act.

Clause 9(3)

3. This subsection re-enacts section 3(2) of the 1960 Act so as to attract to the care order the relevant provisions of the Children Act 1948.

Clause 9(4)

4. This subsection is self-explanatory and re-enacts section 3(3) of the 1960 Act.

Clause 9(5)

5. This subsection preserves the provision in section 3(4) of the 1960 Act whereby a care order ceases to have effect when the child reaches the age of 18. The subsection alters, however, the present position pursuant to sections 2(1)(*d*) and 2(1)(*e*) of the 1960 Act whereby a care order may be made in respect of a child who is under the age of 16. It is now provided that a care order may be made in respect of a child who is under the age of 17.

6. The subsection implements the recommendation in paragraph 5.58 of the report and brings the powers of the magistrates' court into line with those of the divorce court under section 43 of the Matrimonial Causes Act 1973.

Clause 9(6)

7. This subsection is self-explanatory and re-enacts the substance of section 2(4)(*b*) of the 1960 Act.

(7) Where the court makes an order under this section with respect to a child, the court shall not have power to make an order under section 7(2)(*b*) of this Act with respect to that child.

(8) Each parent or guardian of a child for the time being in the care of a local authority by virtue of an order made under this section shall give notice to the authority of any change of address of that parent or guardian, and any person who without reasonable excuse fails to comply with this subsection shall be liable on summary conviction to a fine not exceeding £10.

Clause 9(7)

8. The effect of this subsection is that where the court decides to make a care order under subsection 1, the court is not permitted to make an order under clause 7(2)(*b*) granting right of access to the child by either the parties to the marriage or a parent of the child. The subsection re-enacts the substance of section 2(4)(*c*) of the 1960 Act.

Clause 9(8)

9. This subsection is self-explanatory and re-enacts the substance of section 3(5) of the 1960 Act.

Provision for maintenance for children in case of certain orders under ss. 7 and 9.

10.—(1) Where an order made under section 7(2) of this Act gives actual custody of a child to the respondent, the court may make one or more of the following orders, that is to say—

(*a*) an order that the applicant shall make to the respondent for the benefit of the child or to the child such periodical payments, and for such term, as may be specified in the order;

(*b*) an order that the applicant shall pay to the respondent for the benefit of the child or to the child such lump sum as may be so specified.

Clause 10

1. The main features of the provisions in this clause are:—

(*a*) Subsections (1), (2) and (3) empower the court to make a maintenance order in respect of a child in the three special cases where:—

(i) a custody order is made giving actual custody to the respondent,

(ii) a custody order is made giving legal custody to a parent of the child who is not a party to the marriage,

(iii) a care order is made placing the child in the care of a local authority.

(*b*) Subsection (4) lays down the guidelines which the court should take into account in making a maintenance order in the above cases.

(*c*) Under subsections (1), (2) and (3) effect is given to the recommendation in paragraph 5.73 of the report that the maintenance may be paid to the person having the custody of the child, to the local authority having the care of the child or to the child himself.

(*d*) Under subsections (1) and (2) effect is given to the recommendation in paragraph 5.67(*a*) and (*b*) that where maintenance is ordered to be paid to any person having custody of the child, maintenance may take the form of periodical payments at discretionary intervals or a lump sum.

(*e*) Under section (3) effect is given to the recommendation in paragraph 5.67(*c*) that maintenance may be paid to a local authority only in the form of periodical payments.

Clause 10(1)

2. The payment of maintenance in respect of a child the custody of which is given to the applicant party to a marriage is governed by clause 2(1)(*c*) and (*d*) above under which the court may order that the respondent shall contribute towards the maintenance of the child.

3. This subsection implements the recommendation in paragraph 5.74 and makes separate but similar provision for the payment of maintenance in respect of a child in the converse situation where the actual custody is given to the respondent party to a marriage. Under this subsection the court may order that the applicant shall contribute towards the maintenance of the child in the same manner as the respondent is required to do under clause 2.

(2) Where an order made under section 7(2) of this Act gives legal custody of a child to a person who is a parent of that child but not a party to the marriage in question, the court may make one or more of the following orders, that is to say—

(*a*) an order that a party to the marriage shall make to that parent for the benefit of the child or to the child such periodical payments, and for such term, as may be specified in the order;

(*b*) an order that a party to the marriage shall make to that parent for the benefit of the child or to the child such lump sum as may be so specified.

(3) Where an order under section 9(1) of this Act commits the care of a child to a local authority the court may make a further order requiring a party to the marriage in question to make to that authority or to the child such periodical payments, and for such term, as may be specified in the order.

(4) The court in deciding whether to exercise its powers under subsection (1), (2) or (3) above in relation to any child and, if so, in what manner, shall have regard to all the circumstances of the case including the matters to which the court is required to have regard under section 3(2) of this Act, and, in deciding whether to make an order against a party to the marriage who is not a parent of that child, shall also have regard (among the circumstances of the case)—

(*a*) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed that responsibility and to the length of time for which he discharged that responsibility;

(*b*) to whether in assuming and discharging that responsibility that party did so knowing that the child was not his own child;

(*c*) to the liability of any other person to maintain the child.

(5) The provisions of section 5 of this Act (other than subsection 3(*a*)) shall apply in relation to an order under subsection (1)(*a*), (2)(*a*) or (3) above as they apply in relation to an order under section 2(1)(*c*) of this Act.

Clause 10(2)

4. This subsection implements the recommendation in paragraph 5.73(*c*) and makes provision similar to that in subsection (1) for the payment of maintenance in respect of a child where legal custody is given to a person who is a parent of the child but not a party to the marriage. Under this subsection the court may order that the parties to the marriage shall contribute towards the maintenance of the child in the same manner as the respondent is required to do under clause 2.

Clause 10(3)

5. This subsection implements the recommendations in paragraphs 5.67(*c*) and 5.73(*d*) and provides that either of the parties to a marriage may be ordered to make periodical payments for the maintenance of the child where the court has made an order committing the child to the care of a local authority.

Clause 10(4)

6. This subsection is a provision introduced to achieve consistency. It provides that the court when making a maintenance order in any of the special cases governed by subsections (1)–(3) shall have regard, as in the case where maintenance is payable by the respondent to the applicant or the child, to the guidelines in clause 3(2) and, where relevant, to the further guidelines in clause 3(3).

Clause 10(5)

7. This subsection is also a provision introduced to achieve consistency. It provides that when a maintenance order for periodical payments is made in any of the special cases governed by subsections (1)–(3) then, as in the case where periodical payments are payable by the respondent to the applicant or the child, the provisions of clause 5 (age limits on making orders for financial provision for children and duration of such orders) shall apply, except for the provision in clause 5(3)(*a*).

8. The reason for excluding the operation of clause 5(3)(*a*) is that since clause 10 covers only maintenance orders linked to custody orders which themselves cannot be made after a child has reached the age of 18, it is not possible in these cases to make a maintenance order *de novo* after the child has become 18.

(6) The provisions of sections 2(2) and (3) of this Act shall apply in relation to an order under subsection (1)(*b*) or (2)(*b*) above as they apply in relation to an order under section 2(1)(*d*) of this Act, and no order shall be made under subsection (1)(*b*) or (2)(*b*) above in respect of a child who has attained the age of eighteen.

(7) Any order made under this section which requires periodical payments to be made to a person who is given the custody of a child under section 7(2) of this Act or to a local authority who is given the care of a child under section 9 of this Act shall only require those payments to be made to that person or authority during any period when the order made under the said section 7 or 9, as the case may be, has effect and is enforceable.

Clause 10(6)

9. This subsection is a further provision introduced to achieve consistency. It provides that where maintenance for a child is payable as a lump sum under subsection (1)(*b*) and under subsection (2)(*b*) then, as in the case where the lump sum is payable by the respondent to the applicant or to the child, the reasons for and the amount of the payment are governed by clauses 2(2) and 2(3). This subsection also provides that a lump sum shall not be awarded to a child who has become 18.

Clause 10(7)

10. This subsection provides that any order under this clause for the making of periodical payments to a person having custody or the local authority shall have effect only so long as the related custody or care order is itself in effect and enforceable.

Supplementary provisions with respect to powers of court under ss. 7 to 9.

11.—(1) Where an application is made by a party to a marriage for an order under section 2 or 6 of this Act the court, before exercising its powers under sections 7 to 9 of this Act in respect of any child of the family, shall give each party to the marriage and any other person who, as a parent of that child, is present or represented by counsel or solicitor at the hearing, an opportunity of making representations; and any reference in this section to a party to the proceedings shall include a reference both to a party to the marriage and to any other such person who is present or represented.

(2) Where in the case of such an application there is a child of the family who is not the child of both parties to the marriage in question, the court shall not exercise its powers under the said sections 7 to 9 in relation to that child unless either—

(*a*) any person who is a parent of that child, though not a party to the marriage, is present or represented by counsel or solicitor at the hearing, or

(*b*) it is proved to the satisfaction of the court, on oath or in such other manner as may be prescribed by rules, that such steps have been taken as may be so prescribed with a view to giving notice to that person of the making of the application and of the time and place appointed for the hearing;

except that notice shall not be required to be given under paragraph (*b*) above to any person as the father of an illegitimate child unless that person has been adjudged by a court to be the father of that child.

(3) Where the court on such an application is of the opinion that it has not sufficient information to decide whether to exercise its powers under the said sections 7 to 9 and, if so, in what manner, the court may, at any stage of the proceedings on that application, request a local authority to arrange for an officer of the authority to make to the court a report, orally or in writing, with respect to any such matter as the court may specify (being a matter appearing to the court to be relevant to the decision) or may request a probation officer to make such a report to the court; and it shall be the duty of the local authority or probation officer to comply with the request.

(4) Any report made in pursuance of subsection (3) above shall be made or, if in writing, furnished to the court at the hearing of the application, and, if the report is in writing—

(*a*) a copy of the report shall be given to each party to the proceedings or to his counsel or solicitor either before or during the hearing, and

(*b*) the court may, if it thinks fit, require that the report, or such part thereof as the court may specify, shall be read aloud at the hearing.

Clause 11(1)

1. This subsection re-enacts the substance of section 4(1) of the 1960 Act.

Clause 11(2)

2. This subsection re-enacts the substance of section 4(6) of the 1960 Act.

Clause 11(3)

3. This subsection re-enacts the substance of section 4(2) of the 1960 Act and empowers the court when considering how to exercise its powers in relation to a custody order, a supervision order or a care order to call for a welfare report if the court needs further information.

4. The subsection also implements the recommendation in paragraph 10.23 by enacting that such a report may be called for at any stage of the proceedings and that, as recommeneded in paragraph 10.24, the court may specify the matters to be investigated in order to limit the burden on the social services.

Clause 11(4) *and* 11(5)

5. These two subsections re-enact the subsections which were substituted for section 4(3) and (4) of the 1960 Act by section 91 of the Children Act 1975.

(5) The court may, and if requested to do so at the hearing by a party to the proceedings or his counsel or solicitor shall, require the officer by whom the report was made to give evidence on or with respect to the matters referred to in the report, and, if the officer gives such evidence, any party to the proceedings may give or call evidence with respect to any matter referred to either in the report or in the evidence given by the officer.

(6) Subject to subsection (7) below, the court may take account of—

(*a*) any statement contained in a report made or furnished to the court under subsection (4) above, and

(*b*) any evidence given under subsection (5) above by the officer by whom the report was made,

so far as that statement or evidence relates to any of the matters specified by the court under subsection (3) above, notwithstanding any enactment or rule of law relating to the admissibility of evidence.

(7) A report made in pursuance of subsection (3) above shall not include anything said by either of the parties to a marriage in the course of an interview which took place with, or in the presence of, a probation officer with a view to the reconciliation of those parties, unless both parties have consented to its inclusion; and if anything so said is included without the consent of both those parties in any such report then, unless both those parties agree otherwise, that part of the report shall, for the purposes of the giving of evidence under subsection (5) above and for the purposes of subsection (6) above be treated as not forming part of the report.

(8) Where for the purposes of this section the court adjourns the hearing of any application, then, subject to section 46(2) of the Magistrates' Courts Act 1952 (which requires adequate notice of the time and place of the resumption of the hearing to be given to the parties), the court may resume the hearing at the time and place appointed notwithstanding the absence of both or all of the parties.

1952 c. 55.

(9) The power of the court under subsection (3) of this section to request a report may, at any time before the hearing of the application, be exercised by a single justice, and, if any such request is made by a single justice, the report shall be made or furnished to the court which hears the application and the foregoing provisions of this section shall apply accordingly.

Clause 11 *(continued)*

6. As explained in paragraphs 10.12–10.13 of the report, the effect of the new provisions is that the court has a discretion to dispense with the reporting officer giving evidence, unless one of the parties especially wishes to call him; and it is permissible for reports to be read silently if the court thinks this is more appropriate, subject to copies being provided for the parties.

Clause 11(6), (7) *and* (8)

7. These subsections, which are self-explanatory, respectively re-enact the substance of section 4(4), (5) and (7) of the 1960 Act.

Clause 11(9)

8. This subsection implements the recommendation in paragraph 10.23. It provides that the power to call for a welfare report at any stage of the proceeding under subsection (3) may be exercised by a single justice.

Disputes between persons holding parental rights and duties jointly.

12.—(1) Where two persons who have a parental right or duty jointly by virtue of an order under section 7(2) of this Act disagree on any question affecting the child's welfare, either of them may apply to a magistrates' court for its direction, and the court may make such order regarding the matters in difference as it thinks fit.

(2) Where the court makes an order under subsection (1) above with respect to any child, the court may, on an application made by either of the persons who have a parental right or duty jointly, by order vary or revoke that order.

(3) The power of the court under section 11(3) of this Act to request a local authority to arrange for an officer of the authority to make a report, or to request a probation officer to make a report, shall apply in relation to the exercise by the court of its powers under this section as it applies in relation to the exercise by the court of its powers under sections 7 to 9 of this Act, and the provisions of subsections (4) to (9) of the said section 11 shall apply accordingly.

Clause 12(1)

1. This subsection enables the magistrates' court, on application, to make an order for resolving disputes between the two persons jointly exercising parental rights or duties by virtue of a custody order under clause 7(2).

2. The subsection implements the recommendation in paragraph 5.34(*b*) by providing a means for resolving disputes in custody cases in the magistrates' matrimonial jurisdiction similar to that available in disputes between a mother and a father under section 1(3) of the Guardianship Act 1973.

Clause 12(2)

3. This subsection provides that the court may, when an application is made under subsection 1 for the resolving of a dispute about a custody order, vary or revoke that order.

Clause 12(3)

4. This subsection provides that the court, when resolving a dispute between persons jointly exercising parental rights or duties, shall be able to call for a welfare report from a local authority or probation officer in the same way as it is able to do under clause 11 before making a custody order under clause 7, a supervision order under clause 8 or a care order under clause 9.

Powers of the court to make orders for the protection of a party to a marriage or a child of the family

Powers of court to make orders for the protection of a party to a marriage or a child of the family.

13.—(1) Either party to a marriage may, whether or not an application is made by that party for an order under section 2 of this Act, apply to a magistrates' court for an order under this section.

(2) Where on an application for an order under this section the court is satisfied that the respondent has used, or threatened to use, violence against the person of the applicant or a child of the family and that it is necessary for the protection of the applicant or a child of the family that an order should be made under this subsection, the court may make one or both of the following orders, that is to say—

(*a*) an order that the respondent shall not use, or threaten to use, violence against the person of the applicant;

(*b*) an order that the respondent shall not use, or threaten to use, violence against the person of a child of the family.

Clause 13

1. This clause gives effect to the entirely new scheme described in Part III of the report whereby, in order to provide personal protection for a spouse or children of the family against whom the other spouse inflicts or threatens violence, the magistrates are given power (in place of their existing power under section 2(1)(*a*) of the 1960 Act to order that the complainant be no longer bound to cohabit with the respondent) to make one or both of the following orders:—

(*a*) an order (described in paragraph 3.13 as a "personal protection order") prohibiting the respondent from using or threattening violence against the complainant or the children;

(*b*) an order (described in paragraph 3.13 as an "exclusion order") excluding the respondent from the matrimonial home.

2. The clause implements the detailed recommendations set out in paragraphs 3.40–3.48.

Clause 13(1)

3. As explained in paragraph 3.11, the aim of the Bill is to provide protection against violence to either spouse although it is anticipated that the complainant will usually be the wife. This subsection makes clear, therefore, that either spouse is entitled to apply under the clause and may do so whether or not an application for maintenance is made under clause 2.

Clause 13(2)

4. This subsection gives power to the magistrates' court to make a personal protection order that the respondent shall not use or threaten violence against the complainant or a child of the family.

5. It further makes provision for the grounds, as explained in paragraphs 3.19–3.21, upon which the power to make this order may be exercised, namely that the respondent has used violence or threatened violence to the applicant or a child of the family and that the making of an order is necessary for the protection of the applicant or a child of the family.

6. The wording of this subsection gives effect to the intention explained in paragraph 3.20 that there will be no ground for making a personal protection order if the only complaint against the respondent is that he uses or threatens violence outside his home and family circle.

7. The subsection implements the detailed recommendation in paragraph 3.40(*a*) of the report.

(3) Where on an application for an order under this section the court is satisfied—

(*a*) that the respondent has used violence against the person of the applicant or a child of the family, or

(*b*) that the respondent has threatened to use violence against the person of the applicant or a child of the family and has used violence against some other person, or

(*c*) that the respondent has in contravention of an order made under subsection (2) above threatened to use violence against the person of the applicant or a child of the family,

and that the applicant or a child of the family is in danger of being physically injured by the respondent, the court may make one or both of the following orders, that is to say—

(i) an order requiring the respondent to leave the matrimonial home;

(ii) an order prohibiting the respondent from entering the matrimonial home.

(4) Where on an application for an order under subsection (2) above the court is satisfied that an order should be made under that section and that, in order to prevent physical injury to the applicant or a child of the family, it is essential that such an order should be made without delay, the court may make an order (in this section referred to as an "expedited order") under that subsection notwithstanding—

(*a*) that the summons has not been served on the respondent or has not been served on the respondent within a reasonable time before the hearing of the application,

(*b*) that the summons requires the respondent to appear at some other time or place, or

(*c*) that the court does not include both a man and a woman.

Clause 13(3)

8. This subsection gives power to the magistrates' court to make an exclusion order that the respondent shall leave or shall not enter the matrimonial home.

9. It further makes provision for the grounds, as explained in paragraphs 3.22–3.24, upon which the power to make this order may be exercised, namely, that the wife or children are in danger of being physically injured by the respondent and the respondent:—

(*a*) has used violence against the applicant or a child of the family or

(*b*) has threatened violence against the applicant or a child and also has used violence against some other person, or

(*c*) has disobeyed a personal protection order under subsection (2) by threatening violence.

10. The wording of this subsection gives effect to the intention explained in paragraphs 3.22–3.23(*a*) and (*b*) that to ground an exclusion order it must be shown that the respondent has actually inflicted violence, though the victim need not be the applicant or a child of the family, provided it is shown that the respondent has been guilty of actual violence toward some person on some occasion and has threatened the applicant or a child of the family. As explained in paragraph 3.23(*c*), breach of a personal protection order by the respondent having threatened violence will also be a ground for an exclusion order.

11. The subsection implements the detailed recommendation in paragraph 3.40(*b*) of the report.

Clause 13(4)

12. This subsection implements the recommendation in paragraph 3.24 by providing that, if it appears to the court essential to do so quickly in order to prevent physical injury to the applicant or a child, the court may expedite the making of a personal protection order by making the order although the respondent has not been served with the summons or that some other requirement of normal procedure has not been complied with.

(5) The power of the court to make, by virtue of subsection (4) above, an expedited order under subsection (2) above shall be exercisable by a single justice.

(6) An order under this section may be made subject to such exceptions or conditions as may be specified in the order and, subject in the case of an expedited order to rules made under subsection (8) below, may be made for such term as may be so specified.

(7) The court in making an order under subsection (2)(*a*) or (*b*) above may include provision that the respondent shall not incite or assist any other person to use, or threaten to use, violence against the person of the applicant or, as the case may be, the child of the family.

Clause 13(5)

13. This subsection implements the further recommendation in paragraph 3.44 by providing that an expedited personal protection order may, in the interests of providing relief quickly, be made by a single justice as well as by a full bench.

14. The power conferred on a single justice by this subsection is specifically confined to the making of a personal protection order and accordingly the subsection gives effect by implication to the recommendation in paragraph 3.45 that an exclusion order may only be made by a full bench after a hearing in accordance with the ordinary procedural rules.

Clause 13(6)

15. This subsection implements the recommendation in paragraph 3.41 that either of the above orders should be capable of being made generally or subject to exemptions and conditions and for an indefinite period or such period as may be specified.

16. The subsection gives effect to the recommendation in paragraph 3.40(*d*) that, in making an exclusion order, the court should have power to authorise entry into the home for a temporary and limited purpose, such as, for example, the collection of personal belongings.

Clause 13(7)

17. This subsection implements the recommendation in paragraph 3.40(*c*) by providing that, when making a personal protection order, the court may include a provision prohibiting the respondent from inciting some other person to threaten or inflict violence.

18. As explained in paragraph 3.25(*a*) this provision is intended to deal with the case where, for example, a spouse instigates a relative or some other person to perpetrate the violence against his wife or children.

(8) Rules may be made for the purpose of giving effect to the provisions of this section and any such rules may in particular, but without prejudice to the generality of this subsection—

(*a*) make provision for the hearing without delay of any application for an order under subsection (3) above;

(*b*) make provision for any expedited order made by virtue of subsection (4) above to take effect on the giving of notice to the respondent of the making of the order or on such later date as the court may specify and to cease to have effect after such period as may be specified in the rules unless the court continues the order in force for such further period as may be so specified.

(9) The expiry by virtue of rules made under subsection (8) above of an expedited order shall not prejudice the making of a fresh order under subsection (2) above.

Clause 13(8)

19. This subsection implements the recommendation in paragraph 3.46 that rules should provide generally for the procedures to be followed in the making of the above-mentioned orders and in particular should provide:—

(*a*) for the hearing of an application for an exclusion order by a full bench with the minimum of delay;

(*b*) that a respondent should be given notice of an expedited personal protection order and that such an order should take effect on the date of that notice or such later date as the court may specify;

(*c*) for the duration of an expedited order and also for conferring on the court a power to make a further temporary order for a specified period.

20. Paragraph 3.29 of the report and the recommendation in paragraph 3.42 explain the intention that the rules should provide:—

(*a*) that application should be made by way of complaint and that as a standard procedure the matter should be dealt with by a full bench after the issue of a summons served and returnable in accordance with the ordinary rules;

(*b*) that for both kinds of orders the normal requirement should be for personal service of the summons upon the respondent, though it should be possible to dispense with personal service if the court considers the respondent will attempt to delay matters by evading personal service or if, for any reason, the court considers that expeditious personal service of the summons is not practicable.

Clause 13(9)

21. This subsection is self-explanatory.

Interim Orders

Interim orders

14.—(1) Where an application is made for an order under section 2 or 6 of this Act—

(*a*) the magistrates' court at any time before the court either makes a final order on the application or refuses (whether by virtue of section 21 of this Act or otherwise) to make an order, or

(*b*) the High Court on ordering the application to be reheard by a magistrates' court (either after the refusal of an order under section 21 of this Act or on an appeal under section 23 of this Act)

shall, subject to the provisions of this Act, have the following powers—

(i) if the court is satisfied that the applicant or any child of the family who is under the age of eighteen is in immediate need of financial assistance, the court shall have power to make an interim maintenance order, that is to say, an order which requires the respondent to make to the applicant or to that child, or to the applicant for the benefit of the child, until the order ceases to have effect by virtue of subsection (3) below such periodical payments as the court thinks reasonable,

(ii) if the court is of the opinion that there are special circumstances which make it desirable that provision should be made for the legal custody of any child of the family who is under the age of eighteen, the court shall have power to make an interim custody order, that is to say, an order which makes until the order ceases to have effect under subsection (3) below any such provision with respect to the legal custody of, and the right of access to, that child as the court has power to make under section 7(2) of this Act.

Clause 14(1)

1. Subsection (1)(*a*) implements the recommendation in paragraph 4.34(*a*) by enabling magistrates to make an interim order at any time without having to adjourn the hearing as is now required.

2. In that power to make an interim order is given to "the magistrates' court", it is made clear that an interim order may only be made, as at present, by a bench of at least two justices and the recommendation in paragraph 4.34(*b*) is thus implemented.

3. Subsection 1(*b*) re-enacts the substance of section 6(1) of the 1960 Act in conferring power on the High Court to make an interim order and implements the recommendation in paragraph 4.35.

4. Paragraphs (i) and (ii) prescribe the circumstances in which an interim order may be made and the nature of the order. (For the duration of an interim order see subsection (3) below and the Notes thereon.)

5. Under paragraph (i) an interim order for maintenance may be made if the applicant or a child of the family is in immediate financial need and shall take the form of an order for periodical payments. In making the immediate financial need of the recipient the ground for an interim order this clause makes explicit what is merely implied in the corresponding provision under section 6 of the 1960 Act.

6. Under paragraph (ii) an interim order regarding custody and access may be made where by reason of special circumstances the court considers this desirable. In this respect the clause is modelled on the existing provision in section 6(2)(*b*) of the 1960 Act. In providing that such an interim order shall be of the same nature as a final order for custody and access under clause 7, this clause is also modelled on the corresponding provision in section 6(2)(*b*) of the 1960 Act.

(2) An interim maintenance order may provide for payments to be made from such date as the court may specify, not being earlier than the date of the making of the application for an order under section 2 or 6 of this Act; and where such an order made by the High Court on an appeal under section 23 of this Act provides for payments to be made from a date earlier than the date of the making of the order, the interim order may provide that payments made by the respondent under an order made by a magistrates' court shall, to such extent and in such manner as may be provided by the interim order, be treated as having been paid on account of any payment provided for by the interim order.

(3) An interim order made under this section shall cease to have effect on whichever of the following dates occurs first, that is to say,

(*a*) the date, if any, specified for the purpose in the interim order,

(*b*) the date of the expiration of the period of three months beginning with the date of the making of the interim order, or

(*c*) the date on which a magistrates' court either makes an order under section 2 or 6 of this Act or decides not to exercise its powers thereunder;

but where an interim order made under this section ceases to have effect by virtue of paragraph (*a*) or (*b*) above, the applicant may apply to the magistrates' court which made the order or, in the case of an interim order made by the High Court, the magistrates court by which the application is to be reheard, for an extension of the interim order for a further period not exceeding three months and, if such an extension is granted, this subsection shall have effect as if for the reference in paragraph (*b*) above to three months there were substituted a reference to six months.

(4) Section 7(6) of this Act shall apply in relation to an interim custody order under this section as it applies in relation to an order made under subsection (2) of that section.

(5) No appeal shall lie from the making of or refusal to make, the variation of or refusal to vary, or the revocation of or refusal to revoke, an interim maintenance order.

(6) An interim order made by the High Court under this section on ordering that an application be reheard by a magistrates' court shall, for the purpose of its enforcement and for the purposes of section 15 of this Act, be treated as if it were an order of that magistrates' court and not of the High Court.

Clause 14(2)

7. This subsection implements the recommendation in paragraph 4.52(*a*) and provides that where an interim maintenance order is made by magistrates, the magistrates may direct that the order shall take effect from a date earlier than the hearing, but not earlier than the date of the application. The power to antedate an interim maintenance order is thus assimilated to the power to antedate a final order under clause 4(1).

8. The subsection also implements the recommendation in paragraph 4.52(*c*)(i) that where there is an appeal in a matter of maintenance from the magistrates to the High Court, the High Court should have power to direct that any final or interim order which it makes should take effect from such date, whether before or after the making of the order, as the court may determine, except that the date so fixed shall not be earlier than that which the magistrates themselves could have fixed for such an order.

9. The subsection also implements the recommendation in paragraph 4.52(*c*)(ii) that, where there is an appeal from magistrates to the High Court, the High Court may give credit for payments previously made under the magistrates' order.

Clause 14(3)

10. This subsection implements the recommendation in paragraph 4.34(*c*) that the duration of the interim order should not in the first instance extend beyond 3 months from the making of the order, but the court should have power to extend the order for a further period not exceeding 3 months.

Clause 14(4)

11. This subsection empowers the court, in the same way as it is empowered to do by clause 7(6) for a final custody order, to postpone the coming into effect of the interim custody order.

Clause 14(5)

12. This subsection reproduces in substance section 6(2) of the 1960 Act and also removes the possible anomaly under that Act, referred to in paragraph 4.93, that an appeal might lie against the refusal of an interim maintenance order. Notwithstanding this subsection, clause 22(5) nevertheless enables the High Court, on an appeal against the making or refusal of an interim custody order, to vary or revoke any interim maintenance order made in connection with that custody order.

Clause 14(6)

13. This subsection is self-explanatory and re-enacts the substance of section 6(4) of the 1960 Act.

Variation, revocation and cessation of orders

Variation and revocation of orders.

15.—(1) Where on an application for an order under section 2, 6 or 13 of this Act (in this section referred to as the "original application") a magistrates' court has made an order under this Part of this Act (other than an order for the payment of a lump sum), the court, on an application under this section for the variation or revocation of that order, shall have power by order to vary or revoke that order and to make any other order or give any direction which it could have made under this Part of this Act on the original application.

(2) Where the court has made an order under this Part of this Act for the making of periodical payments, whether on an original application or an application under this section, the power of the court to vary that order shall include power to suspend the operation of any provision thereof temporarily and to revive the operation of any provision so suspended.

(3) The court in the exercise by virtue of this section of its powers under section 2(1)(*b*) or 2(1)(*d*) of this Act may require the respondent to pay a lump sum not exceeding the maximum amount that may at that time be required to be paid under subsection 2(3) of this Act, notwithstanding that the respondent was required to pay a lump sum by a previous order made under section 2(1)(*b*) or 2(1)(*d*), as the case may be.

Clause 15(1)

1. The general effect of this subsection, which implements the recommendation in paragraph 2.45, is the same as that of section 8 of the 1960 Act, namely to give the court an unfettered discretion to vary or revoke orders.

2. The power to vary or revoke thus conferred applies to orders for maintenance by periodical payments made under clause 2, to the like orders made by consent under clause 6 and to the orders for protection against violence made under clause 13. The power likewise applies to orders in respect of the custody, supervision and care of children under clauses 7–10 and to interim orders under clause 14.

3. Exceptionally no power is conferred under this subsection to vary or revoke an order for maintenance by way of a lump sum.

Clause 15(2)

4. This subsection reflects the recommendation in paragraph 4.56 and empowers magistrates, where they have made an order for periodical payments in the exercise of their matrimonial jurisdiction, to suspend any provision of the order temporarily and to revive the operation of a provision so suspended.

5. For the reasons given in paragraphs 4.53–4.55, the subsection thus confers upon magistrates a new power similar to that exercisable by the divorce court under section 31(1) of the Matrimonial Causes Act 1973.

6. The power specifically conferred upon magistrates in their matrimonial jurisdiction by this subsection is conferred generally, as specifically recommenedd in paragraph 4.56, by clause 41 which amends section 53 of the Magistrates' Courts Act 1952; see the Note on clause 41 below.

Clause 15(3)

7. This subsection implements that part of the recommendation in paragraph 2.39(*a*) which proposes that the exercise of the new power conferred on magistrates by clause 2 to award maintenance in the form of a lump sum should not be limited to a single occasion.

8. Since the award of maintenance as a lump sum will arise from the need to meet some special and identifiable item of expenditure it is unnecessary and impracticable to permit the amount of such a sum to be subsequently varied or to be revoked. The only needful power of variation is a power to award a sum additional to that awarded originally.

(4) An order made by virtue of this section which provides for the making of periodical payments or which varies or revokes an order for the making of periodical payments may, subject to the provisions of section 10(7) of this Act, provide that the payments shall be made from such date as the court may specify, not being earlier than the date of the making of the application under this section.

(5) Where an order made under this Part of this Act for the making of periodical payments to or in respect of a child ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, then, if at any time before he attains the age of twenty-one an application is made by the child for an order under this subsection, the court shall have power by order to revive the first mentioned order from such date as the court may specify, not being earlier than the date of the making of the application, and to vary or revoke under this section any order so revived.

(6) In exercising the powers conferred by this section to make an order for periodical payments or to vary or revoke such an order the court shall, so far as it appears to the court just to do so, give effect to any agreement which has been reached between the parties in relation to the application and, if there is no such agreement or if the court decides not to give effect to the agreement, the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates or, in the case of an application for the variation or revocation of an order made under section 6 of this Act or on an appeal under section 23 of this Act, to which the court would have been required to have regard if that order had been made on an application under section 2 of this Act.

Clause 15(4)

9. This subsection is a provision introduced to achieve consistency and implements the recommendation in paragraph 4.52(*b*).

10. On an original order for maintenance by way of periodical payments one of the effects of clause 4(1) is that the order may take effect from such date as the court may specify, not being earlier than the date of the making of the application. This subsection gives the court a similar power where, on an application for variation, it makes an order for maintenance by way of periodical payments or an order varying or revoking such a maintenance order previously made.

11. Clause 10(7) contains a limitation on the duration of the liability to make periodical payments to a person given custody of a child under section 7(2) or to a local authority given the care of a child under section 9. Clause 15(4) is made subject to the provisions of clause 10(7) since the general power to antedate or postdate orders under the subsection is not to prevail against the restriction imposed by clause 10(7). (This does not prevent the court antedating or postdating orders requiring payments to be made to the child himself, since clause 10(7) relates only to payments made to the person having the custody of the child or to the local authority to whose care the child has been committed).

Clause 15(5)

12. This subsection implements the recommendation in paragraph 5.96(*b*) of the report that where a maintenance order for the benefit of a child has ceased to have effect on the child attaining the age of 18 years or at any time within the two years preceding his attaining that age, he may, at any time before attaining the age of 21, apply to the court to revive the order with variations. In this case the court will have power, as recommended, to include variations as to duration and as to amount.

Clause 15(6)

13. This subsection is a provision introduced to achieve consistency. Its effect is to ensure that the court exercises its powers to vary or revoke an order for periodical payments in a manner consistent with the making of the relevant original order. When varying or revoking an order the court is required to consider all the circumstances of the case and any change in the matters on the basis of which the original order was made.

(7) Section 11 of this Act shall apply in relation to the exercise by the court by virtue of this section of powers under sections 7 to 9 of this Act as it applies in relation to the exercise by the court of powers under those sections on an original application.

(8) An application for the variation or revocation of an order under this section may be made by either party to the marriage in question and also—

(*a*) in the case of an order made under section 7, 8 or 9 of this Act with respect to a child of the family who is not a child of both the parties to the marriage and in the case of an interim custody order made in respect of such a child, by any person who, though not one of the parties to the marriage, is a parent of that child,

(*b*) in the case of an order made under section 8 of this Act which provides for a child of the family to be under the supervision of a local authority or a probation officer, by that local authority or probation officer,

(*c*) in the case of an order made under section 9 of this Act which commits a child of the family to the care of a local authority, by that local authority,

(*d*) in the case of an order made under section 10(2) of this Act for the making of periodical payments where the legal custody of a child of the family is given to a person who is a parent of that child but not a party to the marriage in question, by that parent; and

(*e*) in the case of an order made under section 10(3) of this Act for the making of periodical payments where a child of the family is committed to the care of a local authority, by that local authority,

and an application for the variation of an order made under section 2(1)(*c*), 6 or 10(1), (2) or (3) of this Act for the making of periodical payments to or in respect of a child may, if the child has attained the age of sixteen, be made by the child himself.

(9) Where any order is made on an application under this section, the court may exercise in relation thereto all the powers which would have been so exercisable under subsection (1) above if the order had been made on the original application.

Clause 15(7)

14. This subsection is self-explanatory and provides that when the court is called upon to vary or revoke an order for the custody, supervision or care of a child it shall be bound by the requirements of clause 11 (supplementary provisions regarding welfare reports, etc.) in the same way as when making the original order.

Clause 15(8)

15. The first part of this subsection provides for the persons who may apply for the variation and revocation of an order made under the Act. This provision implements the recommendations in paragraph 5.118(*b*) (i)–(v).

16. The second part of this subsection provides that where a maintenance order by way of periodical payments has been made for the benefit of a child, the child himself, if over 16 years of age, may apply for the variation of the order. This provision implements the recommendation in paragraph 5.96(*a*).

Clause 15(9)

17. This subsection is a drafting provision, the object of which is to ensure that the court on a second or subsequent application for the variation or revocation of a matrimonial order can exercise all its powers in relation to children under clauses 7–10.

Variation of instalments of lump sum.

1952 c. 55.

16. Where in the exercise of its powers under section 63 of the Magistrates' Court Act 1952 a magistrates' court orders that a lump sum required to be paid under this Part of this Act shall be paid by instalments, the court, on an application made by either the person liable to pay or the person entitled to receive that sum, shall have power to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable.

Clause 16

This clause implements the recommendation in paragraph 2.39(*b*) that it should be made clear that, when magistrates have ordered payment of a lump sum by instalments, they have power to vary the instalments.

Supplementary provisions with respect to variation and and revocation of orders.

1952 c. 55.

17.—(1) The court before which there fall to be heard any proceedings for the variation of an order for the payment of money made under this Part of this Act may, if it thinks fit, order that those proceedings and any other proceedings being heard therewith shall be treated for the purposes of the Magistrates' Courts Act 1952 as domestic proceedings, notwithstanding anything in section 56(1) of that Act; and no appeal shall lie from the making of, or the refusal to make, an order under this subsection.

(2) Provision may be made by rules as to the persons who are to be made defendants on an application for the variation or revocation of an order under section 15 of this Act; and if on any such application there are two or more defendants, the powers of the court under section 55(1) of the Magistrates' Courts Act 1952 shall be deemed to include power, whatever adjudication the court makes on the application, to order any of the parties to pay the whole or part of the costs of all or any of the other parties.

(3) The powers of a magistrates' court to revoke, revive or vary an order for the periodical payment of money under section 53 of the Magistrates' Courts Act 1952 and to suspend or rescind certain other orders under section 54(2) of that Act shall not apply in relation to an order made under this Part of this Act.

Clause 17(1)

1. This subsection re-enacts section 8(3) of the 1960 Act.

Clause 17(2)

2. This subsection re-enacts section 10(2) of the 1960 Act.

Clause 17(3)

3. This subsection implements the recommendation in paragraph 4.60; that where an order made by the magistrates in the exercise of their matrimonial jurisdiction has wholly ceased to have effect, the power to revive it should be confined to cases where specific statutory provision has been made for the purpose. The reasons for this recommendation and provision are explained in paragraphs 4.57–4.59.

Proceedings by or against a person outside England and Wales for variation or revocation of orders.

18.—(1) It is hereby declared that any jurisdiction conferred on a magistrates' court by virtue of section 15 of this Act is exercisable notwithstanding that the proceedings are brought by or against a person residing outside England and Wales.

(2) Subject to subsection (3) below, a magistrates' court may, if it is satisfied that the respondent has been outside the United Kingdom during such period as may be prescribed by rules, proceed on an application made under section 15 of this Act notwithstanding that the respondent has not been served with the summons; and rules may prescribe any other matters as to which the court is to be satisfied before proceeding in such a case.

(3) A magistrates' court shall not exercise its powers under section 15 of this Act so as to increase the amount of any periodical payments required to be made by any person under this Part of this Act unless the order under that section is made at a hearing at which that person appears or the requirements of section 47(3) of the Magistrates' Courts Act 1952 with respect to proof of service of summons or appearance on a previous occasion are satisfied in respect of that person.

1952 c. 55.

Clause 18

1. This clause empowers the court, subject to certain conditions, to hear proceedings for the revocation or variation of orders under clause 15 of this Bill where either the complainant or the respondent is resident outside England or Wales. As explained below, this clause re-enacts the substance of section 9 of the 1960 Act with the difference that rules will now provide for certain detailed matters regarding which provision was previously made by section 9 itself.

Clause 18(1)

2. This section implements the recommendation in paragraph 4.90(*c*) that the reformulated magistrates' matrimonial law should contain a provision corresponding to section 9(1) of the 1960 Act. The exception to section 9(1) (which relates to the "non-cohabitation" provision under the present law) is not, however, re-enacted as, under this Bill, a "non-cohabitation" provision can no longer be made (see clause 13).

Clause 18(2)

3. This subsection authorises the court, subject to the restriction set out in subsection (3) below, to hear an application for variation or revocation of an order under clause 15 where the respondent has been outside the United Kingdom for a prescribed period and has not been served with the summons. The actual period and any other matters as to which the court must be satisfied before hearing the case are left to rules.

4. "Rules" are defined by clause 56(1) as rules made under section 15 of the Justices of the Peace Act 1949.

5. By leaving the detailed procedural matters in such cases to rules, it is unnecessary for this clause to re-enact the lengthy provisions in section 9(2), (3) and (4) of the 1960 Act setting out the matters on which the court must satisfy itself before hearing an application to vary or revoke an order under clause 15 where the respondent is not resident in the United Kingdom. These provisions, therefore, are not repeated.

Clause 18(3)

6. This subsection restricts the court's powers as to the variation of orders under clause 15, by providing that the amount of an order for periodical payments shall not be increased unless the respondent is present at the hearing or certain other requirements are satisfied. This subsection re-enacts the substance of section 9(5) of the 1960 Act.

Effect on orders of parties living together.

19.—(1) Where—

(*a*) periodical payments are required to be made to one of the parties to a marriage (whether for his own benefit or for the benefit of a child of the family) by an order made under section 2, 6 or 10(1) of this Act or by an interim maintenance order made under section 14 of this Act, or

(*b*) the actual custody of a child is given to one of the parties to a marriage by an order made under section 7(2) of this Act or by an interim custody order made under section 14 of this Act,

the order shall be enforceable notwithstanding that the parties to the marriage are living with each other at the date of the making of the order or that, although they are not living with each other at that date they subsequently resume living with each other; but the order shall cease to have effect if after that date the parties continue to live with each other, or resume living with each other, for a continuous period exceeding six months.

Clause 19

1. This clause deals with the effect of cohabitation by the parties to a marriage upon maintenance orders for periodical payments for the benefit of one of the parties or for the benefit of a child of the family. The clause also deals with the effect of such cohabitation upon orders for the custody, care and supervision of children.

2. In this clause the words "living with each other" are used to describe cohabitation: for the significance of this form of words, see clause 58(2) and the Note thereon.

3. The clause makes three changes to the present position under the 1960 Act in that, as explained in paragraphs 2.58 and 2.47 of the report:—

(*a*) under section 7(1) of the 1960 Act an order made while the parties are cohabiting is not enforceable and gives rise to no liability until they have ceased to cohabit;

(*b*) under section 7(1)(*b*) an order made while the parties are cohabiting ceases to have effect if they continue to cohabit for 3 months;

(*c*) under section 7(2) an order made when the parties are not cohabiting ceases to have effect if there is any resumption of cohabitation after the order is made.

Clause 19(1)

4. This subsection applies to:—

(*a*) a maintenance order for periodical payments to a spouse for the benefit of that spouse or a child of the family made under clause 2, a like order made by consent under clause 6, a maintenance order under clause 10(1) and to an interim maintenance order made under clause 14;

(*b*) a custody order or an interim custody order giving the actual custody of the child to one of the parties to the marriage.

5. The subsection provides that the order in question shall:—

(*a*) be enforceable notwithstanding that the parties to the marriage are cohabiting when the order is made or subsequently resume cohabitation;

(*b*) shall, however, cease to have effect if after the date of the order, the parties to the marriage continue to cohabit or subsequently resume cohabitation for a continuous period exceeding six months.

6. Effect is thus given to the recommendations in paragraphs 2.65, 2.57(*a*), 5.102 and 5.109 of the report.

(2) Where any of the following orders is made under this part of this Act, that is to say—

(*a*) an order under section 2, 6 or 10(1) of this Act which requires periodical payments to be made to a child of the family,

(*b*) an interim maintenance order under section 14 of this Act which requires periodical payments to be made to a child of the family,

(*c*) an order under section 7(2) of this Act which gives legal custody of a child to a person who is a parent of that child but not a party to the marriage in question, or

(*d*) an order under section 8, 9 or 10(2) or (3) of this Act,

then, unless the court otherwise directs, the order shall continue to have effect and be enforceable notwithstanding that the parties to the marriage in question are living with each other at the date of the making of the order or that, although they are not living with each other at that date, they subsequently resume living with each other.

(3) Where an order made under this Part of this Act ceases to have effect by virtue of subsection (1) above or by virtue of a direction given under subsection (2) above, a magistrates' court may, on an application made by either party to the marriage, make an order declaring that the first mentioned order ceased to have effect from such date as the court may specify.

Clause 19(2)

7. This subsection provides that, in the case of the undermentioned orders, the order shall, unless the court otherwise directs, continue to have effect and be enforceable notwithstanding that the parties are cohabiting when the order is made or subsequently resume cohabitation.

8. The orders to which this provision is made to apply are:—

(*a*) as recommended in paragraph 5.107, maintenance orders and interim maintenance orders for periodical payments to be made to the child himself;

(*b*) as recommended in paragraphs 5.105 and 5.113, custody orders which give the legal custody of a child to a parent of that child who is not a party to the marriage;

(*c*) as also recommended in paragraphs 5.105 and 5.113, orders providing for the supervision of a child or committing a child to care.

Clause 19(3)

9. This subsection implements the recommendation in paragraph 2.57(*b*) that there should be a general provision that, where an order has ceased to be in force by reason of cohabitation, the court may on application make a declaration to that effect and may specify the date on which the order ceased to be in force.

10. As explained in paragraph 2.56 of the report, this subsection replaces section 8(2) of the 1960 Act, since it is thought useful to have a specific provision for resolving the cases in which there is disagreement between the parties as to whether and on what date an order ceased to have effect.

Reconciliation

Reconciliation.

20.—(1) Where an application is made for an order under section 2 of this Act the court, before deciding whether to exercise its powers under that section shall consider whether there is any possibility of reconciliation between the parties to the marriage; and if at any stage of the proceedings on that application it appears to the court that there is a reasonable possibility of such a reconciliation, the court may adjourn the proceedings for such a period as it thinks fit to enable attempts to be made to effect a reconciliation.

(2) Where the court adjourns any proceedings under subsection (1) above, it may request a probation officer or any other person to attempt to effect a reconciliation between the parties to the marriage, and where any such request is made, the probation officer or that other person shall report in writing to the court whether the attempt has been successful or not, but shall not include in that report any other information.

Clause 20

1. This clause sets out the provisions concerning the duty of the court to consider the possibility of reconciliation between the parties in the case where the complainant is endeavouring to establish one of the three grounds under clause 1 for a maintenance order under clause 2. As explained in paragraph 4.12 of the report, this is the only case where this duty is imposed upon the court. No such duty arises where other types of orders are sought, such as a consent order under clause 6 or an order under clause 13 to protect the complainant or a child from violence.

2. For the reasons explained in paragraphs 4.9–4.15 of the report these provisions are intended to replace those in sections 59 and 62 of the Magistrates' Courts Act 1952 which, as recommended in paragraph 4.17(*b*), are repealed by clause 59(1) and Schedule 2.

3. Subsection (1) read together with the first part of subsection (2) implements the recommendation in paragraph 4.16 that the court should be under a duty to consider the possibility of reconciliation and that, as a matter of procedure, the court may, in order to assist reconciliation, adjourn the hearing and request a report from a probation officer or other person.

4. The second half of subsection (2) implements the recommendation in paragraph 4.17(*a*) that where a report is called for it should consist merely of a written statement whether attempted reconciliation has succeeded.

Provisions relating to High Court and county court

Refusal of order in case more suitable for High Court.

21. Where on hearing an application for an order under section 2 of this Act a magistrates' court is of the opinion that any of the matters in question between the parties would be more conveniently dealt with by the High Court, the magistrates' court shall refuse to make any order on the application, and no appeal shall lie from that refusal; but if in any proceedings in the High Court relating to or comprising the same subject matter as that application the High Court so orders, the application shall be reheard and determined by a magistrates' court acting for the same petty sessions area as the first mentioned court.

Clause 21

1. This clause re-enacts the substance of the existing law in section 5 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 and thus implements the recommendation in paragraph 4.100(*a*) made for the reasons set out in paragraphs 4.94–4.96.

2. In reproducing section 5 of the 1960 Act, the word "may" in line 4 of that section has been changed to "shall" in order to bring the provision into line with section 16(4) of the Guardianship of Minors Act 1971, as amended by the Children Act 1975: see section 108(1) and Schedule 3, paragraph 75(3).

Powers of High Court and county court in relation to orders under ss. 2, 6 and 14.

22. Where after the making by a magistrates' court of—

(*a*) an order under section 2(1)(*a*) or (*c*) of this Act,

(*b*) an order under section 6 of this Act, or

(*c*) an interim order under section 14 of this Act,

proceedings between, and relating to the marriage of, the parties to the proceedings in which that order was made have been commenced in the High Court or a county court, the court in which the proceedings or any application made therein are or is pending may, if it thinks fit, direct that the order made under this Act shall cease to have effect on such date as may be specified in the direction.

Clause 22

1. This clause substantially re-enacts the provisions of section 7(3) of the 1960 Act and thus implements the recommendation in paragraph 4.100(*c*) that, where magistrates have made a matrimonial money order for periodical payments or any interim order and the parties thereafter start divorce proceedings, the divorce court should have a discretionary power to discharge the magistrates' order.

2. This clause differs, however, from the existing provision in the 1960 Act to reflect the new powers conferred on magistrates by the Bill. Thus by paragraph (*b*) the power of the divorce court under this clause extends to magistrates' money orders for periodical payments made by consent under clause 6, magistrates having no power in terms under the 1960 Act to make orders of this kind.

3. This clause does not apply to orders for lump sum payments made under clause 2(1)(*b*) or (*d*) of the Bill.

Appeals.

23.—(1) Subject to sections 17(1) and 21 of this Act, where a magistrates' court makes or refuses to make, varies or refuses to vary, revokes or refuses to revoke an order (other than an interim maintenance order) under this Part of this Act, an appeal shall lie to the High Court.

(2) On an appeal under this section the High Court shall have power to make such orders as may be necessary to give effect to its determination of the appeal, including such incidental or consequential orders as appear to the court to be just, and, in the case of an appeal from a decision of a magistrates' court made on an application for or in respect of an order for the making of periodical payments, the High Court shall have power to order that its determination of the appeal shall have effect from such date as the court thinks fit, not being earlier than the date of the making of the application to the magistrates' court.

Clause 23

1. This clause re-enacts, but more compactly than in the 1960 Act, the existing law, in conferring a right of appeal to the High Court in respect of the making or refusal of the orders referred to in subsection (1). It also sets out the orders which the High Court may make in the exercise of its appellate jurisdiction and in this respect gives effect to recommendations in the report.

Clause 23(1)

2.(*a*) This subsection re-enacts the provisions relating to appeals contained in the 1960 Act in so far as those provisions are applicable to the altered grounds on which the magistrates may make orders in matrimonial matters. It also provides, for the reasons explained in paragraphs 4.92–4.93, that in no circumstances is there to be an appeal against an interim maintenance order only.

(*b*) By virtue of clause 15(2), the power of the court to vary an order includes, and hence the right of appeal extends to, the power temporarily to suspend any provision and thereafter to revive a provision so suspended.

3. Clause 17(1), the first of the two provisions subject to which this subsection is expressed to take effect, provides that there is no right of appeal when the court has ordered that proceedings for the variation of a periodical payments order (and proceedings being heard with them) should be treated as "domestic proceedings" for the purposes of the Magistrates' Courts Act 1952. Section 11(1) of the 1960 Act contains a similar qualification.

4. Clause 21, the other provision subject to which this subsection is expressed to take effect, confers power on the magistrates to refuse to make an order in cases which they consider would be more conveniently dealt with by the High Court. It repeats section 5 of the 1960 Act.

Clause 23(2) *and* (3)

5.(*a*) These two subsections together implement the detailed recommendations in paragraph 4.52(*c*) as to the powers of the High Court in the exercise of its appelate jurisdiction. The problems with which those recommendations are designed to deal relate to the position of a husband or a wife when an appeal is made to the High Court from the making or refusal of the various types of order referred to in clause 23(1). These problems are explained in paragraphs 4.37–4.51 of the report.

(3) Without prejudice to the generality of subsection (2) above, where, on an appeal under this section in respect of an order of a magistrates' court requiring any person to make periodical payments, the High Court reduces the amount of those payments or discharges the order, the High Court shall have power to order the person entitled to payments under the order of the magistrates' court to pay to the person liable to make payments under that order such sum in respect of payments already made in compliance with the order as the court thinks fit and, if any arrears are due under the order of the magistrates' court, the High Court shall have power to remit the payment of those arrears or any part thereof.

(4) Where on an appeal under this section in respect of an interim custody order made by a magistrates' court the High Court varies or revokes that order, the High Court shall have power to vary or revoke any interim maintenance order made in connection with that order by the magistrates' court.

(5) Any order of the High Court made on an appeal under this section (other than an order directing that an application shall be reheard by a magistrates' court) shall for the purposes of the enforcement of the order and for the purposes of sections 15 and 16 of this Act be treated as if it were an order of the magistrates' court from which the appeal was brought and not of the High Court.

Clause 23*(continued)*

(*b*) Subsection (2) confers on the High Court, when exercising its appellate jurisdiction, the powers recommended in paragraph 4.52(*c*)(i) and (iv), a specific instance of the application of which appears in subsection (3).

(*c*) Subsection (3) specifies in detail the types of order recommended in paragraph 4.52(*c*)(iii).

Clause 23(4)

6. This subsection enables the court, on an appeal against the making or refusal of an interim custody order, to vary or revoke any interim maintenance order made in connection with the interim custody order.

Clause 23(5)

7. This subsection, by providing that where the High Court makes an order on appeal from a magistrates' court (other than an order for rehearing by magistrates) the order is, for the purposes of enforcement, variation and revocation to be treated as if it were an order of the magistrates' court, substantially re-enacts a similar provision in the 1960 Act.

8. See clauses 39(8) and 55 below which introduce a similar provision into the Guardianship of Minors Act 1971 and the Children Act 1975.

Provisions relating to procedure, jurisdiction and enforcement

Provisions as to jurisdiction and procedure.

1964 c. 42.

24.—(1) A magistrates' court shall, subject to section 11 of the Administration of Justice Act 1964 and any determination of the committee of magistrates thereunder, have jurisdiction to hear an application for an order under this Part of this Act if at the date of the making of the application either the applicant or the respondent ordinarily resides within the commission area for which the court is appointed.

(2) Any application for an order under this Part of this Act, including an application for the variation or revocation of such an order, shall be made by way of complaint.

(3) In relation to an application for an order under this Part of this Act (other than an application in relation to which jurisdiction is exercisable by virtue of section 18 of this Act) the jurisdiction conferred by subsection (1) above—

(*a*) shall be exercisable notwithstanding that the respondent resides in Scotland or Northern Ireland if the applicant resides in England and Wales and the parties last ordinarily resided together as man and wife in England and Wales, and

(*b*) is hereby declared to be exercisable where the applicant resides in Scotland or Northern Ireland if the respondent resides in England and Wales.

1950 c. 37.

(4) Section 15 of the Maintenance Orders Act 1950 (which relates to the service of process on a person residing in Scotland or Northern Ireland) shall have effect as if subsection (3) above and section 18(1) of this Act were included in Part I of that Act.

Clause 24

1. This clause deals with the matters relating to the jurisdiction of magistrates' courts discussed in paragraphs 4.77–4.89 of the report.

Clause 24(1)

2. This subsection implements the recommendation in paragraph 4.90(*a*) that a magistrates' court should have jurisdiction in matrimonial proceedings if its area falls within the county in which the complainant or the respondent ordinarily resides.

3. The subsection thus alters the present position laid down by section 1(2) of the 1960 Act which, as explained in paragraph 4.77, gives jurisdiction to the court of the petty sessions area.

4. That jurisdiction should be on a county basis is achieved by the final words "within the commission area for which the court is appointed" since, by clause 59(1), "commission area" means "any county, any London Commission area and the City of London" as enacted by section 1 of the Administration of Justice Act 1973.

5. The alteration made by this subsection to the magistrates' matrimonial jurisdiction under the 1960 Act is similarly made by clause 40 below to the magistrates' civil jurisdiction generally by way of an amendment to section 44 of the Magistrates' Courts Act 1952. The reasons for amending the civil jurisdiction generally are shown in Note 2 on clause 40 and those reasons apply with equal force to the alteration in the magistrates' matrimonial jurisdiction provided for in this subsection.

Clause 24(2)

6. In specifying that applications shall be made by way of complaint, this subsection provides that proceedings shall be initiated according to the existing procedure and attracts the provisions of section 43 (issue of summons on complaint) of the Magistrates' Courts Act 1952.

Clause 24(3)

7. This subsection reproduces the existing provisions in section 1(3)(*a*) and (*b*) of the 1960 Act and implements the recommendation in paragraph 4.90(*c*).

Clause 24(4)

8. This subsection reproduces the existing provisions in section 14(1) of the 1960 Act and implements the recommendation in paragraph 4.90(*c*).

(5) Nothing in either subsection (3) above or section 18(1) of this Act shall be construed as derogating from any jurisdiction exercisable by any court apart from the provisions of those subsections.

(6) It is hereby declared that any jurisdiction conferred on a magistrates' court by this Part of this Act is exercisable notwithstanding that any party to the proceedings is not domiciled in England.

Clause 24(5)

9. Since subsection (4) has reproduced the existing provisions in section 14(1) of the 1960 Act, this subsection is a necessary consequential provision which reproduces the substance of section 14(2) of the 1960 Act.

Clause 24(6)

10. This subsection reproduces the existing provision in section 14(3) of the 1960 Act and implements the recommendation in paragraph 4.90(*c*).

Enforcement etc. of orders for payment of money.

25.—(1) An order for the payment of money made by a magistrates' court under this Part of this Act may be enforced in the same manner as an affiliation order, and the enactments relating to affiliation orders shall apply accordingly with the necessary modifications.

1952 c.55.

(2) Without prejudice to section 52 of the Magistrates' Courts Act 1952 (which relates to the power of a magistrates' court to direct periodical payments to be made through the clerk of a magistrates' court), a magistrates' court making an order under this Part of this Act for the making of a periodical payment by one person to another may direct that it shall be made to some third party on that other person's behalf instead of directly to that other person; and, for the purposes of any order made under this Part of this Act, the said section 52 shall have effect as if, in subsection (2) thereof, for the words "the applicant for the order" there were substituted the words "the person to whom the payments under the order fall to be made".

(3) Any person for the time being under an obligation to make payments in pursuance of any order for the payment of money made under this Part of this Act shall give notice of any change of address to such person, if any, as may be specified in the order; and any person who without reasonable excuse fails to give such a notice shall be liable on summary conviction to a fine not exceeding £10.

(4) A person shall not be entitled to enforce through the High Court or any county court the payment of any arrears due under an order made by virtue of this Part of this Act without the leave of that court if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.

(5) The court hearing an application for the grant of leave under subsection (4) above may refuse leave, or may grant leave subject to such restrictions and conditions (including conditions as to the allowing of time for payment or the making of payment by instalments) as that Court thinks proper, or may remit the payment of such arrears or any part thereof.

(6) An application for the grant of leave under subsection (4) above shall be made in such manner as may be prescribed by rules.

Clause 25

1. This clause deals with the enforcement of money orders made by magistrates in the exercise of their matrimonial jurisdiction, and with other related matters. The penalties for disobeying orders other than for the payment of money are contained in section 54 of the Magistrates' Courts Act 1952, which is amended by clause 41 of this Bill.

Clause 25(1)

2. This subsection re-enacts section 13(1) of the 1960 Act and enables orders for the payment of money under Part I of the Bill to be enforced under the provisions of sections 74 and 75 of the Magistrates' Courts Act 1952.

Clause 25(2)

3. This subsection re-enacts section 13(2) of the 1960 Act. The power given to the court by this subsection, namely, the power, on making an order for periodical payments by one person to another, to direct that payment should be made to a third party on the payee's behalf, would, for example, enable the court to order a husband, against whom an order has been made under clause 2(1)(*a*), to make payments to a third party, notwithstanding that clause 2(1)(*a*) refers merely to periodical payments "to the applicant".

4. This subsection does not extend to the new power conferred by clause 2 of the Bill to order a husband or wife to pay a lump sum to the other or for the benefit of a child of the family.

Clauses 25(3), (4), (5) *and* (6)

5. These four subsections re-enact the substance of the existing law in section 5(4), (5), (6) and (7) of the 1960 Act.

Enforcement of orders for custody.

26. Where at a time when any person is entitled to the actual custody of a child, or a local authority is entitled to the care of a child, by virtue of an order made under this Part of this Act another person has the actual custody of the child, a copy of the order may be served on that other person, and thereupon the order may, without prejudice to any other remedy which may be available, be enforced under section 54(3) of the Magistrates' Courts Act 1952 as if it were an order of a magistrates' court requiring that other person to give up the child to the person entitled by virtue of the order to actual custody or, as the case may be, to the local authority.

1952 c. 55.

Clause 26

1. This clause re-enacts the substance of section 13(3) of the 1960 Act as to the procedure for enforcing a custody order against a person not entitled to custody, but who has actual possession of a child. However, it introduces a difference of nomenclature for the reasons explained below.

2. The new nomenclature used in this clause implements the recommendation in paragraph 5.55 of the report, the reasons for which are discussed in paragraph 5.54.

3. In the 1960 Act the person having actual possession of a child is referred to as having "actual custody" and that expression is used in the fourth line of this clause. In the 1960 Act, however, the person who is not in possession of the child but is entitled to enforce a custody order is referred to as entitled to "legal custody".

4. Section 89 of the Children Act 1975 added a new provision, section 19A, to the Interpretation Act 1889. That section provides that certain expressions, including "legal custody" should, in any Act passed after the Children Act 1975 (in the absence of a contrary intention), be "construed in accordance with Part IV of the Children Act 1975". Because of the definition of "legal custody" contained in Part IV of the 1975 Act (in section 86), that term may be inapt to describe the person entitled to enforce a custody order under this Bill. Accordingly, the person who, though not having the child in his possession, is entitled, by virtue of an order made under Part I of this Bill, to the actual custody of the child, is described as the person entitled to enforce the order.

5. Similarly, the term "actual custody" is used in section 43(1) of the Children Act 1975 which corresponds to this clause.

6. Paragraph 5.55 also recommends, for the reasons which apply to this clause, that the person entitled to enforce a custody order in guardianship proceedings should be the person with "actual custody" as it is defined in section 87 of the Children Act 1975. For the appropriate amendment to the Guardianship of Minors Act 1971 see clause 29(1).

Restriction on removal of child from England and Wales.

27.—(1) Where a magistrates' court makes—

(*a*) an order under section 7(2) of this Act regarding the legal custody of a child, or

(*b*) an interim custody order under section 14 of this Act in respect of a child,

the court, on making the order or at any time while the order is in force, may, if an application is made for an order under this section, by order direct that no person shall take the child out of England and Wales while the order made under this section is in force, except with the leave of the court.

(2) A magistrates' court may by order vary or revoke any order made under this section.

(3) An application for an order under subsection (1) above, or for the variation or revocation of such an order, may be made by either party to the marriage in question and also, in the case of an order made under section 7(2) or 14 of this Act with respect to a child of the family who is not a child of both the parties to the marriage, by any person who, though not one of the parties to the marriage, is a parent of that child.

Clause 27

1. This clause implements, for the purposes of the matrimonial jurisdiction of magistrates' courts, the recommendations in paragraph 10.11 of the report that:—

(*a*) on making an interim or final order for the custody of a child, the court should have power to make an order prohibiting or restricting the removal of the child out of England and Wales without the leave of the court;

(*b*) where the court has imposed such a prohibition or restriction, it should have power to grant leave for the removal of the child.

2. Applications for the making, variation or discharge of such orders may be made by either party to the marriage or by a parent of the child who is not a party to the marriage.

Orders for repayment in certain cases of sums paid after cessation of orders by reason of remarriage.

28.—(1) Where—

(*a*) an order made under section 2(1)(*a*) or 6 of this Act has, by virtue of section 4(2) of this Act, ceased to have effect by reason of the remarriage of the party in whose favour it was made, and

(*b*) the person liable to make payments under the order made payments in accordance with it in respect of a period after the date of that remarriage in the mistaken belief that the order was still subsisting,

no proceedings in respect of a cause of action arising out of the circumstances mentioned in paragraphs (*a*) and (*b*) above shall be maintainable by the person so liable or his personal representatives against the person so entitled or his personal representatives, but on an application made under this section the court may exercise the powers conferred on it by subsection (2) below.

(2) The court may order the respondent to an application made under this section to pay to the applicant a sum equal to the amount of the payments made in respect of the period mentioned in subsection (1)(*b*) above or, if it appears to the court that it would be unjust to make that order, it may either order the respondent to pay to the applicant such lesser sum as it thinks fit or dismiss the application.

(3) An application under this section may be made by the person liable to make payments under the order made under section 2(1)(*a*) or 6 this Act or his personal representatives and may be made against the person entitled to payments under that order or his personal representatives.

(4) An application under this section shall be made to a county court, except that such an application may be made in proceedings in the High Court or a county court for leave to enforce, or the enforcement of, the payment of arrears under an order made under section 2(1)(*a*) or 6 of this Act; and accordingly references in this section to the court are references to the High Court or a county court, as the circumstances require.

(5) An order under this section for the payment of any sum may provide for the payment of that sum by instalments of such amount as may be specified in the order.

(6) The jurisdiction conferred on a county court by this section shall be exercisable by a county court notwithstanding that by reason of the amount claimed in an application under this section the jurisdiction would not but for this subsection be exercisable by a county court.

Clause 28

1. This clause substantially re-enacts section 13A of the 1960 Act, added by section 31 of the Matrimonial Proceedings and Property Act 1970.

2. The following drafting amendment has, however, been made. The specific exclusion effected by section 13A(7) of the 1960 Act of section 13(1) (which provides that any orders (without qualification) for payments of money may be enforced in the same manner as affiliation orders) and of section 13(2) (enabling the court to order any payments (without qualification) to be made to a third party on behalf of the payee) of that Act has not been re-enacted since it is now unnecessary. Clause 25(1) and (2) of this Bill which respectively correspond to section 13(1) and (2) of the 1960 Act are formulated in slightly different terms, which make their operation inapplicable to applications under this clause. It is therefore unnecessary in this Bill specifically to limit their ambit by express exclusion.

(7) The clerk of a magistrates' court to whom any payments under an order made under section 2(1)(*a*) or 6 of this Act are required to be made, and the collecting officer under an attachment of earnings order made to secure payments under the first mentioned, shall not be liable—

(*a*) in the case of the clerk, for any act done by him in pursuance of the first mentioned order after the date on which that order ceased to have effect by reason of the remarriage of the person entitled to payments under it, and

(*b*) in the case of the collecting officer, for any act done by him after that date in accordance with any enactment or rule of court specifying how payments made to him in compliance with the attachment of earnings order are to be dealt with,

if, but only if, the act was one which he would have been under a duty to do had the first mentioned order not ceased to have effect by reason of the remarriage and the act was done before notice in writing of the fact that the person so entitled had remarried was given to him by or on behalf of that person, the person liable to make payments under the first mentioned order or the personal representatives of either of those persons.

(8) In this section "collecting officer", in relation to an attachment of earnings order, means the officer of the High Court, the registrar of a county court or the clerk of a magistrates' court to whom a person makes payments in compliance with the order.

PART II

AMENDMENTS OF THE GUARDIANSHIP OF MINORS ACTS 1971 AND 1973

Amendment of provisions relating to the custody of minors

Meaning of custody in Guardianship of Minors Acts 1971 and 1973.

29.—(1) In the Guardianship of Minors Act 1971 for the word "custody" in each place (except in section 13) where that word occurs there shall be substituted the words "legal custody", in section 13(1) for the words "legal custody" there shall be substituted the words "actual custody", and at the end of section 20(2) there shall be added the words " 'legal custody' shall be construed in accordance with Part IV of the Children Act 1975."

1971 c. 3.

1973 c. 29.

(2) In the Guardianship Act 1973 for the word "custody" in each place where that word occurs there shall be substituted the words "legal custody" and at the end of section 1(1) of that Act there shall be added the following paragraph—

"In this Act 'legal custody' shall be construed in accordance with Part IV of the Children Act 1975.".

Clause 29

1. This clause amends the guardianship legislation by introducing the concepts of "legal custody" and "actual custody", as they are defined in Part IV of the Children Act 1975, in place of the terms relating to custody at present used, in order to achieve uniformity between the guardianship legislation, this Bill and the Children Act 1975. A discussion of the meaning of these concepts appears in paragraphs 5.7–5.11.

Clause 29(1)

2. This subsection amends the Guardianship of Minors Act 1971 by substituting the words "legal custody" for "custody" wherever the latter word appears in that Act, except in section 13, thus implementing the recommendation in paragraph 6.14(*a*). It also expressly introduces into the Act the definition of "legal custody" which appears in Part IV of the Children Act 1975.

3. With regard to section 13 of the Guardianship of Minors Act 1971, the words "legal custody" in section 13(1) are replaced by the words "actual custody" by virtue of this subsection. This implements the recommendation made in paragraph 5.55, in so far as it applies to the guardianship legislation, thus bringing the provision in the 1971 Act relating to the person who can enforce an order for custody into line with this Bill: see clause 26 above.

Clause 29(2)

4. Similarly, this subsection substitutes the words "legal custody" for the word "custody" each time the latter appears in the Guardianship Act 1973, and introduces into that Act the same definition of "legal custody" as appears in Part IV of the Children Act 1975.

Further provisions relating to orders for custody.
1971 c. 3.

30. In the Guardianship of Minors Act 1971 the following section shall be inserted after section 11—

"Further provisions relating to orders for custody.

11A.—(1) Without prejudice to the generality of sections 9(1), 10(1)(*a*) and 11(*a*) of this Act, where the court makes an order under one of those sections giving the legal custody of a minor to any person, it may order that a parent of the minor who is not given the legal custody of the minor shall retain all or such as the court may specify of the parental rights and duties comprised in legal custody (other than the right to the actual custody of the minor) and shall have those rights and duties jointly with the person who is given the legal custody of the minor.

(2) Where the court makes an order under section 9(1), 10(1)(*a*) or 11(*a*) of this Act regarding the custody of a minor, the court may direct that the order, or such provision thereof as the court may specify, shall not have effect until the occurrence of an event specified by the court or the expiration of a period so specified; and where the court has directed that the order or any provision thereof shall not have effect until the expiration of a specified period, the court may, at any time before the expiration of that period, direct that the order, or that provision thereof, shall not have effect until the expiration of such further period as the court may specify."

Clause 30

1. This clause brings the guardianship legislation into line with the magistrates' reformulated matrimonial legislation by inserting a new section 11A into the Guardianship of Minors Act 1971. Subsection (1) of that section specifies the types of "split order" for custody which the court may make in the light of the concepts of "legal custody" and "actual custody" introduced into the guardianship legislation by clause 29. Subsection (2) gives the court a discretion to postpone the coming into effect of custody orders.

2. New section 11A(1) of the 1971 Act implements the recommendation in paragraph 6.14(*b*) and is in similar terms to clause 7(4), which relates to the magistrates' powers in matrimonial proceedings.

3. New section 11A(2) of the 1971 Act implements the recommendation in paragraph 5.47, in so far as it applies to the guardianship legislation. It corresponds to clause 7(6), which also relates to the magistrates' powers in matrimonial proceedings.

Amendment of provisions relating to age limits on orders for custody etc.

1971 c. 3.

1973 c. 29.

31.—(1) Section 15(2)(*a*) of the Guardianship of Minors Act 1971 (which provides that a magistrates' court shall not entertain an application relating to a minor over sixteen unless the minor is physically or mentally incapable of self-support) shall cease to have effect.

(2) In section 2(2) of the Guardianship Act 1973 (which provides that supervision orders and orders committing the care of a minor to a local authority shall only be made in relation to a minor who is under sixteen) for the words "where an application made under section 9 of the Guardianship of Minors Act 1971 relates to the custody of a minor under the age of sixteen" there shall be substituted the words "where an application is made under section 9 of the Guardianship of Minors Act 1971 for an order regarding the custody of a minor".

(3) In section 3(2) of the Guardianship Act 1973 (which provides that a supervision order shall cease to have effect when a minor becomes sixteen) for the words "age of sixteen" there shall be substituted the words "age of eighteen".

(4) In section 4 of the Guardianship Act 1973 (which relates to orders committing the care of a minor to a local authority) after subsection (2) there shall be inserted the following subsection—

> "(2A) The court shall not make an order committing a minor to the care of a local authority under section 2(2)(*b*) above after he has attained the age of seventeen.".

Clause 31

1. This clause amends the provisions in the guardianship legislation as to the age limits on orders for custody, supervision orders and orders committing a child to the care of a local authority so that they are brought into line with the corresponding age limits in the reformulated magistrates' matrimonial legislation.

Clause 31(1)

2. This subsection, by repealing section 15(2)(*a*) of the Guardianship of Minors Act 1971, implements the recommendation in paragraph 6.9 and thus provides that a magistrates' court may, under the guardianship legislation, make a custody order in respect of any child up to 18.

Clause 31(2) *and* (3)

3. These subsections implement the recommendation in paragraph 6.17(*b*), by providing that a supervision order may be made under the guardianship legislation in respect of any child under 18 and that it may remain in force until the child reaches 18. They are in similar terms to the corresponding provision in the magistrates' matrimonial legislation: see clause 8(1).

Clause 31(4)

4. This subsection implements the recommendation in paragraph 6.17(*a*) and corresponds to the provision as to the age limits on care orders in the magistrates' matrimonial jurisdiction.

Restriction on removal of minor from England and Wales.

1971 c. 3.

32. In the Guardianship of Minors Act 1971 the following section shall be inserted after section 13—

"Restriction on removal of minor from England and Wales.

13A.—(1) Where the court makes—

(*a*) an order under section 9(1), 10(1)(*a*) or 11(*a*) of this Act regarding the legal custody of a minor, or

(*b*) an interim order under section 2(4) of the Guardianship Act 1973 containing provision regarding the legal custody of a minor,

the court, on making the order or at any time while the order is in force, may, if an application is made under this section, by order direct that no person shall take the minor out of England and Wales while the order made under this section is in force, except with the leave of the court.

(2) An order made under subsection (1) above may be varied or discharged by a subsequent order.

(3) An application for an order under subsection (1) above, or for the variation or discharge of such an order, may be made by any party to the proceedings in which the order mentioned in paragraph (*a*) or (*b*) of that sub-section was made."

Clause 32

1. This clause implements, for the purposes of the guardianship legislation, the recommendation in paragraph 10.11 of the report that:—

(*a*) on making an interim or final order for the custody of a child, the court should have power to make an order prohibiting or restricting the removal of a child out of England and Wales without the leave of the court;

(*b*) where the court has imposed such a prohibition or restriction it should have power to grant leave for the removal of the child.

2. This clause introduces into the guardianship legislation a provision similar to that introduced by clause 27 into the magistrates' matrimonial law, except that applications for the making, variation or discharge of orders under new section 13A of the Guardianship of Minors Act 1971 may be made by any party to the proceedings in which the order of restriction or prohibition was made.

Amendment of provisions relating to orders for maintenance

Extension of powers of court to make orders for maintenance.
1971 c. 3.

33.—(1) The provisions of sections 9, 10 and 11 of the Guardianship of Minors Act 1971 relating to orders for maintenance shall have effect subject to the provisions of this section.

(2) In section 9 of that Act for subsection (2) there shall be substituted the following subsection—

"(2) Where the court makes an order under subsection (1) of this section giving the actual custody of the minor to one of the parents, the court may also, subject to section 12 of this Act, make one or both of the following orders, that is to say—

(*a*) an order requiring the parent excluded from having actual custody to make to the other parent for the benefit of the minor, or to the minor, such periodical payments, and for such term, as may be specified in the order;

(*b*) an order requiring the parent excluded from having actual custody to pay to the other parent for the benefit of the minor, or to the minor, such lump sum as may be so specified;"

and in subsection (4) after the words "this section" there shall be inserted the words "(other than an order for the payment of a lump sum)".

(3) In section 10(1) of that Act for paragraph (*b*) there shall be substituted the following paragraph—

"(*b*) may also, subject to section 12 of this Act, make one or both of the following orders, that is to say—

(i) an order requiring the mother or father to pay to the guardian for the benefit of the minor, or to the minor, such periodical payments, and for such term, as may be specified in the order;

(ii) an order requiring the mother or father to pay to the guardian for the benefit of the minor, or to the minor, such lump sum as may be so specified;"

and in subsection (2) of that section after the words "any order" there shall be inserted the words "(other than an order for the payment of a lump sum)".

Clause 33

1. This clause extends the powers of the court to make orders against a parent for maintenance in respect of a child under sections 9 and 10 of the Guardianship of Minors 1971 where the court makes a custody order in favour of one of the parents (under section 9) or a guardian who is not a parent of the child (under section 10); and, under section 11 of that Act, where there is a dispute between joint guardians, one of whom is a parent of the child. These powers correspond to the magistrates' reformulated matrimonial legislation: see the discussion in paragraphs 6.18–6.21.

2. Sections 9, 10 and 11 are extended by this clause to enable the court, when making a maintenance order under those sections, to order the payment of a lump sum. Further, maintenance by way of a lump sum or periodical payments may be paid to the child himself. These amendments implement the recommendations in paragraph 6.30(*a*) and (*c*).

3. This clause also makes clear (by the addition, where indicated, of the words "(other than an order for the payment of a lump sum)" to sections 9, 10 and 11) that a lump sum order made under section 9, 10 or 11 shall not itself be capable of variation. This provision corresponds to clause 15(1), which relates to the magistrates' matrimonial legislation.

4. Section 9 of the 1971 Act is further amended, by subsection (2), to provide that a maintenance order may be made against the parent excluded from actual custody of the child, thus implementing the recommendation in paragraph 6.30(*b*). Paragraph 6.20 contains a discussion of the reasons for this amendment, which is a result of the new concepts of "legal custody" and "actual custody" introduced into the guardianship legislation by clause 29 of this Bill.

(4) In section 11 of that Act for paragraph (*b*) there shall be substituted the following paragraph—

"(*b*) to make, subject to section 12 of this Act, one or both of the following orders, that is to say—

(i) an order requiring the mother or father to pay to the other guardian for the benefit of the minor, or to the minor, such periodical payments, and for such term, as may be specified in the order;

(ii) an order requiring the mother or father to pay to the other guardian for the benefit of the minor, or to the minor, such lump sum as may be so specified;"

and in paragraph (*c*) after the words "any order" there shall be inserted the words "(other than an order for the payment of a lump sum)".

Duration of orders for maintenance
1971 c. 3.

34. For section 12 of the Guardianship of Minors Act 1971 (which relates to orders for the maintenance of persons between 18 and 21) there shall be substituted the following section—

"Duration of orders for maintenance.

12.—(1) The term to be specified in an order made under section 9, 10 or 11 of this Act for the making of periodical payments in favour of a minor may begin with the date of the making of an application for the order in question or any later date but—

(*a*) shall not in the first instance extend beyond the date of the birthday of the minor next following his attaining the upper limit of the compulsory school age (that is to say, the age that is for the time being that limit by virtue of section 35 of the Education Act 1944 together with any Order in Council made under that section) unless the court thinks it right in the circumstances of the case to specify a later date; and

(*b*) shall not in any event, subject to subsection (2) below, extend beyond the date of the minor's eighteenth birthday.

(2) Paragraph (*b*) of subsection (1) above shall not apply in the case of a minor if it appears to the court that—

(*a*) the minor is, or will be, or if an order were made without complying with that paragraph would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order without complying with that paragraph.

(3) Any order made under section 9, 10 or 11 of this Act requiring the making of periodical payments shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order, except in relation to any arrears due under the order on the date of the death."

Clause 34

1. The provisions of this clause, together with those of clauses 35 and 38, replace section 12 of the Guardianship of Minors Act 1971. The objective is to bring the guardianship legislation into line with the magistrates' matrimonial legislation. The existing section 12 of the 1971 Act is repealed because it is inconsistent with this objective.

2. This clause implements the recommendation in paragraph 6.30(*e*) by inserting into the 1971 Act a new section 12 which sets out the duration of orders for maintenance made under sections 9, 10 and 11 of the 1971 Act. The new provision is modelled on section 29 of the Matrimonial Causes Act 1973 (which is also the model for the corresponding clause in the magistrates' matrimonial legislation: see clause 5) with the exception that there shall be no fresh order after the child has reached 18, and empowers the court to award maintenance for a child up to the age of 18 and to continue maintenance orders beyond that age if the child is continuing his education or training or if there are special circumstances.

Further provisions as to orders for maintenance.
1971 c. 31.

35. In the Guardianship of Minors Act 1971 the following sections shall be inserted after section 12—

"Matters to which court is to have regard in making orders for maintenance.

12A. In deciding whether to exercise its powers under section 9(2), 10(1)(*b*) or 11(*b*) of this Act and, if so, in what manner, the court shall have regard to all the circumstances of the case including the following matters, that is to say—

(*a*) the income, earning capacity, property and other financial resources which the mother or father of the minor has or is likely to have in the foreseeable future;

(*b*) the financial needs, obligations and responsibilities which the mother or father of the minor has or is likely to have in the foreseeable future;

(*c*) the financial needs of the minor;

(*d*) the income, earning capacity (if any), property and other financial resources of the minor;

(*e*) any physical or mental disability of the minor.

Further provisions as to orders for maintenance.

12B.—(1) Without prejudice to the generality of sections 9(2), 10(1)(*b*) and 11(*b*) of this Act, an order under any of those provisions for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the minor before the making of the order to be met.

(2) The amount of any lump sum required to be paid by an order under section 9(2), 10(1)(*b*) or 11(*b*) of this Act shall not exceed £500 or such larger sum as Her Majesty may from time to time by Order in Council fix for this purpose.

Any Order in Council under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) The power of the court under section 9, 10 or 11 of this Act to vary or discharge an order for the making of periodical payments by a parent of a minor shall include power to make an order under the said section 9, 10 or 11, as the case may be, requiring the parent to pay a lump sum not exceeding the maximum amount that may at that time be required to be paid under subsection (2) above notwithstanding that the parent was required to pay a lump sum by a previous order under this Act.

Clause 35

1. This clause (like clause 34) replaces, in respect of the matters with which it deals, the corresponding existing provisions in section 12 of the Guardianship of Minors Act 1971. It also introduces into the 1971 Act provisions relevant to the objective of bringing the guardianship legislation appropriately into line with the magistrates' matrimonial law. The clause extends the court's powers on the making, variation and discharge of maintenance orders made in connection with orders for custody under sections 9, 10 and 11 of the 1971 Act by inserting a new section 12A and 12B into that Act, the provisions of which correspond to the maintenance provisions in the magistrates' matrimonial law under Part I of this Bill.

New section 12A

2. This subsection requires the court, in deciding whether to award maintenance for a child under section 9, 10 or 11 of the 1971 Act, to have regard to the matters specified, and thus implements the recommendation in paragraph 6.30(*d*).

New section 12B(1) *and* 12B(2)

3. These subsections correspond to clauses 2(2) and 2(3) in Part I of this Bill, which indicate the purposes for which a lump sum order may be made and the maximum amount which the court may order by way of a lump sum.

New section 12B(3)

4. This subsection imports into the guardianship legislation power to the court to award a lump sum on an application to vary or revoke an order for periodical payments made under section 9, 10 or 11 of the 1971 Act, whether or not a lump sum has previously been awarded: for the corresponding provision in Part I of the Bill, see clause 15(3).

(4) The power of the court under section 9, 10 or 11 of this Act to vary an order for the making of periodical payments shall include power to suspend the operation of any provision thereof temporarily and to revive the operation of any provision so suspended.

(5) In exercising its powers under section 9, 10 or 11 of this Act to vary or discharge an order for the making of periodical payments the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order.

(6) Where on an application under section 9, 10 or 11 of this Act for the variation or discharge of an order for the making of periodical payments the court varies the payments required to be made under that order, the court may provide that the payments as so varied shall be made from such date as the court may specify, not being earlier than the date of the making of the application.

(7) An application for the variation of an order for the making of periodical payments made under section 9, 10 or 11 of this Act may, if the minor in whose favour the order was made has attained the age of sixteen, be made by the minor himself.

(8) Where an order for the making of periodical payments made under sections 9, 10 or 11 of this Act ceases to have effect on the date on which the minor attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, then, if at any time before he attains the age of twenty-one an application is made by the minor for an order under this subsection, the court shall have power by order to revive the first-mentioned order from such date as the court may specify, not being earlier than the date of the making of the application, and to vary or discharge under section 9, 10 or 11 of this Act, as the case may be, any order so revived.

(9) An order made under section 9, 10 or 11 of this Act for the payment of a lump sum may provide for the payment of that sum by instalments, and where the court provides for the payment of a lump sum by instalments the court, on an application made either by the person liable to pay or the person entitled to receive that sum shall have power to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable."

New section 12B(4)

5. This subsection, which provides that the power to vary an order for periodical payments made under section 9, 10 or 11 shall include the power to suspend temporarily any provision of the order and to revive it subsequently, reflects the corresponding provisions of clause 15(2), which relates to the powers of magistrates in the exercise of their matrimonial jurisdiction, and of clause 41, which relates to magistrates' powers generally.

New section 12B(5)

6. This subsection sets out the matters to which the court is to have regard in deciding whether to vary or revoke an order for periodical payments under section 9, 10 or 11 of the 1971 Act: for the corresponding provision in Part I of the Bill see clause 15(6).

New section 12B(6)

7. This subsection provides that an order varying an order for periodical payments made under section 9, 10 or 11 of the 1971 Act may take effect at the court's discretion, but not earlier than the date when the application for variation or discharge was made. For the corresponding provision in Part I of the Bill, see clause 15(4).

New section 12B(7) *and* 12B(8)

8. These subsections set out the circumstances in which a child who is the subject of a maintenance order for periodical payments under section 9, 10 or 11 of the 1971 Act may himself apply for the variation or revival of the order. These provisions implement the recommendation in paragraph 6.30(*f*). For the corresponding provisions in Part I of the Bill, see clause 15(5) and (8).

New section 12B(9)

9. Where the court, under section 9, 10 or 11 of the 1971 Act, has ordered a lump sum to be paid by instalments, this subsection empowers the court to vary the number and amount of those instalments and the date on which any instalment becomes payable. It corresponds to the provisions of clause 16, which relates to the magistrates' powers in the exercise of their matrimonial jurisdiction.

Maintenance for minors in care of local authorities.

1973 c. 29.

36.—(1) In section 2 of the Guardianship Act 1973 the following subsections shall be substituted for subsection (3)—

"(3) Where the court makes an order under subsection (2)(*b*) above committing the care of a minor to a local authority, the court may make a further order requiring either parent to make to that authority or to the minor such periodical payments, and for such term, as may be specified in the order; but the order shall only require payments to be made to a local authority while it has the care of the minor.

(3A) The court in deciding whether to exercise its power under subsection (3) above and, if so, in what manner, shall have regard to all the circumstances of the case including the matters to which the court is required to have regard under section 12A of the Guardianship of Minors Act 1971.

1971 c.3.

(3B) The provisions of section 12 of the Guardianship of Minors Act 1971 shall apply in relation to an order made under subsection (3) above as they apply in relation to an order made under section 9(2) of that Act."

Clause 36

1. This clause deals with maintenance payable in respect of a child who is committed to the care of a local authority under the guardianship legislation. The aim of the clause is to promote consistency between the provisions of this clause and the provisions for maintenance both in the guardianship legislation and in the magistrates' matrimonial law. The clause extends the powers of the court on the making, variation and discharge of a maintenance order made in connection with a care order under sections 2 and 4 of the Guardianship Act 1973.

Clause 36(1)

2. This subsection substitutes three new subsections for the present section 2(3) of the 1973 Act (which permits a court, when making a care order in respect of a child, to order either parent to make such periodical payments to the local authority as the court "thinks reasonable").

3. New subsection (3) provides that, where a child is committed to the care of a local authority, either parent may be ordered to make periodical payments for the benefit of the child to the local authority, or to the child himself. This implements the recommendation in paragraph 6.30(*c*) and corresponds to clause 10(3) in Part I of the Bill. Consistently with the latter clause, no provision is made for the payment of maintenance by way of lump sum where the child is committed to care: see paragraph 5.66 and the recommendation in paragraph 5.67(*c*).

4. New subsection (3A) implements the recommendation in paragraph 6.30(*d*) by providing that, in deciding whether to award maintenance under subsection (3) above, the court should have regard to the guidelines set out in new section 12A of the Guardianship of Minors Act 1971: see clause 35 which sets out these guidelines.

5. New subsection (3B) implements the recommendation in paragraph 6.30(*e*) as to the duration of maintenance orders, by stating that the provisions of new section 12 of the Guardianship of Minors Act 1971 shall apply to a maintenance order made in connection with a care order under subsection (3) above: see the Note to clause 34.

(2) At the end of subsection (3A) of section 4 of the Guardianship Act 1973 there shall be inserted—

"and in the case of an order under section 2(3) above requiring payments to be made to or in respect of a minor an application for the variation of the order may, if the minor has attained the age of sixteen, be made by the minor himself.

(3B) The court in exercising its powers under subsection (3A) above in relation to an order made under section 2(3) above shall have regard to all the circumstances of the case including any change in any of the matters to which the court was required to have regard when making the order.

(3C) Where, on an application under subsection (3A) above for the variation or discharge of an order for the making of periodical payments made under section 2(3) above, the court varies the payments required to be made under the order, the court may provide that the payments as so varied shall be made from such date as the court may specify, not being earlier than the date of the making of the application.

(3D) Section 12B(8) of the Guardianship of Minors Act 1971 shall apply for the purposes of the revival of an order made under section 2(3) above as it applies for the purposes of the revival of an order made under section 9 of that Act, and subsection (3A) above (except the reference therein to the local authority to whose care the minor was committed) shall apply in relation to an order which is revived by virtue of this subsection."

Clause 36 (2)

6. This subsection adds new provisions to section 4 of the Guardianship Act 1973 (which relates to the committal of a child to the care of a local authority).

7. The present subsection (3A) of section 4 is extended to implement the recommendation in paragraph 6.30(*f*), thus allowing a child who has reached 16 and who is subject to a maintenance order by virtue of section 2(3) of the 1973 Act to apply to vary it.

8. New subsection (3B) of section 4, in specifying the matters to which the court is to have regard in exercising its powers to vary or discharge an order made under section 2(3) of the 1973 Act, introduces for care proceedings under the guardianship legislation provisions corresponding to those introduced by new section 12B(5) for maintenance orders made in custody proceedings under sections 9, 10 and 11 of the 1971 Act: see Note 6 to clause 35 above.

9. New subsection (3C) of section 4 introduces for care proceedings under the guardianship legislation provisions relating to the date from which an order varying a maintenance order made under section 2(3) may take effect. Those provisions correspond to those introduced by new section 12B(6) for maintenance orders made in custody proceedings under sections 9, 10 and 11 of the 1971 Act: see Note 7 to clause 35 above.

10. New subsection (3D) of section 4 provides that section 12B(8) of the 1971 Act (inserted by clause 35), which permits the child himself to apply for the revival of a maintenance order in certain circumstances, shall apply to a maintenance order made under section 2(3) of the 1973 Act. It also provides that section 4(3A) of the 1973 Act, which empowers the court to vary or discharge certain orders, shall apply (with the exception of the reference to a local authority to whose care the child was committed) to an order revived by virtue of this subsection.

General provisions

Interim orders.
1973 c. 29.

37.—(1) The provisions of section 2 of the Guardianship Act 1973 relating to interim orders shall have effect subject to the provisions of this section.

(2) For subsection (4) of the said section 2 there shall be substituted the following subsection—

1971 c. 3.

"(4) Subject to subsection (5C) below, where an application is made under section 9 of the Guardianship of Minors Act 1971 the court may, at any time before it makes a final order or dismisses the application, make an interim order containing—

(*a*) provision requiring either parent to make to the other or to the minor such periodical payments towards the maintenance of the minor as the court thinks reasonable, and

(*b*) where by reason of special circumstances the court thinks it proper, any such provision regarding the legal custody of and right of access to the minor as the court has power to make under the said section 9."

(3) In subsection (5) of the said section 2 the words from "but an interim order" to the end of the subsection shall be omitted.

(4) At the end of subsection (5) of the said section 2 there shall be inserted the following subsections—

"(5A) Section 11A(2) of the Guardianship of Minors Act 1971 shall apply in relation to an interim order made under this section which contains provision regarding the custody of a minor as it applies in relation to an order made under section 9(1) of that Act.

(5B) An interim order made under this section which requires the making of payments for the maintenance of a minor may provide for payments to be made from such date as the court may specify, not being earlier than the date of the making of the application for an order under section 9 of the Guardianship of Minors Act 1971.

Clause 37

1. This clause extends the court's powers under the guardianship legislation as to the making and duration of interim orders so that they correspond to the provisions relating to interim orders in the magistrates' reformulated matrimonial legislation: see the discussion in paragraph 6.36.

Clause 37(1)

2. This subsection is self-explanatory.

Clause 37(2)

3. This subsection repeals the present subsection 2(4) of the Guardianship Act 1973 and replaces it by a new subsection setting out reformulated circumstances in which the court may make an interim custody or maintenance order under the guardianship legislation, thus implementing the recommendation in paragraph 6.37(*a*).

4. Consistently with the provisions in every Part of the Bill as to maintenance payments for the benefit of a child, periodical payments made under this subsection may be paid to the child himself.

Clause 37(3)

5. The words repealed by this subsection set out the maximum duration of an interim order made where the court refuses to make a final order on an application under section 9 of the Guardianship of Minors Act 1971 on the ground that the matter would be more conveniently dealt with by the High Court. (The duration of all interim orders made by virtue of section 2 of the 1973 Act is provided for in new subsection (5C) of section 2 enacted by clause 37(4) below.)

Clause 37(4)

6. This clause inserts a new subsection (5A) into section 2 of the 1973 Act, which, by stating that new section 11A(2) of the Guardianship of Minors Act 1971 shall apply to interim orders made under section 2, implements the recommendation in paragraph 5.47, in so far as it applies to the guardianship legislation. (Paragraph 5.47 recommends that the court should have power to postpone the coming into effect of custody orders, both interim and final.)

7. This subsection also inserts a new subsection (5B) into section 2 of the 1973 Act which provides for the date from which an interim maintenance order may take effect. The provisions of this subsection correspond to the provisions of the magistrates' reformulated matrimonial law relating to the commencement of both interim and final maintenance orders: see clauses 4(1) and 14(2).

(5C) An interim order made under this section shall cease to have effect on whichever of the following dates occurs first, that is to say—

(*a*) the date, if any, specified by the court for the purposes of the order,

(*b*) the date of the expiration of the period of three months beginning with the date of the making of the order, or

(*c*) in the case of an interim order made under subsection (4) above, the date on which the court either makes a final order or dismisses the application;

but where an interim order made under this section ceases to have effect by virtue of paragraph (*a*) or (*b*) above the applicant may apply to the court which made the order for an extension of the interim order for a further period not exceeding three months and, if such an extension is granted, this subsection shall have effect as if for the reference in paragraph (*b*) above to three months there were substituted a reference to six months."

Clause 37 *(continued)*

8. New subsection (5C), which is inserted into section 2 of the 1973 Act by this subsection, relates to the duration of interim orders made under section 2 and implements the recommendation in paragraph 6.37(*b*).

Effect on certain orders of parents living together.

1973 c. 29.

38. After section 5 of the Guardianship Act 1973 there shall be inserted the following section—

"Effect on certain orders of parents living together.

5A.—(1) Where—

(*a*) the actual custody of a minor is given to one of the parents of the minor by an order made under section 9(1) of the Guardianship of Minors Act 1971 or by a provision of an interim order made under section 2(4) or (5) above, or

(*b*) periodical payments are required to be made to a parent of a minor by an order made under section 9(2) of that Act or by a provision of an interim order made under section 2(4) or (5) above,

the order made under the said section 9 or, as the case may be, that provision of the interim order shall be enforceable notwithstanding that the parents of the minor are living with each other at the date of the making of the order under the said section 9 or the interim order or that, although they are not living with each other at that date, they subsequently resume living with each other; but that order or provision shall cease to have effect if after that date the parents of the minor continue to live with each other, or resume living with each other, for a continuous period exceeding six months.

(2) Where any of the following orders is made, that is to say—

(*a*) an order under section 9(2) of the Guardianship of Minors Act 1971 which requires periodical payments to be made to a minor,

(*b*) an order under section 2(2)(*a*), (2)(*b*) or (3) above,

(*c*) an interim order under section 2(4) or (5) above containing a provision requiring periodical payments to be made to a minor,

then, unless the court otherwise directs, the order or, in the case of an interim order, that provision thereof shall be enforceable notwithstanding that the parents of the minor are living with each other at the date of the making of the order or that, although they are not living with each other at that date, they subsequently resume living with each other.

(3) Reference in this section to the parents of a minor living with each other shall be construed as references to their living with each other in the same household."

Clause 38

1. This clause deals with the effect on certain orders made in respect of children under the guardianship legislation of the "cohabitation" of the parents, whether the parents are living together when the order is made or resume living with each other subsequently. The conception of "cohabitation" is discussed in paragraph 2.54 and the same principles apply here as apply to the effect of living together on orders made in respect of children by magistrates' courts in matrimonial proceedings: see paragraphs 5.97–5.113 and clause 19.

2. This clause inserts a new section 5A into the Guardianship Act 1973, section 5A(1) of which provides that:—

(*a*) where the actual custody of a child is given to one parent by an order under section 9 of the Guardianship of Minors Act 1971 or by an interim custody order, the order shall (subject to the provisions of paragraph (*c*) below) be enforceable while the parents are living together, thus implementing the recommendation in paragraph 6.35(*b*);

(*b*) where an order for periodical payments is made to a parent in connection with a custody order under section 9 of the 1971 Act or an interim custody order, it shall (subject to the provisions of paragraph (*c*) below), be enforceable while the parents are living together, thus implementing the recommendation in paragraph 6.35(*b*);

(*c*) if the parents of the child live together for a continuous period exceeding six months after the making of a custody or maintenance order referred to in paragraphs (*a*) and (*b*) above, the order shall cease to have effect. This implements the recommendation in paragraph 6.35(*a*). Clause 19(1) contains the corresponding provisions in the reformulated magistrates' matrimonial law.

3. New section 5A(2) implements the recommendations in paragraph 6.35(*c*) and (*d*) by setting out the orders which will be enforceable, unless the court otherwise directs, notwithstanding that the parents are living together when the order is made or subsequently resume living together. Clause 19(2) contains the corresponding provisions in the reformulated magistrates' matrimonial law.

4. New section 5A(3) defines the expression "living together" for the purposes of new section 5A of the 1973 Act. This definition corresponds with that in clause 58(2): see the discussion in paragraphs 2.51–2.54.

Orders made on appeal from a magistrates' court.
1971 c. 3.

39. At the end of section 16 of the Guardianship of Minors Act 1971 (which relates to appeals) there shall be added the following subsections—

"(6) On an appeal under subsection (3) of this section the High Court shall have power to make such orders as may be necessary to give effect to its determination of the appeal, including such incidental or consequential orders as appear to the court to be just, and, in the case of an appeal from a decision of a magistrates' court made on an application for or in respect of an order for the making of periodical payments, the High Court shall have power to order that its determination of the appeal shall have effect from such date as the court thinks fit, not being earlier than the date of the making of the application to the magistrates' court.

(7) Without prejudice to the generality of subsection (6) above, where, on an appeal under subsection (3) of this section in respect of an order of a magistrates' court requiring a parent of a minor to make periodical payments, the High Court reduces the amount of those payments or discharges the order, the High Court shall have power to order the person entitled to payments under the order of the magistrates' court to pay to that parent such sum in respect of the payments already made by the parent in compliance with the order as the High Court thinks fit and, if any arrears are due under the order of the magistrates court, the High Court shall have power to remit the payment of those arrears or any part thereof.

(8) Any order of the High Court made on an appeal under subsection (3) of this section (other than an order directing that an application shall be re-heard by a magistrates' court) shall for the purposes of the enforcement of the order and for the purposes of any power to vary or discharge orders conferred by section 9(4), 10(2), 11(*c*) or 12B(9) of this Act or section 3(3) or 4(3A) of the Guardianship Act 1973 be treated as if it were an order of the magistrates' court from which the appeal was brought and not of the High Court.".

Clause 39

1. This clause extends the provisions in the guardianship legislation relating to orders made on appeal in order to bring them into line with the appeal provisions in the magistrates' reformulated matrimonial law in clause 23.

2. Three additional subsections are added to section 16 of the Guardianship of Minors Act 1971 (which relates to appeals) by this clause. Subsection (6) confers on the High Court, when exercising its appellate jurisdiction, the powers recommended in paragraph 4.52(c)(i) and (iv) in relation to appeals from magistrates in the exercise of their matrimonial jurisdiction, a specific instance of the application of which is set out in subsection (7). The corresponding provisions in the magistrates' matrimonial law appear in clause 23(2) and (3).

3. Subsection (8) adds to the guardianship legislation a provision relating to the enforcement, variation and revocation of orders made on appeal from a magistrates' court in similar terms to clause 23(5), which is concerned with magistrates' matrimonial proceedings. This provision is added to the guardianship legislation to fill a lacuna in the present law and thus implements the recommendation in paragraph 6.45. A corresponding provision is inserted into the Children Act 1975 by clause 55.

PART III

AMENDMENTS OF OTHER ENACTMENTS RELATING TO DOMESTIC PROCEEDINGS AND MAGISTRATES' COURTS

Amendments of the Magistrates' Courts Act 1952

Jurisdiction to deal with complaints.
1952 c. 55.

40. In section 44 of the Magistrates' Courts Act 1952 (which relates to the jurisdiction of magistrates' courts to hear complaints) for the words "petty sessions area for which the court acts" there shall be substituted the words "county in which the court acts" and for the words "that area" there shall be substituted the words "that county".

Clause 40

1. This clause implements the recommendation in paragraph 4.90(*d*) that section 44 of the Magistrates Courts Act 1952 (which deals with jurisdiction to hear complaints in civil proceedings generally and provides that, where no express provision is made by any statute or rules for jurisdiction, a magistrates' court shall have jurisdiction based on the petty sessions area) should be amended so that jurisdiction under the provisions of section 44 is based on the county and not the petty sessions area.

2. As explained in paragraph 4.79 of the report, the reasons for this amendment are to bring the magistrates' general civil jurisdiction into line with their criminal jurisdiction, to allow for greater flexibility in accommodating the convenience of the parties and their witnesses, and also to help meet the criticism that the hearing might be prejudiced because a particular bench had prior knowledge of the circumstances or that the parties might be embarrassed by personal acquaintance with the justices available in the petty sessions area.

Extension of power to vary orders for periodical payments.
1952 c. 55.

41. At the end of section 53 of the Magistrates' Courts Act 1952 (which relates to the revocation, variation and revival of orders for the periodical payment of money) there shall be added the following paragraph—

> "The power to vary an order by virtue of this section shall include power to suspend the operation of any provision of that order temporarily and to revive the operation of any provision so suspended."

Clause 41

This clause implements the recommendation in paragraph 4.56 and, by amending section 53 of the Magistrates' Courts Act 1952, gives to magistrates, in cases where an order for periodical payments has been made, a general power (similar to and consequential upon that specifically conferred on them in their matrimonial jurisdiction by clause 15(2) above) to suspend any provision of the order temporarily and to revive the operation of the provision so suspended.

Penalties for disobeying orders other than for the payment of money.
1952 c. 55.

42.—(1) In section 43(3) of the Magistrates' Courts Act 1952 (which provides penalties for disobeying orders other than for the payment of money) for the words from "the court may" to the end of the subsection there shall be substituted the words "the court may—

(*a*) order him to pay a sum not exceeding £10 for every day during which he is in default or a sum not exceeding £400; or

(*b*) commit him to custody until he has remedied his default or for a period not exceeding two months;

but a person who is ordered to pay a sum for every day during which he is in default or who is committed to custody until he has remedied his default shall not by virtue of this section be ordered to pay more than £400 or be committed for more than two months in all for doing or abstaining from doing the same thing contrary to the order (without prejudice to the operation of this section in relation to any subsequent default)."

(2) For subsection (4) of the said section 54 there shall be substituted the following subsection—

"(4) Any sum ordered to be paid under the last preceding subsection shall for the purposes of this Act be treated as adjudged to be paid by a conviction of a magistrates' court."

Clause 42

1. For the reasons discussed in paragraphs 5.48–5.52 of the report, it is intended generally to strengthen the powers of the magistrates' court to enforce orders other than for the payment of money.

Clause 42(1)

2. Accordingly, this subsection by the amendment made to section 54(3) of the Magistrates' Courts Act 1952 implements the recommendations in paragraph 5.53(*a*) and (*b*):—

(*a*) that the financial penalties at present prescribed should be increased to £10 for the daily penalty and £400 for the cumulative limit;

(*b*) that the existing provision should be reformulated so as to enable further penalties to be imposed for the breaches of an order subsequent to a breach for which penalties have already been imposed under the subsection.

3. The present section 54(3) of the 1952 Act enables the court to impose a penalty upon a person disobeying an order "for every day during which he is in default". This power is now extended by the words "or in a sum not exceeding £400" in paragraph (*a*) of this clause so that the court can impose a fixed penalty, for example, for an infringement consisting of one act.

4. The power in this subsection to commit to custody re-enacts the substance of the corresponding part of section 54(3), as amended by section 41(1)(3), Schedule 4 of the Criminal Justice Act 1961.

Clause 42(2)

5. Likewise, this subsection by the amendment made to section 54(4) of the 1952 Act implements the recommendation in paragraph 5.53(*c*) that provision should be made for sums ordered to be paid under the amended section 54(3) to be treated for enforcement purposes as sums adjudged to be paid on a conviction.

Reports by probation officers on means of parties.

1952 c. 55.

43. Section 60 of the Magistrates' Courts Act 1952 (which provides that a court which has requested a probation officer to investigate the means of parties may require the probation officer to furnish to the court a statement in writing or make an oral statement about his investigation) shall have effect subject to the following provisions—

(*a*) in subsection (2) the words "which shall be read aloud in the presence of such parties to the proceedings as may be present at the hearing" shall be omitted;

(*b*) for subsection (3) there shall be substituted the following subsections—

"(3) Where the court requires a probation officer to furnish a statement in writing under subsection (2) of this section—

(*a*) a copy of the statement shall be given to each party to the proceedings or to his counsel or solicitor at the hearing; and

(*b*) the court may, if it thinks fit, require that the statement or such part of the statement as the court may specify shall be read aloud at the hearing.

(3A) The court may and, if requested to do so at the hearing by a party to the proceedings or his counsel or solicitor shall, require the probation officer to give evidence about his investigation, and if the officer gives such evidence, any party to the proceedings may give or call evidence with respect to any matter referred to either in the statement or in the evidence given by the officer.";

(*c*) in subsection (4) for the words "subsection (3)" there shall be substituted the words "subsection (3A)".

Clause 43

1. This clause implements the recommendation in paragraph 10.17 that section 60(2) of the Magistrates' Courts Act 1952 should be amended in the same way as section 4(3) of the 1960 Act and for the same reasons.

2. For the reasons for this amendment see the Notes on clauses 11(4) and 11(5) above which contain the new provisions recommended in place of section 4(3) of the 1960 Act.

Amendments of Affiliation Proceedings Act 1957

Provisions which may be contained in affiliation orders.

1957 c. 55.

44.—(1) In section 4(2) of the Affiliation Proceedings Act 1957 (which relates to the provisions which may be contained in an affiliation order) for the words from "for the payment by him of" to the end of the subsection there shall be substituted the following words—

"containing one or both of the following provisions—

(*a*) provision for the making by him of such periodical payments for the maintenance and education of the child, and for such term, as may be specified in the order;

(*b*) provision for the payment by him of such lump sum as may be so specified."

(2) For section 4(3) of the said Act there shall be substituted the following subsections:—

"(3) In deciding whether to exercise its powers under subsection (2) of this section and, if so, in what manner, the court shall, among the circumstances of the case, have regard to the following matters, that is to say—

(*a*) the income, earning capacity, property and other financial resources which the mother of the child and the person adjudged to be the putative father of the child have or are likely to have in the foreseeable future;

(*b*) the financial needs, obligations and responsibilities which the mother and that person have or are likely to have in the foreseeable future;

(*c*) the financial needs of the child;

(*d*) the income, earning capacity (if any), property and other financial resources of the child;

(*e*) any physical or mental disability of the child.

(4) Without prejudice to the generality of subsection (2)(*b*) of this section, an affiliation order may provide for the payment of a lump sum to be made for the purpose of enabling liabilities or expenses reasonably incurred before the making of the order to be met, being liabilities or expenses incurred in connection with the birth of the child or in maintaining the child or, if the child has died before the making of the order, being the child's funeral expenses.

Clause 44(1)

1. This subsection and the amendment which it makes to section 4(2) of the Affiliation Proceedings Act 1957 implements the recommendation in paragraph 8.14(*a*) and gives the magistrates in affiliation proceedings the same general powers as they have in matrimonial proceedings by clause 2(1)(*c*) and (*d*) (as recommended in paragraph 5.67) to order maintenance in respect of a child by way of periodical payments and to order a lump sum.

Clause 44(2)

2. The provisions of this subsection bring the powers of the magistrates in affiliation proceedings into line with those conferred upon them in matrimonial proceedings by this Bill. (The present section 4(3) of the 1957 Act, which is replaced by these provisions, is substantially re-enacted as a new section 6(3) in the 1957 Act—see Note 3 to clause 46(1) below.)

3. The new section 4(3) of the 1957 Act implements the recommendation in paragraph 8.14(*c*) and lays down for affiliation proceedings guidelines for maintenance claims in respect of children similar to (so far as the different circumstances permit) those laid down for matrimonial proceedings by clause 3(2).

4. The new section 4(4) of the 1957 Act preserves the existing provisions in sections 4(2)(*b*) and (*c*) of that Act and enables the court to order that the putative father shall pay expenses incidental to the birth of the child and, if the child has died before the making of the order, the child's funeral expenses.

(5) The amount of any lump sum required to be paid by an affiliation order shall not exceed £500 or such larger sum as Her Majesty may from time to time by Order in Council fix for this purpose.

Any Order in Council under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament."

Clause 44*(continued)*

5. The new section 4(5) of the 1957 Act provides that where a lump sum is ordered pursuant to the magistrates general power under the new section 4(2), the sum so ordered shall not exceed £500 or such larger sum as may from time to time be prescribed by Order in Council. In this way the power in that regard exercisable by magistrates in affiliation proceedings is brought into line, as recommended in paragraph 8.14(*a*), with that conferred upon them in matrimonial proceedings by clause 2(3).

Persons entitled to payments under affiliation orders.
1957 c. 55.

45.—(1) In section 5(1) of the Affiliation Proceedings Act 1957 (which relates to the persons entitled to payments under an affiliation order) after the words "child's mother" there shall be inserted the words "for the benefit of the child or the child himself".

(2) In section 5(3) of the said Act (which enables payments under an affiliation order to be made to the person who for the time being has the custody of the child) for the words "entitle that person to any payments to be made under the order" there shall be substituted the words "provide that the person entitled to payments under the order shall be that person for the benefit of the child or the child himself".

(3) In section 5(4) of the said Act (which provides that a person appointed as guardian under that subsection shall be entitled to payments under an affiliation order) for the words from "a person appointed" to the words "affiliation order and" there shall be substituted the words "where the court has appointed a person as guardian under this subsection the court may provide that the person entitled to any payments to be made under the affiliation order shall be that guardian for the benefit of the child or the child himself and the guardian."

Clause 45(1)

1. This subsection and the amendment which it makes to section 5(1) of the Affiliation Proceedings Act 1957 implements the recommendation in paragraph 8.14(*b*). By the new provision, whereby the child himself as well as the mother is entitled to receive maintenance payments, the rules in affiliation proceedings are brought into line with those in magistrates' matrimonial proceedings.

Clause 45(2)

2. This subsection introduces an amendment to section 5(3) of the 1957 Act which is consequential upon the amendment made by subsection (1) above. It provides that an affiliation order may be made or varied so as to entitle the child himself as well as the mother to receive any maintenance payments made under the affiliation order.

Clause 45(3)

3. This subsection introduces an amendment to section 5(4) of the 1957 Act which is also consequential upon the amendment made by subsection (1) above. It provides that, where a guardian for the child has been appointed, the child himself as well as the guardian is entitled to receive any maintenance payments made under the affiliation order.

Age limit on making of affiliation orders and duration of orders.

1957 c. 55.

46.—(1) For section 6 of the Affiliation Proceedings Act 1957 (which relates to the duration of affiliation orders) there shall be substituted the following section:

"Age limit on making of orders and duration of orders.

6.—(1) No affiliation order shall be made in respect of a child who has attained the age of eighteen.

(2) The term to be specified in an affiliation order which requires the making of periodical payments in favour of a child may begin with the date of the making of an application for the summons under this Act or any later date, but—

(*a*) shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age (that is to say, the age that is for the time being that limit by virtue of section 35 of the Education Act 1944 together with any Order in Council made under that section) unless the court thinks it right in the circumstances of the case to specify a later date; and

(*b*) shall not in any event, subject to subsection (4) of this section, extend beyond the date of the child's eighteenth birthday.

(3) Where a complaint under section 1 of this Act is made before or within two months after the birth of the child, the term to be specified in an affiliation order which requires the making of periodical payments may, if the court thinks fit, begin with the date of the birth.

(4) Paragraph (*b*) of subsection (2) of this section shall not apply in the case of a child if it appears to the court that—

(*a*) the child is, or will be, or if an order were made without complying with that paragraph would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order without complying with that paragraph.

Clause 46(1)

1. This subsection, relating to the duration of affiliation orders, repeals section 6 of the Affiliation Proceedings Act 1957 and substitutes a new section 6, which implements the recommendations in paragraph 8.14(*d*) and (*e*).

2. The effect of the new section 6 is to provide that, in respect of the age up to which maintenance may be ordered for a child in affiliation proceedings, the powers of the magistrates should be substantially the same as their powers in matrimonial proceedings by virtue of this Bill, with the exception that there shall be no fresh order after the child has reached 18. Clause 5 above sets out the corresponding powers of the magistrates in matrimonial proceedings.

3. As recommended in paragraph 8.14(*d*), the new subsection 6(3) of the 1957 Act, which is peculiar to the magistrates' affiliation jurisdiction, substantially re-enacts the present section 4(3) of that Act. As explained in Note 2 to clause 44(2) above, the substance of section 4(3) is thus preserved. However, in order, as a matter of drafting, to rationalise the structure of the 1957 Act as it will appear after amendment by this Bill, the place where that subsection appears in that Act has been altered.

(5) An affiliation order requiring the making of periodical payments shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order, except in relation to any arrears due under the order on the date of the death."

(2) Subsections (1) to (3) of section 7 of the Affiliation Proceedings Act 1957 shall cease to have effect, and in subsection (4) of that section for the words "the foregoing provisions of this section or in any order made by virtue of this section" there shall be substituted the words "section 6 of this Act" and in paragraph (*b*) of that subsection after the words "child's mother" there shall be inserted the words "or the child himself".

Clause 46(2)

4. This subsection repeals subsections (1) to (3) of section 7 of the 1957 Act which provide that the power to vary and revoke affiliation orders under section 53 of the Magistrates' Courts Act 1952 shall include the power to extend the duration of such orders in certain circumstances. These subsections are no longer necessary in view of the provisions as to the duration of such orders set out in the new section 6 of the 1957 Act and those as to the variation and revocation of affiliation orders dealt with in clause 47 below.

5. The two amendments made by this subsection to section 7(4) of the 1957 Act consist, first, of a drafting amendment to preserve its sense, namely, the substitution of the words "section 6 of this Act" for the words indicated and, secondly, the addition of the words "or the child himself" as an amendment ancillary to the new provision in clause 45(1) allowing payments under an affiliation order to be made to the child himself.

Variation and revocation of affiliation orders.
1957 c. 55.
1952 c. 55.

47. After section 6 of the Affiliation Proceedings Act 1957 there shall be inserted the following section:—

"Variation and revocation of orders.

6A.—(1) The power of the court under section 53 of the Magistrates' Courts Act 1952 to vary an affiliation order which provides for the making of periodical payments shall include power to vary the order so that it makes provision for the payment of a lump sum (whether or not when the affiliation order was first made, or on an earlier variation, provision was made for the payment of a lump sum).

(2) In exercising its powers under the said section 53 to revoke, vary or revive an affiliation order the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order.

(3) An application for the variation or revival of an affiliation order so as to require periodical payments to be made thereunder after the date mentioned in section 6(2)(*a*) of this Act may be made by the child's mother or by any person who for the time being has the custody of the child either legally or by an arrangement approved by the court, but not including a local authority in whose care the child is under section 1 of the Children Act 1948 or by virtue of a care order (other than an interim order) within the meaning of the Children and Young Persons Act 1969; and, if the child has attained the age of sixteen, an application for the variation or revival of an affiliation order may be made by the child himself.

1948 c.43.
1969 c.54.

(4) Where on an application for the variation of an affiliation order the court decides to make provision for the payment of a lump sum, the court may provide for the payment of a sum not exceeding the maximum amount that may at that time be required to be paid under section 4(5) of this Act.

(5) Where in the exercise of its powers under section 63 of the Magistrates' Courts Act 1952 the court orders that a lump sum required to be paid under an affiliation order shall be paid by instalments, the court, on an application made either by the person liable to pay or the person entitled to receive that sum, shall have power to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable."

Clause 47

1. This clause inserts a new section 6A, to follow the new section 6 set out in clause 46 above, into the Affiliation Proceedings Act 1957 to deal with the court's powers on the variation and revocation of affiliation orders.

2. Section 6A(1) extends the powers of the court to revoke, revive or vary a money order under section 53 of the Magistrates' Courts Act 1952 by providing that the power to vary an affiliation order shall include the power to order the payment of a lump sum, whether or not a lump sum was ordered when the affiliation order was made or on an earlier variation, thus implementing the recommendation in paragraph 8.14(*a*).

3. Section 6A(2), in setting out the matters to which the court is to have regard in exercising its powers to revoke, revive or vary an affiliation order, introduces for affiliation proceedings under the 1957 Act provisions which correspond to those relating to the variation and revocation of money orders under the magistrates' matrimonial legislation by clause 15(6).

4. Section 6A(3) sets out the persons who may apply to vary or revive an affiliation order by requiring its duration to be extended beyond those dates specified in new section 6(2)(*a*). In such cases, the persons who may apply correspond to those who, by virtue of section 7(6) of the 1957 Act, are included in any reference to the child's mother. In addition, the new section 6A(3) includes a child himself who has reached the age of 16 among the persons who may apply for a variation or revival of an affiliation order, and thus implements the recommendation in paragraph 8.14(*f*). The general power to revive an order conferred by section 53 of the Magistrates' Courts Act 1952, combined with this latter provision, would enable the child himself to apply to revive an order which has ceased to have effect on or after the date he reaches the age of 16.

5. Section 6A(4) provides that any lump sum which is ordered to be paid in variation proceedings shall not exceed the maximum amount allowable by way of lump sum on the making of an original order: see clause 44(2) above.

6. Section 6A(5) corresponds to clause 16 (which relates to the magistrates' powers in the exercise of their matrimonial jurisdiction) by enabling the court which has ordered an affiliation payment to be made by way of lump sum to be paid by instalments to vary those instalments as to the number or amount payable, or as to the date on which any instalment becomes payable.

Amendments of the Matrimonial Causes Act 1973

Amendment of s. 4 of Matrimonial Causes Act 1973.

1973 c. 18.

48. In section 4 of the Matrimonial Causes Act 1973 (which relates to petitions for divorce presented after the granting of a decree of judicial separation or an order in matrimonial proceedings in a magistrates' court)—

(*a*) in subsection (3) after the words "judicial separation or" there shall be inserted the words "(subject to subsection (5) below)";

(*b*) at the end of the section there shall be added the following subsections—

"(4) For the purposes of section 1(2)(*c*) above the court may treat a period during which an order is in force with respect to the respondent under section 13(3) of the Domestic Proceedings and Magistrates' Courts Act 1976 (under which a magistrates' court has power to make orders excluding a party to a marriage from the matrimonial home) as a period during which the respondent has deserted the petitioner.

(5) Where—

(*a*) a petition for divorce is presented after the date on which Part I of the Domestic Proceedings and Magistrates' Courts Act 1976 comes into force, and

(*b*) an order made under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 containing a provision exempting the petitioner from the obligation to cohabit with the respondent is in force on that date,

then, for the purposes of section 1(2)(*c*) above, the court may treat a period during which such a provision was included in that order (whether before or after that date) as a period during which the respondent has deserted the petitioner."

Clause 48

This clause amends section 4 of the Matrimonial Causes Act 1973 to give effect to the recommendations in paragraphs 3.47 and 3.48, namely that an exclusion order made under clause 13(3) should not stop the party against whom the order was made from being in desertion and that the period during which existing non-cohabitation orders (exempting the petitioner from the obligation to live with the respondent) are in force may, after this Bill comes into force as an Act, be treated as a period during which the respondent has deserted the petitioner.

Amendment of s. 27 of Matrimonial Causes Act 1973.
1973 c. 18.

49.—(1) For subsection (1) of section 27 of the Matrimonial Causes Act 1973 there shall be substituted the following subsection—

"(1) Either party to a marriage may apply to the court for an order under this section on the ground that the other party to the marriage (in this section referred to as the respondent)—

(*a*) has failed to provide reasonable maintenance for the applicant, or

(*b*) has failed to provide, or to make a proper contribution towards, reasonable maintenance for any child of the family."

(2) For subsections (3) and (4) of the said section 27 there shall be substituted the following subsections—

"(3) Where an application under this section is made on the ground mentioned in subsection (1)(*a*) above then, in deciding—

(*a*) whether the respondent has failed to provide reasonable maintenance for the applicant, and

(*b*) what order, if any, to make under this section in favour of the applicant,

the court shall have regard to all the circumstances of the case including the matters mentioned in section 25(1)(*a*) to (*f*) above and, so far as it is just to take it into account, the conduct of each of the parties in relation to the marriage.

(3A) Where an application under this section is made on the ground mentioned in subsection (1)(*b*) above then, in deciding—

(*a*) whether the respondent has failed to provide, or to make a proper contribution towards, reasonable maintenance for the child of the family to whom the application relates, and

(*b*) what order, if any, to make under this section in favour of the child,

the court shall have regard to all the circumstances of the case including the matters mentioned in section 25(1)(*a*) and (*b*) and (2)(*a*) to (*e*) above, and where the child of the family to whom the application relates is not the child of the respondent, including also the matters mentioned in section 25(3) above.

Clause 49

1. The general effect of this clause is to implement the recommendations in paragraph 9.24 of the report which aim to eliminate anomalies between the matrimonial jurisdiction of magistrates and the jurisdiction of the High Court under section 27 of the Matrimonial Causes Act 1973 (Financial provision orders etc. in case of neglect by party to a marriage to maintain other party or child of the family) by bringing the powers of the High Court into line with the new powers conferred upon magistrates by Part I of the present Bill.

Clause 49(1)

2. The subsection implements the recommendation in paragraph 9.24(*a*) by amending section 27(1) of the 1973 Act so as to abolish, as a ground for an order by the High Court, the requirement that the respondent's failure to maintain the applicant or a child of the family was wilful.

3. The opening words of the amended section 27(1), "Either party to a marriage", make clear that under this clause, as under clause 1, the duty of each spouse to support the other is to be based on the principle of equality. The recommendation in paragraph 9.24(*b*) is thus implemented.

Clause 49(2)

4. This subsection implements the recommendations in paragraph 9.24(*d*) and (*e*) by substituting new provisions for the present section 27(3) and (4) of the 1973 Act, and its general effect is to lay down for proceedings in the High Court guidelines similar to those prescribed for the magistrates' matrimonial court by clause 3 above.

5. The amended section 27(3) of the 1973 Act provides that where the application relates to the failure of the respondent to provide reasonable maintenance for the applicant, the court shall apply the guidelines in section 25(1) of the 1973 Act which are now substantially the same as those applicable under clause 3 above to the hearing of an application by magistrates: see Note 1 to clause 3.

6. The new section 27(3A) of the 1973 Act provides that where the application relates to the failure of the respondent to make proper or reasonable maintenance for a child of the family the court shall likewise apply the guidelines in section 25(1)(*a*) and (*b*) and (2) of the 1973 Act, which are now substantially the same as applied by clause 3 above to the hearing of an application by magistrates.

(3B) In relation to an application under this section on the ground mentioned in subsection (1)(*a*) above, section 25(1)(*c*) shall have effect as if for the reference therein to the breakdown of the marriage there were substituted a reference to the failure to provide reasonable maintenance for the applicant, and in relation to an application under this section on the ground mentioned in subsection (1)(*b*) above, section 25(2)(*d*) shall have effect as if for the reference therein to the break down of the marriage there were substituted a reference to the failure to provide, or to make a proper contribution towards, reasonable maintenance for the child of the family to whom the application relates."

(3) In subsection (6) of the said section 27 for the words "such one or more of the following orders as it thinks just" there shall be substituted the words "any one or more of the following orders".

(4) After subsection (6) of the said section 27 there shall be inserted the following subsections—

"(6A) An application for the variation under section 31 of this Act of a periodical payments order or secured periodical payments order made under this section in favour of a child may, if the child has attained the age of sixteen, be made by the child himself.

(6B) Where a periodical payments order made in favour of a child under this section ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, then, if at any time before he attains the age of twenty-one an application is made by the child for an order under this subsection, the court shall have power by order to revive the first mentioned order from such date as the court may specify, not being earlier than the date of the making of the application, and to exercise its powers under section 31 of this Act in relation to any order so revived."

(5) Subsection (8) of the said section 27 shall cease to have effect.

Clause 49 (*continued*)

7. The new section 27(3B) of the 1973 Act is a drafting amendment. It makes clear that the standard of living enjoyed by the family (which has to be taken into account under section 25(1)(*c*) and (2)(*d*) when the High Court adjudicates a maintenance claim under section 27) shall be that obtaining when the circumstances giving rise to the application occurred and not (as in a divorce petition) when the marriage broke down.

Clause 49(3)

8. This subsection introduces into section 27(6) of the 1973 Act a formal amendment which is consequential upon the new section 27(1) of that Act enacted by subsection (1) above.

Clause 49(4)

9. This subsection implements the recommendations in paragraph 9.24(*f*) and (*g*) by inserting into section 27 of the 1973 Act two new subsections, (6A) and (6B), the provisions of which enable a child, when a maintenance order has been made for his benefit under section 27, himself to apply for the variation and revival of the order. These correspond to the provisions of clause 15(5) and (8), where the maintenance order for his benefit has been made by magistrates, except that, for the reasons explained in paragraph 9.23, the power to vary conferred by section 27(6A) applies to both unsecured and secured periodical payments whereas the power of reviver under section 27(6B) applies only to unsecured periodical payments.

Clause 49(5)

10. This subsection, which repeals section 27(8) of the 1973 Act, has the result that in the High Court jurisdiction, as in the reformulated magistrates' matrimonial law, adultery is no longer an absolute bar to financial relief and becomes merely one of the matters of which the court may take account under the new guidelines. The recommendation in paragraph 9.24(*c*) is thus implemented.

Amendments of the Children Act 1975

Extension of powers of court to make orders for maintenance under s. 34 of Children Act 1975.
1975 c. 72.

50. The provisions of section 34 of the Children Act 1975 relating to maintenance for a child in respect of whom an application for a custodianship order is made shall have effect subject to the following provisions—

(*a*) in subsection (1)(*b*) for the words "such periodical payments towards the maintenance of the child as it thinks reasonable" there shall be substituted the words "for the benefit of the child or to the child such periodical payments, and for such term, as may be specified in the order";

(*b*) after subsection (1)(*b*) there shall be inserted the following paragraph—

"(*bb*) on the application of the custodian, require the child's mother or father (or both) to pay to the applicant for the benefit of the child or to the child such lump sum as may be so specified";

(*c*) in subsection (2) the words from "but the court" to the end of the subsection shall be omitted;

(*d*) in subsection (3) after the words "subsection (1) (*b*)" there shall be inserted the words "or (*bb*)" and at the end of the subsection there shall be inserted the words "or to the child";

(*e*) after subsection (3) there shall be inserted the following subsections—

"(3A) Without prejudice to the generality of subsection (1)(*bb*), an order under that provision for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the child before the making of the order to be met.

(3B) The amount of any lump sum required to be paid by an order under subsection (1)(*bb*) above shall not exceed £500 or such larger sum as Her Majesty may from time to time by Order in Council fix for this purpose.

Any Order in Council under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.";

(*f*) in subsection (4) for the words "Subsections (2), (3), (4)" there shall be substituted the words "Subsections (2), (3), (3A), (3B), (4), (5A), (5B), (5C)."

Clause 50

1. This clause amends section 34 of the Children Act 1975 by extending the powers of the court as to the making of maintenance orders for a child who is subject to a custodianship order. The result is that the powers of the court to award maintenance in such cases are substantially the same as its powers to award maintenance in respect of a child where proceedings are brought under the guardianship legislation (as amended by this Bill to reflect the magistrates' reformulated powers in matrimonial proceedings).

2. Paragraphs (*a*) and (*b*) of the clause amend section 34(1)(*b*) of the 1975 Act by providing that, when awarding maintenance in the form of periodical payments on the application of a custodian, the court may order that the payments be made to the applicant for the benefit of the child or to the child himself: a new section 34(1)(*bb*) provides that the court may also order the payment of a lump sum. These provisions implement the recommendations in paragraph 7.14(*a*) and (*b*) and correspond to the amendments made to the Guardianship of Minors Act 1971 by clause 33 above and the provisions in the magistrates' matrimonial legislation under clause 2(1)(*c*) and (*d*).

3. Paragraph (*c*) repeals the present guidelines in section 34(2) of the 1975 Act which the court is to take into account when making a maintenance order against a person who is not the natural parent of a child. These guidelines are re-enacted, together with other guidelines, in a new section 34A of the 1975 Act: see clause 51.

4. Paragraph (*d*) extends section 34(3) of the 1975 Act by providing that the father of an illegitimate child shall not have to pay maintenance by way of a lump sum to the custodian or to the child. (At present, this section states merely that the father of an illegitimate child shall not be required to make periodical payments to the custodian of the child.)

5. Paragraph (*e*) adds two new subsections, (3A) and (3B) to section 34 of the 1975 Act. Subsection (3A) provides that a lump sum may be awarded to meet expenses incurred in maintaining a child before the making of the order. Subsection (3B) states the maximum amount of the lump sum order which the court may make. The corresponding provisions in the magistrates' matrimonial legislation are set out in clause 2(2) and (3), and similar provisions are inserted by this Bill into the Guardianship of Minors Act 1971 by Clause 35.

6. Paragraph (*f*) comprises a substantial drafting amendment. At present section 34(4) of the Children Act 1975 incorporates for custodianship orders certain provisions from sections 2, 3 and 4 of the Guardianship Act 1973. Section 2 of the 1973 Act is itself substantially amended by clauses 31(2), 36(1) and 37 of this Bill. All these amendments to the guardianship legislation are therefore by paragraph (*e*) attracted to custodianship orders under the Children Act 1975.

Further provisions as to maintenance of child subject to custodianship order.
1975 c. 72.

51. After section 34 of the Children Act 1975 there shall be inserted the following sections—

"Matters to which court is required to have regard in exercising powers as to maintenance.

34A.—(1) The court, in deciding whether to exercise its powers under section 34(1)(*b*) or (*bb*) and, if so, in what manner, shall have regard to all the circumstances of the case including the following matters, that is to say—

(*a*) the income, earning capacity, property and other financial resources which the mother or father of the child has or is likely to have in the foreseeable future;

(*b*) the financial needs, obligations and responsibilities which the mother or father of the child has or is likely to have in the foreseeable future;

(*c*) the financial needs of the child;

(*d*) the income, earning capacity (if any), property and other financial resources of the child;

(*e*) any physical or mental disability of the child.

(2) The court in deciding whether to exercise its powers under section 34(1)(*b*) or (*bb*) against a person who is not the child's mother or father and, if so, in what manner, shall, in addition to the matters mentioned in subsection (1), have regard (among the circumstances of the case)—

(*a*) to whether that person had assumed any responsibility for the child's maintenance and, if he did, to the extent to which and the basis on which he assumed that responsibility and to the length of time during which he discharged that responsibility;

(*b*) to whether in assuming and discharging that responsibility he did so knowing that the child was not his own child;

(*c*) to the liability of any other person to maintain the child.

Clause 51

1. This clause inserts into the Children Act 1975 first, a new section 34A which sets out the matters to which the court is to have regard in exercising its powers as to the maintenance of a child who is subject to a custodianship order, and, secondly, a new section 34B dealing with the duration of orders for periodical payments made on the application of a custodian under section 34(1)(*b*) of that Act. Both sections aim to produce uniformity with the corresponding provisions in the guardianship legislation (as amended by this Bill) and the magistrates' matrimonial legislation.

2. The new section 34A sets out the guidelines to which the court should have regard in deciding whether to make an order for periodical payments or a lump sum for the benefit of a child who is subject to a custodianship order. The guidelines in new section 34A(1) correspond to those inserted into the Guardianship of Minors Act 1971 by clause 35 above and implement the recommendation in paragraph 7.14(*c*); the guidelines for magistrates in matrimonial proceedings in similar circumstances appear in clause 3(2).

3. Additional guidelines, which apply where maintenance is to be awarded against a person who is not the child's natural parent and which are at present set out in section 34(2) of the 1975 Act but are repealed by this Bill (see Note 3 of clause 50 above) are re-enacted in a new section 34A(2) as a drafting amendment in order to rationalise the structure of the Children Act 1975 as amended. Similar guidelines in relation to magistrates' matrimonial proceedings are set out in clause 3(3); there are no equivalent guidelines in the guardianship legislation, as maintenance may only there be awarded against a natural parent.

4. This clause also inserts into the 1975 Act a new section 34B, modelled on section 29 of the Matrimonial Causes Act 1973 (with the exception that there shall be no fresh order after the child has reached 18), which relates to the duration of orders for periodical payments made in connection with a custodianship order. This implements the recommendation in paragraph 7.14(*d*). (Clause 34 above sets out a corresponding provision to be inserted into the Guardianship of Minors Act 1971 and clause 5 contains a similar provision in relation to matrimonial proceedings in magistrates' courts.)

Duration of orders for maintenance.

34B.—(1) The term to be specified in an order made under section 34(1)(*b*) in favour of a child may begin with the date of the making of an application for the order in question or any later date but—

(*a*) shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age (that is to say, the age that is for the time being that limit by virtue of section 35 of the Education Act 1944 together with any Order in Council made under that section) unless the court thinks it right in the circumstances of the case to specify a later date; and

(*b*) shall not in any event, subject to subsection (2) below, extend beyond the date of the child's eighteenth birthday.

(2) Paragraph (*b*) of subsection (1) shall not apply in the case of a child if it appears to the court that—

(*a*) the child is, or will be, or if an order were made without complying with that paragraph would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order without complying with that paragraph.

(3) Any order made under section 34(1)(*b*) in favour of a child shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order, except in relation to any arrears due under the order on the date of the death."

Amendment of s. 35 of Children Act 1975.
1975 c. 72.

52.—(1) Section 35 of the Children Act 1975 (which relates to the revocation and variation of custodianship orders) shall have effect subject to the provisions of this section.

(2) In subsection (3) of the said section 35 after the words "section 34" there shall be inserted the words "(other than an order under subsection (1)(*bb*))".

(3) In subsection (4) of the said section 35 for the words "such an order" there shall be substituted the words "an order made under that section (other than an order under subsection (1)(*bb*))".

(4) After subsection (4) of the said section 35 there shall be inserted the following subsection—

> "(4A) An application for the variation of an order made under section 34(1)(*b*) may, if the child has attained the age of sixteen, be made by the child himself".

(5) In subsection (5) of the said section 35 for the words "section 34" there shall be substituted the words "section 34(1)(*a*) or (*b*)".

(6) In subsection (6) of the said section 35 for the words "section 34" there shall be substituted the words "section 34(1)(*a*)".

Clause 52

1. This clause extends the powers of the court under section 35 of the Children Act 1975 to revoke and vary orders for maintenance made under section 34(1)(*b*) of that Act, thus bringing these provisions into line with similar provisions as to maintenance orders in the guardianship and magistrates' matrimonial legislation.

Clause 52(2) *and* (3)

2. The amendments made to section 35 of the 1975 Act by these subsections are necessary to provide that where an order for maintenance by way of lump sum has been made in respect of a child under section 34 of that Act, the lump sum order shall not be capable of variation or revocation. This reflects a similar provision in the magistrates' matrimonial legislation in clause 15(1).

Clause 52(4)

3. This subsection, by inserting a new subsection 4A into section 35 of the 1975 Act which permits a child of 16 to apply for the variation of a maintenance order made under section 34(1)(*b*) of that Act, implements the recommendation in paragraph 7.14(*e*). The 1975 Act, as thus amended, reflects the similar provision in magistrates' matrimonial proceedings under clause 15(8) above and in the guardianship legislation under clauses 35 and 36(2) above.

Clause 52(5)

4. This subsection amends section 35(5) of the 1975 Act by limiting the orders made under section 34 which shall cease to have effect on the revocation of a custodianship order to those made under paragraphs (*a*) and (*b*) of section 34(1) (which relate to access and periodical payments).

Clause 52(6)

5. This subsection amends section 35(6) of the 1975 Act so as to confine the provisions to orders relating to custody and access. The duration of maintenance orders related to custodianship orders is dealt with in the new section 34A inserted into the 1975 Act by clause 51 of this Bill.

(7) At the end of the said section 35 there shall be added the following subsections—

"(7) On an application under this section for the revocation or variation of an order made under section 34(1)(*b*), the court shall have power to make an order under section 34(1)(*bb*) requiring the child's mother or father (or both) to pay a lump sum not exceeding the maximum amount that may at that time be required to be paid under section 34(3B) notwithstanding that the mother or father was required to pay a lump sum by a previous order under that section.

(8) On an application under this section for the revocation or variation of an order made under section 34(1)(*b*), the court shall have power to suspend the operation of any provision of that order temporarily and to revive the operation of any provision so suspended.

(9) In exercising its power under this section to revoke or vary an order made under section 34(1)(*b*), the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order.

(10) Where on an application under this section the court varies any payments required to be made under section 34(1)(*b*), the court may provide that the payments as so varied shall be made from such date as the court may specify, not being earlier than the date of the making of the application.

(11) Where an order made under section 34(1)(*b*) ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, then, if at any time before he attains the age of twenty-one an application is made by the child to an authorised court for an order under this subsection, the court shall have power by order to revive the first-mentioned order from such date as the court may specify, not being earlier than the date of the making of the application, and to vary or revoke under this section any order so revived.

(12) An order made under section 34(1)(*bb*) for the payment of a lump sum may provide for the payment of that sum by instalments, and where such an order makes provision for the payment of a lump sum by instalments, an authorised court, on an application made either by the person liable to pay or the person entitled to receive that sum, shall have power to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable."

Clause 52(7)

6. This subsection adds six further subsections to section 35 of the 1975 Act. First, a new section 35(7) enables the court, on an application for the variation or revocation of an order for periodical payments, to order the payment of a lump sum up to a maximum amount. This brings the 1975 Act into line with corresponding provisions in the magistrates' matrimonial legislation under clause 15(3) above and the guardianship legislation, as amended by clause 35 of this Bill.

7. Secondly, a new section 35(8) provides that on an application to revoke or vary an order for periodical payments made under section 34(1)(*b*), the court may suspend temporarily and revive any provision of the order. This corresponds to a similar provision in the magistrates' matrimonial legislation under clause 15(2), and a similar provision inserted into the magistrates' jurisdiction generally by clause 41.

8. Thirdly, a new section 35(9) sets out the matters to which the court is to have regard in exercising its powers to revoke or vary an order for periodical payments made under section 34(1)(*b*) of the 1975 Act and corresponds to similar provisions in the magistrates' matrimonial legislation under clause 15(6), and in the guardianship legislation, as amended by clauses 35 and 36(2) of this Bill.

9. Fourthly, a new section 35(10) provides that where the court varies an order for periodical payments made under section 34(1)(*b*) of the 1975 Act the variation may take effect at the court's discretion but not earlier than from the date of the application for variation or revocation. This provision substantially corresponds to provisions in the magistrates' matrimonial legislation under clause 15(4) and in the guardianship legislation under clauses 35 and 36(2).

10. Fifthly, a new section 35(11) implements the recommendation in paragraph 7.14(*e*) which permits a child, in certain circumstances, to apply to the court to revive a maintenance order in his favour which has come to an end at the age of 18 or within the 2 years preceding his eighteenth birthday. This provision is in the same terms as clause 15(5) in Part I of the Bill and as the provisions inserted into the guardianship legislation by clauses 35 and 36(2).

11. Sixthly, a new section 35(12) provides that a lump sum order made under section 34(1)(*bb*) may be made payable by instalments, and in such a case the court may vary the instalments as to the number and amount, and as to the date on which any instalment becomes payable. This corresponds to the provisions of clause 16 as to the magistrates' matrimonial legislation and those of clause 35 as to the guardianship legislation.

Amendment of s. 36 of Children Act 1975.
1975 c. 72.

53. In section 36 of the Children Act 1975 (which gives the court power on the revocation of a custodianship order to commit the care of the child to a local authority) the following subsections shall be substituted for subsection (5)—

"(5) Where the court makes an order under subsection (3)(*a*) the order may require either parent to make to the local authority or to the child such periodical payments, and for such term, as may be specified in the order; but the order shall only require payments to be made to the local authority while it has the care of the child.

(5A) An order made under subsection (3)(*a*) with reference to an illegitimate child shall not require the father of that child to make any payments to the local authority or to the child.

(5B) The court in deciding whether to exercise its powers under subsection (5) and, if so, in what manner, shall have regard to all the circumstances of the case including the matters to which the court is required to have regard under section 34A.

(5C) Section 34B shall apply in relation to an order under subsection (5) as it applies in relation to an order under section 34(1)(*b*)."

Clause 53

1. This clause extends the powers of the court under the Children Act 1975 to make, and sets out the matters to which it is to have regard before making, an order for periodical payments against either or both of the parents of a child where, on the revocation of a custodianship order, it commits the child to the care of a local authority. For this situation the clause imports the undermentioned features introduced into the magistrates' matrimonial law and the guardianship legislation.

2. A new subsection, empowering the court to make an order for periodical payments when, on revoking a custodianship order, it commits the child to care, replaces the existing section 36(5) of the 1975 Act. It corresponds to section 34(1)(*b*) of the 1975 Act (as amended by this Bill: see Note 2 to clause 50). This implements the recommendation in paragraph 7.14(*b*).

3. A new subsection, section 36(5A), makes clear that where an illegitimate child is committed to the care of a local authority under section 36(3)(*a*) no order for periodical payments may be made against the father in favour of the local authority or the child. This provision corresponds to one which already appears in section 34(3) where an illegitimate child is the subject of a custodianship order.

4. This clause also adds a new subsection, section 36(5B), which provides that, in deciding whether or not to order periodical payments under section 36(5), the court should have regard to the guidelines set out in new section 34A, as recommended in paragraph 7.14(*c*): see Notes 2 and 3 to clause 51 above.

5. Finally, this clause adds a new subsection, section 36(5C), which provides that, with regard to the duration of orders for periodical payments under section 36(5), the provisions of new section 34B shall apply: see Note 4 to clause 51. This implements the recommendation in paragraph 7.14(*d*).

Restriction on removal of child from England and Wales.

1975 c. 72.

54. After section 43 of the Children Act 1975 there shall be inserted the following section—

"Restriction on removal of child from England and Wales.

43A.—(1) Where an authorised court makes—

(*a*) a custodianship order in respect of a child, or

(*b*) an interim order under section 34(4) containing provision regarding the legal custody of a child,

the court, on making that order or at any time while that order is in force, may, if an application is made under this section, by order direct that no person shall take the child out of England and Wales while the order made under this section is in force, except with the leave of the court.

(2) An authorised court may by order vary or revoke any order made under this section.

(3) An application for an order under subsection (1), or for the variation or revocation of such an order, may be made by the mother or father of the child or by the custodian."

EXPLANATORY NOTES

Clause 54

1. This clause empowers the court, when making an interim or final custodianship order in respect of a child under section 34(4) of the Children Act 1975:—

(*a*) to make an order prohibiting or restricting the removal of the child out of England and Wales without the leave of the court;

(*b*) where the court has imposed such a prohibition or restriction, subsequently to grant leave for the removal of the child.

2. Thus, this clause implements in the context of custodianship orders the recommendation in paragraph 10.11 of the report which clause 27 implements for the magistrates matrimonial jurisdiction and clause 32 implements for the guardianship legislation.

3. Applications for the making, variation or revocation of such orders may be made by either parent or by the custodian of the child.

Orders made on appeal from a magistrates' court.
1975 c. 72.

55. At the end of section 101 of the Children Act 1975 (which relates to appeals) there shall be added the following subsection—

"(4) Any order made on an appeal under subsection (2) from a decision of a magistrates' court on an application under Part II (other than an order directing that an application shall be re-heard by a magistrates' court) shall for the purposes of the enforcement of the order and for the purposes of sections 35 and 36 be treated as if it were an order of the magistrates' court from which the appeal was brought and not of the High Court."

Clause 55

1. This clause adds to the Children Act 1975 a provision relating to the enforcement, variation and revocation of orders made on appeal in similar terms to that in clause 23(6) (which relates to the magistrates' matrimonial law) and to that in section 16(9) added to the Guardianship of Minors Act 1971 by clause 39 (which relates to the guardianship legislation), thus implementing the recommendation in paragraph 7.16.

2. It provides that an order of the High Court made on appeal against an order made under Part II of the Children Act 1975, (other than an order directing that an application shall be reheard by a magistrates' court) is to be treated, for the purposes of enforcement, variation and revocation, as a magistrates' court order. It has been added to the Children Act 1975 for the sake of consistency: see Note 7 to clause 23 above.

Part IV

Supplementary Provisions

Rules.

56.—(1) The power to make rules conferred by section 15 of the Justices of the Peace Act 1949 shall, without prejudice to the generality of subsection (1) of that section, include power to make provision for the recording by a magistrates' court, in such manner as may be prescribed by the rules, of reasons for a decision made in such domestic proceedings or class of domestic proceedings as may be so prescribed, and for making available a copy of any record made in accordance with those rules of the reasons for a decision of a magistrates' court to any person who requests a copy thereof for the purposes of an appeal against that decision or for the purpose of deciding whether or not to appeal against that decision.

(2) A copy of any record made by virtue of this section of the reasons for a decision of a magistrates' court shall, if certified by such officer of the court as may be prescribed, be admissible as evidence of those reasons.

Clause 56

1. This clause deals with the procedural proposals relating to the giving of reasons for the magistrates' decisions discussed in paragraphs 4.67–4.75 of the report.

Clause 56(1)

2. This subsection implements the recommendation in paragraph 4.76(*a*) that in certain prescribed cases rules should require the justices, before announcing their decision, to draw up in consultation with the clerk of the court a note of the main reasons for the decision. As is also recommended, it is further provided that a copy of this note should be available as of right to a party wishing to appeal.

3. As explained in paragraph 4.75, it is considered that further consultation is required on the class of cases to which the above requirement under the rules should apply. It is suggested that such cases might include maintenance claims under clause 2 of the Bill, where the court makes a maintenance order but reduces the amount of maintenance by reason of the applicant's conduct, and any cases where a dispute has arisen about the custody of a child, whether under the matrimonial or the guardianship legislation.

Clause 56(2)

4. This subsection implements the recommendation in paragraph 4.76(*b*) that a copy of the note should be admissible as evidence of the justices' reasons.

Expenses.

57. There shall be defrayed out of moneys provided by Parliament any increase attributable to this Act in the sums payable out of moneys so provided under any other enactment.

Clause 57

This clause makes formal provision for the defrayment out of moneys provided by Parliament of any increase attributable to this Act in the sums provided by Parliament under any other enactment.

Interpretation.

58.—(1) In this Act—

"child", in relation to one or both of the parties to a marriage, includes an illegitimate child of that party or, as the case may be, of both parties;

"child of the family", in relation to the parties to a marriage, means—

(*a*) a child of both of those parties; and

(*b*) any other child, not being a child who is being boarded-out with those parties by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family;

1973 c. 15.

"commission area" has the same meaning as in section 1 of the Administration of Justice Act 1973;

1952 c. 55.

"domestic proceedings" has the meaning assigned to it by section 56 of the Magistrates' Courts Act 1952;

"local authority" means the council of a county (other than a metropolitan county), a metropolitan district, a London borough, or the Common Council of the City of London;

"petty sessions area" means any of the following areas, that is to say, a non-metropolitan county which is not divided into petty sessional divisions, a petty sessional division of a non-metropolitan county, a metropolitan district which is not divided into petty sessional divisions and a petty sessional division of a metropolitan district;

1949 c. 101.

"rules" means rules made under section 15 of the Justices of the Peace Act 1949.

(2) References in this Act to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.

Clause 58(1)

1. The definition of "child" differs from that in section 16(1) of the 1960 Act in that it does not refer to an adopted child. This change results from paragraph 3(1) in Schedule 1, Part II of the Children Act 1975 which provides that an adopted child shall be treated in law—

(*a*) where the adopters are a married couple, as if he had been born as a child of the marriage, and

(*b*) in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter.)

2. "Child of the family" is defined not as in section 16(1) of the 1960 Act but as in section 52(1) of the Matrimonial Causes Act 1973. This reflects the broad objective of the Bill to bring the family law administered by magistrates into line with the law administered by the divorce court, and implements the recommendation in paragraph 5.17.

3. The definition of "commission area" in section 1 of the Administration of Justice Act 1973 is adopted in order to achieve the objective of clause 24(1) which gives jurisdiction to a magistrates' court in matrimonial proceedings on the basis of the county area in place of the petty session area: see Notes 2–4 on clause 24(1).

4. The definition of "domestic proceedings", which is that in section 56 of the Magistrates' Courts Act 1952, read together with the use of that expression in clause 56 (Rules relating to the giving of reasons for magistrates' decisions) makes clear that the provisions in clause 56 are intended to apply to domestic proceedings generally and not merely to the matrimonial proceedings for which provision is made in Part I of this Bill.

5. The expression "local authority", which is relevant to the making by magistrates of orders for the supervision or care of a child by a local authority under clauses 8 and 9, relates to the authorities constituted to carry out such functions by the Local Government Act 1972.

6. "Petty sessions area" is defined as in section 217(3) of the Local Government Act 1972.

7. The definition of "rules" is self-explanatory and reflects the present position.

Clause 58(2)

8. This subsection amplifies the provisions of clause 19 (Effect on order of parties living together) and makes clear that in the clause "living together" has the meaning intended by paragraph 2.54 of the report.

(3) For the avoidance of doubt it is hereby declared that references in this Act to remarriage include references to a marriage which is by law void or voidable.

(4) Anything authorised or required by this Act to be done by, to or before the magistrates' court by, to or before which any other thing was done, or is to be done, may be done, by to or before any magistrates' court acting for the same petty sessions area as that court.

(5) Any reference in this Act to an enactment shall be construed as a reference to that enactment as amended by or under any subsequent enactment, including this Act.

Clause 58(3)

9. This subsection makes clear that (as in the corresponding provision in section 52(3) of the Matrimonial Causes Act 1973) remarriage includes a void or voidable marriage.

Clause 58(4) *and* 58(5)

10. These subsections contain formal provisions which are self-explanatory.

Consequential amendments, repeals, commencement and transitional provisions.

59.—(1) Subject to the provisions of this section—

(*a*) the enactments specified in Schedule 1 to this Act shall have effect subject to the amendments specified in that Schedule (being amendments consequential on the preceding provisions of this Act), and

(*b*) the enactments specified in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(2) This Act shall come into force on such date as the Secretary of State may by order appoint and different dates may be appointed for, or for different purposes of, different provisions.

(3) This Act (including the repeals and amendments made by it) shall not have effect in relation to any application made under any enactment repealed or amended by this Act if that application is pending at the time when the provision of this Act which repeals or amends that enactment comes into force.

1960 c. 48.

(4) Any order made or other thing done under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 which is in force immediately before the coming into force of Part I of this Act shall not be affected by the repeal by this section of that Act, and the provisions of that Act shall after the coming into force of the said Part I apply in relation to such an order and to an order made under that Act by virtue of subsection (3) above subject to the following modifications—

(*a*) on a complaint for the revocation of the order the court shall not be bound under section 8 of that Act to revoke the order by reason of an act of adultery committed by the person on whose complaint the order was made, and

(*b*) on a complaint for the variation, revival or revocation of the order, the court, in exercising its powers under the said section 8 in relation to a provision of the order requiring the payment of money, shall have regard to any change in any of the matters to which the court would have been required to have regard when making that order if the order had been made on an application under section 2 of this Act.

EXPLANATORY NOTES

Clause 59 (1)

1. Subsection 1(*a*) makes formal provision for the amendments to existing legislation specified in Schedule 1: see the Note on that Schedule.

2. Subsection 1(*b*) makes formal provision for the repeals of existing legislation specified in Schedule 2: see the Note on that Schedule.

Clause 59(2)

3. This subsection makes formal provision for the coming into force of the Act.

Clause 59(3)

4. By the saving provision in this subsection, any application under enactments repealed or amended by this Act (for example an application under the 1960 Act) which is pending when the repeal or amendment comes into force will not be affected by that repeal or amendment but will continue to be dealt with under the present law.

Clause 59(4)

5. By the saving provision in this subsection (subject to the two modifications mentioned in Note 6 below) any order made under the 1960 Act which is in force immediately before Part I of this Bill becomes law will not be affected by the repeal of that Act by this clause; and the liability to continue making payments under any such order will continue.

6. The continued effect of orders made under the 1960 Act after this Bill becomes law is modified by this subsection in two respects:—

(*a*) on an application for the revocation of a pre-existing order, the court will apply the new law and will not be obliged to revoke the order by reason of the adultery of the party in whose favour the order was originally made;

(*b*) on an application for the variation, revival or revocation of a pre-existing order requiring the payment of money, the court will apply the new law and thus be required to have regard to changes in any of the matters to which regard must be had when the court deals with an application under clause 2 in this Bill.

(5) The amendment by this section of any enactment shall not affect the operation of that enactment in relation to any order made or having effect as if made under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (including an order made under that Act by virtue of subsection (3) above) or in relation to any decision of a magistrates' court made on an application for such an order or for the variation, revival or revocation of such an order.

(6) An order under subsection (2) above may make such further transitional provision as appears to the Secretary of State to be necessary or expedient in connection with the provisions thereby brought into force.

(7) Any reference in subsection (3) above to an application made under an enactment repealed by this Act shall be construed as including a reference to an application which is treated as a complaint under section 1 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 by virtue of section 27 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 and any reference in subsection (4) or (5) above to an order made under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 shall be construed as including a reference to an order which is made under that Act by virtue of section 28 of the Maintenance Orders (Reciprocal Enforcement) Act 1972.

)72 c. 18.

(8) Nothing in this section shall be taken as prejudicing the general application of section 38 of the Interpretation Act 1889 with regard to the effect of repeals.

889 c. 63.

Clause 59(5)

7. This is a saving provision ancillary to the saving provisions in subsections (3) and (4) above and preserves the rights and duties conferred or imposed by amended enactments which relate to orders made under the 1960 Act, *e.g.*, legal aid, functions of local authorities, attachment of earnings.

Clause 59(6)

8. This subsection contains a formal provision conferring power to make such further transitional provisions as may be necessary.

Clause 59(7)

9. This subsection contains two further saving provisions.

10. Existing applications which are saved under subsection (3) above are to include applications for maintenance under section 27 of the Maintenance Orders (Reciprocal Enforcement) Act 1972.

11. Existing orders and decisions which are saved under subsections (4) and (5) above are to include orders made under section 28 of the Maintenance Orders (Reciprocal Enforcement) Act 1972.

Clause 59(8)

12. This subsection is a formal saving provision to preserve the general application of section 38 of the Interpretation Act 1889 with regard to the effect of repeals.

Short title and extent.

60.—(1) This Act may be cited as the Domestic Proceedings and Magistrates' Courts Act 1976.

(2) This Act, except for section 24(4), does not extend to Scotland or Northern Ireland.

Clause 60

Subsection (1) makes formal provision as to the short title of the Act.

Subsection (2) provides that the Act does not extend to Scotland or Northern Ireland except for the provisions relating to jurisdiction in clause 24(4), as to which see the Note on that subsection.

SCHEDULES

SCHEDULE I

CONSEQUENTIAL AMENDMENTS

The Maintenance Orders Act 1950 (*c.* 37.)

1. In section 3(2) of the Maintenance Orders Act 1950 for the words " having jurisdiction in the place " there shall be substituted the words " appointed for the commission area (within the meaning of the Administration of Justice Act 1973) ".

2. In section 16(2)(*a*) of that Act, for sub-paragraph (ii) there shall be substituted the following sub-paragraph—

"(ii) Part I of the Domestic Proceedings and Magistrates' Courts Act 1976."

The Magistrates' Courts Act 1952 (*c.* 55)

3. In sections 52(2), 56(1) and 57(4) of the Magistrates' Courts Act 1952 for the words "the Summary Jurisdiction (Separation and Maintenance) Acts 1895 to 1949" there shall be substituted the words "Part I of the Domestic Proceedings and Magistrates' Courts Act 1976."

The Affiliation Proceedings Act 1957 (*c.* 55)

4. In section 3(1) of the Affiliation Proceedings Act 1957 for the words "acting for the petty sessions area (within the meaning of the Magistrates' Courts Act 1952)" there shall be substituted the words "appointed for the commission area (within the meaning of section 1 of the Administration of Justice Act 1973)" and for the words "for the said petty sessions area" there shall be substituted the words "appointed for the said area".

The County Courts Act 1959 (*c.* 22)

5. In section 109(2)(*g*) of the County Courts Act 1959 for the words "section 13A of the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "section 28 of the Domestic Proceedings and Magistrates' Courts Act 1976".

The Children and Young Persons Act 1963 (*c.* 51)

6. In sections 47 and 58 of the Children and Young Persons Act 1963 for the words "the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "Part I of the Domestic Proceedings and Magistrates' Courts Act 1976".

Schedule 1: *Consequential amendments*

No explanation need be made on most of the consequential amendments listed in this Schedule since they are of a formal nature. However, comment is necessary on the following because they are amendments which have some substance.

Paragraphs 1, 4 *and* 14

1. Paragraph 4.90(*d*) of the report recommends that section 44 of the Magistrates' Courts Act 1952 should be amended so that jurisdiction under its provisions is based on the county and not the petty sessions area. This recommendation has been implemented by clause 40. Clause 24(1) implements the recommendation in paragraph 4.90(*a*) that the jurisdiction of magistrates' courts in matrimonial proceedings should also be based on the county and not the petty sessions area.

2. The recommendation in paragraph 4.90(*d*) is further implemented by the amendments listed under paragraphs 1, 4 and 14 which make an alteration similar to that in clause 24(1) in the jurisdiction of magistrates' courts in other types of proceedings under the Maintenance Orders Act 1950, the Affiliation Proceedings Act 1957 and the Guardianship of Minors Act 1971.

Paragraphs 16, 17 *and* 18

3. In that the Maintenance Orders (Reciprocal Enforcement) Act 1972 itself relates to provisions in the 1960 Act, the amendments now introduced into the 1972 Act are intended to give effect to the substitution for the 1960 Act of the provisions now contained in this Bill.

The Health Services and Public Health Act 1968 (*c.* 46)

7. In section 64(3)(*a*) of the Health Services and Public Health Act 1968 for sub-paragraph (ix) there shall be substituted the following sub-paragraph—

"(*ix*) section 8 of the Domestic Proceedings and Magistrates' Courts Act 1976".

8. In section 65(3)(*b*) of that Act for sub-paragraph (*x*) there shall be substituted the following sub-paragraph—

"(*x*) section 8 of the Domestic Proceedings and Magistrates' Courts Act 1976".

The Children and Young Persons Act 1969 (*c.* 54)

9. In section 63(6)(*g*) of the Children and Young Persons Act 1969 for the words "section 2(1)(*f*) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "section 8 of the Domestic Proceedings and Magistrates' Courts Act 1976".

The Administration of Justice Act 1970 (*c.* 31)

10. In Schedule 1 of the Administration of Justice Act 1970 for the words "section 11 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "section 23 of the Domestic Proceedings and Magistrates' Courts Act 1976" and for the words "the Matrimonial Proceedings (Magistrates' Courts) Act 1960" in the second and third place where those words occur there shall be substituted the words "Part I of the Domestic Proceedings and Magistrates' Courts Act 1976".

11. In Schedule 8 of that Act in paragraph 3 for the words "or having effect as if made under the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "under Part I of the Domestic Proceedings and Magistrates' Courts Act 1976".

The Local Authority Social Services Act 1970 (*c.* 42)

12. In Schedule 1 of the Local Authority Social Services Act 1970, the entry relating to the Matrimonial Proceedings (Magistrates' Courts) Act 1960 shall be omitted and at the end of that Schedule there shall be inserted—

"The Domestic Proceedings and Magistrates' Courts Act 1976. Section 8.	Supervision of children."

The Matrimonial Proceedings and Property Act 1970 (*c.* 45)

13. In section 30(2) of the Matrimonial Proceedings and Property Act 1970 for the words "Subsections (4), (5) and (6) of section 7 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "Section 4(2) of the Domestic Proceedings and Magistrates' Courts Act 1976", for the words "section 2(1)(*b*) or (*c*)" there shall be substituted the words "section 2(1)(*a*)" and for the words "as they apply in relation to such an order as is referred to in the said subsection (4)" there shall be substituted the words "as it applies in relation to an order made under section 2(1)(*a*) of the Domestic Proceedings and Magistrates' Courts Act 1976."

The Guardianship of Minors Act 1971 (*c.* 3)

14. In section 15 of the Guardianship of Minors Act 1971 in subsections (1) and (4) for the words "having jurisdiction in the place" there shall be substituted the words "appointed for the commission area (within the meaning of the Administration of Justice Act 1973)".

The Attachment of Earnings Act 1971 (c. 32)

15. In Schedule 1 of the Attachment of Earnings Act 1971, in paragraph 4 for the words "or having effect as if made under the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "under Part I of the Domestic Proceedings and Magistrates' Courts Act 1976".

The Maintenance Orders (Reciprocal Enforcement) Act 1972 (*c.* 18)

16. In section 27(9) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 for the words "section 13(2) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "section 25(2) of the Domestic Proceedings and Magistrates' Courts Act 1976".

17. For section 28 of that Act there shall be substituted the following section:

"Complaint by spouse in convention country for recovery in England and Wales of maintenance from other spouse.

28. Where the complaint is a complaint made for an order under section 2 of the Domestic Proceedings and Magistrates' Courts Act 1976, the court hearing the complaint may make any order which it has power to make under section 2 or 14 of that Act; but Part I of that Act shall, in its application to the complaint and to any order made on the complaint have effect subject to the following modifications, that is to say—

(*a*) sections 7 to 12, 18, 21 and 25(2) of that Act shall be omitted; and

(*b*) in section 25(3) of that Act the reference to Part I of that Act shall be construed as including a reference to this Part of this Act."

18. In section 41 of that Act for subsection (2) there shall be substituted the following subsections:—

"(2) Subject to subsection (2A) below, a magistrates' court may, if it is satisfied that the respondent has been outside the United Kingdom during such period as may be prescribed by rules made under section 15 of the Justices of the Peace Act 1949, proceed on an application made under section 53 of the Magistrates' Courts Act 1952 for the revocation, revival or variation of any such order as is mentioned in paragraph *(a)* or *(b)* of subsection (1) above notwithstanding that the defendant has not been served with the summons; and rules may prescribe any other matters as to which the court is to be satisfied before proceeding in such a case.

(2A) A magistrates' court shall not exercise its powers under section 53 of the Magistrates' Courts Act 1952 so as to increase the amount of any periodical payments required to be made by any person under any such order as is mentioned in paragraph *(a)* or *(b)* of subsection (1) above unless the order made by virtue of the said section 53 is made at a hearing at which that person appears or the requirements of section 47(3) of the Magistrates' Courts Act 1952 with respect of proof of service of summons or appearance on a previous occasion are satisfied in respect of that person."

19. In section 42(1) of that Act for the words "section 2(1)*(b)* or *(c)* of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (payment of weekly sums by husband or wife)" there shall be substituted the words "section 2(1)*(a)* of the Domestic Proceedings and Magistrates' Courts Act 1976 (making of periodical payments by husband or wife)".

The Matrimonial Causes Act 1973 (*c.* 18)

20. In section 4(1) of the Matrimonial Causes Act 1973 after the words "the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be inserted the words "or Part I of the Domestic Proceedings and Magistrates' Courts Act 1976".

21. In section 47(2)*(e)* of that Act for the words "the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "Part I of the Domestic Proceedings and Magistrates' Courts Act 1976".

22. In section 50(2)*(b)* of that Act for the words "the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "Part I of the Domestic Proceedings and Magistrates' Courts Act 1976".

The Guardianship Act 1973 (*c.* 29)

23. In section 4(3) of the Guardianship Act 1973 for the words "sections 12(2) and" there shall be substituted the word "section".

24. In section 5(2) of that Act for the words "section 9(3) and (4)" there shall be substituted the words "section 9(4)".

The Legal Aid Act 1974 (*c.* 4)

25. In Schedule 1 of the Legal Aid Act 1974, in paragraph 3(*a*) for the words "the Matrimonial Proceedings (Magistrates' Courts) Act 1960" there shall be substituted the words "Part I of the Domestic Proceedings and Magistrates' Courts Act 1976."

SCHEDULE 2

ENACTMENTS REPEALED

Chapter	Short Title	Extent of Repeal
1950 c. 37.	The Maintenance Orders Act 1950.	In section 2, subsection (3).
1952 c. 55.	The Magistrates' Courts Act 1952	Sections 59 and 62.
1957 c. 55.	The Affiliation Proceedings Act 1957.	In section 7, subsections (1) to (3).
1960 c. 48.	The Matrimonial Proceedings (Magistrates' Courts) Act 1960.	The whole Act.
1964 c. 42.	The Administration of Justice Act 1964.	In Schedule 3, paragraph 27.
1965 c. 72.	The Matrimonial Causes Act 1965.	Section 42.
1967 c. 80.	The Criminal Justice Act 1967.	In Schedule 3, the entry relating to the Matrimonial Proceedings (Magistrates' Courts) Act 1960.
1968 c. 36.	The Maintenance Orders Act 1968.	In the Schedule, the entry relating to the Matrimonial Proceedings (Magistrates' Courts) Act 1960.
1969 c. 46.	The Family Law Reform Act 1969.	In section 5, subsection (2).
1970 c. 45.	The Matrimonial Proceedings and Property Act 1970.	In section 30, subsection (1). Sections 31 to 33.
1971 c. 3.	The Guardianship of Minors Act 1971.	In section 9, subsection (3). In section 14, subsection (4).
1971 c. 38.	The Misuse of Drugs Act 1971.	Section 34.
1972 c. 18.	The Maintenance Orders (Reciprocal Enforcement) Act 1972.	In section 27, subsection (3).
1972 c. 70.	The Local Government Act 1972.	In Schedule 23, paragraph 10.
1973 c. 18.	The Matrimonial Causes Act 1973.	In section 27, subsection (8).

EXPLANATORY NOTES

Schedule 2: *Enactments repealed*

1. Reference has been made elsewhere in these Notes and in the text of the report to those enactments the repeal of which is of particular significance and is specifically recommended, for example, sections 59 and 62 of the Magistrates' Courts Act 1952, the whole of the 1960 Act, section 42 of the Matrimonial Causes Act 1965 and section 91 of the Children Act 1975.

2. The repeal of the other enactments listed in this Schedule is of a formal nature and calls for no comment.

Chapter	Short Title	Extent of Repeal
1973 c. 29.	The Guardianship Act 1973	In section 3, in subsection (2) the words from "and where a supervision order" to the end of the subsection. Section 8. In Schedule 2, paragraph 1(2).
1975 c. 72.	The Children Act 1975.	Section 91.

APPENDIX 2

Members of the Joint Law Commission and Home Office Working Party

Chairman:	The Honourable Mr. Justice Scarman, O.B.E. (now the Right Honourable Lord Justice Scarman)	
Members:	Professor L. C. B. Gower (1) Lady Johnston Mr. D. Tolstoy, Q.C. (2)	Law Commission
	Mr. H. Homfray Cooper Mr. R. L. Jones Mr. R. W. Mott (3) Mr. J. Nursaw } (4) Mr. H. W. Wollaston } (4)	Home Office
Secretary:	Mr. C. J. Train (5)	Home Office
	Mr. P. C. Edwards	Home Office

(1) Professor Gower resigned on his appointment on 1 October 1971 as Vice-Chancellor of the University of Southampton.

(2) Mr. Tolstoy resigned on his retirement in 1972 from the Law Commission.

(3) Mr. Mott resigned in March 1973 on transfer to other work.

(4) Mr. Nursaw resigned in the autumn of 1973 on transfer to other work; he was succeeded by Mr. Wollaston.

(5) Mr. Train acted as Secretary until August 1972 when his place was taken by Mr. Edwards.

APPENDIX 3

List of those who commented on Working Paper No. 53

General Council of the Bar
The Law Society
Holborn Law Society
The Justices' Clerks Society
The Magistrates' Association
Mid-Essex Law Society
Society of Conservative Lawyers

The Right Honourable Sir George Baker, O.B.E., President of the Family Division
The Honourable Mr. Justice Dunn
The Honourable Mr. Justice Rees
His Honour Judge Stinson
Mr. C. E. M. Chatterton (Justices' Clerk, Bury St. Edmunds Magistrates' Court)
Dr. D. E. Gray, M.B.E., J.P. (Chairman of the Solihull Magistrates' Court)
Mr. B. T. Harris, LL.B. (Justices' Clerk, Poole Magistrates' Court)
Mrs. C. Kennedy, J.P.
Mrs. S. Lochhead, J.P.
Mr. D. C. E. Price (Registrar, Croydon County Court)
Mr. G. C. Purchase (Justices' Clerk, Solihull Magistrates' Court)
Mr. F. A. Rooke-Matthews (General Register Office)
Messrs. Hill and Abbott (Solicitors)
Messrs. R. & R. F. Kidd & Spoor (Solicitors)
Messrs. Mooring Aldridge & Haydon (Solicitors)
Mr. A. Laurence Polak (Solicitor)
Messrs. J. M. Rix & Kay (Solicitors)
Dr. Lionel Rosen (Solicitor)
Westminster Small Claims Court.

Mr. A. Bissett-Johnson (Leicester University)
Professor H. K. Bevan (Hull University)
Professor P. M. Bromley (Manchester University)
Mr. J. Eekelaar (Pembroke College, Oxford)
Mr. J. C. Hall (Cambridge University)
Mr. S. Poulter (University of Southampton)
Mrs. J. Levin (Queen Mary College, London)
Mr. A. Samuels (University of Southampton)
Dr. Olive Stone (London School of Economics)
Professor P. R. H. Webb (University of Auckland, New Zealand)
Mr. A. Wharam (Leeds Polytechnic)

Mr. P. Snow
Mr. P. K. J. Thompson

The Reverend Canon G. B. Bentley
British Council of Churches
Cornwall Probation and After-Care Service
Devon, Exeter and Torbay Probation and After-Care Service
The Fawcett Society
Legal Action Group
Mr. W. Leitch C.B. (Office of Director of Law Reform, Northern Ireland)
The Methodist Church, Division of Social Responsibility
The Mission Department of the Baptist Union
National Board of Catholic Women
National Marriage Guidance Council
Trades Union Congress
Women's Liberal Federation
Women's National Commission

APPENDIX 4

The terms of reference of the Committee on One-Parent Families (the Finer Committee)

1. To consider in the light of paragraphs 41 and 42 of the White Paper (Cmnd. 3883) the problems of one-parent families in our society. [The relevant paragraphs are set out below.]

2. To examine the nature of any special difficulties which the parents of the various kinds of one-parent families may encounter; the extent to which they can obtain financial support when they need it; and the ways in which other provisions and facilities are of help to them.

3. To consider in what respects and to what extent it would be appropriate to give one-parent families further assistance, having regard to:

i. The preservation of the discretion vested in local authorities by Section 1 of the Children Act 1948, Section 1 of the Children and Young Persons Act 1963 and Sections 12 and 15 of the Social Work (Scotland) Act 1968 as to the exercise of their duties under those provisions.

ii. The need to maintain equity as between one-parent families and other families.

iii. Practical and economic limitations.

[The relevant paragraphs of the White Paper, *National Superannuation and Social Insurance* (Cmnd. 3883), (which is referred to in the terms of reference) set out the then Government's plans for the future of social security as follows:

40. Besides its pension provisions, the new scheme, like the present one, will include benefits for widows of working age. These benefits will be based on the earnings record of the husband, and will be available to widows with children and to childless widows above a certain age.

41. It is often suggested that the national insurance scheme should go further and cover either all "fatherless families" or at least the children in such households: this would mean an insurance benefit for divorced, separated and unmarried mothers. "Fatherless families" as a whole, however, not only divide into obvious groups but also show wide variations of need and circumstances within each group. There is a great difference between the needs of an unmarried mother who supports her child alone, and those of another girl who has a stable relationship with her child's father; and there are many possible gradations between these two extremes. Similarly, it is often very difficult to distinguish between temporary separations and marriages that have finally broken down. Again, the father of the children is normally liable to contribute towards their maintenance, while he

may or may not be liable for the maintenance of the mother. Whatever the extent of his liability, he may or may not be honouring his obligation. The available information about the number, structure and needs of these families is very inadequate.

42. Social security benefits are one obvious method by which fatherless families can be helped by Government action, and many of them are already receiving supplementary benefit. But they are also affected by the law on family matters and the practices of the courts (on which the Graham Hall Committee[1] have recently made a valuable contribution) and by central and local Government policies, especially policies on housing, education and child care. The Government have therefore decided, first to start a further study[2] of the circumstances of families with children, paying special attention to one-parent families (whether fatherless or motherless); and, secondly, to appoint a committee to consider the general position of one-parent families in our society and whether there are further methods by which they should be helped. The results of the study mentioned above will be available to the Committee, who will meanwhile proceed with other aspects of their work. The appropriate provision for one-parent families will be further considered when the results of the study and the Committee's report are available.]

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[1] *Report of the Committee on Statutory Maintenance Limits;* (1968). Cmnd. 3587.

[2] The results of a study made in 1966 were published as *Circumstances of Families;* H.M.S.O., 1967.

APPENDIX 5

Existing provisions relating to children in various jurisdictions

	Divorce (Matrimonial Proceedings and Property Act 1970; Matrimonial Causes Act 1965)	*Magistrates' Matrimonial Jurisdiction* (Matrimonial Proceedings (Magistrates' Courts) Act 1960)	*Guardianship* (Guardianship of Minors Act 1971 and Guardianship Act 1973)	*Affiliation* (Affiliation Proceedings Act 1957; Family Law Reform Act 1969)	*Custodianship* (Children Act 1975)
1. Custody; which children.	Child of the family who is under 18 (1970, sections 18(1) and 27(1).).	Child of the family who must be a child of one of the parties and who is under 16 (1960, sections 2(1)(*d*) and 16(1).)	Child of both parents under 18 (magistrates' court under 16 unless child incapable of self-support) (1971, sections 9 and 15(2)).	The mother has custody of the child at common law.	Any child under 18 may be subject to a custodianship order, but the order may not be in favour of his father or mother, nor his step parent in certain circumstances (1975, section 33).
2. Custody; until what age.	18	16, or possibly 18	18	Probably 18	18
3. Custody; to whom.	Such order as the court thinks fit (1970, section 18(1)). Impliedly includes a third person (1965, section 36).	A matrimonial order may include "provision for the legal custody" of the child (1960, section 2(1)(*d*)). Impliedly includes a third person (1960, section 2(1)(*e*)).	Such order regarding custody as the court thinks fit (1971, section 9(1)), but custody may only be given to the mother or father (1971, section 9(5) added by Children Act 1975). Includes putative father (1971, section 14(1).).	Custody may be given to another person by two justices if the mother is in prison; of unsound mind or dies (1957, section 5(4)) 1957, section 5(3) might be taken to imply that custody can be given to or held by another person (not the father) in other circumstances.	Not the child's father or mother, but a relative or step-parent of the child if the person with legal custody consents and the child has lived with the applicant for 3 months preceding the application; or any person, if the person with legal custody consents and if the child had lived with the applicant for at least 12 months, including the 3 months immediately preceding the application; or any person with whom the child has lived for 3 years, including the 3 months immediately preceding the

					application. A step-parent is precluded in certain circumstances. (1975, section 33(5) and (8).
4. Maintenance; to whom payable and until what age.	The child or such person as may be specified for the benefit of the child (1970, section 3(2)). Up to 18, or without limit if receiving full-time education or in special circumstances (1970, section 8(3)).	Any person having legal custody of the child up to 16. If over 16 but under 21 and a dependant, to the child or such person as may be specified (1960, sections 2(1)(*h*) and 16(1)).	The person with custody; up to 21, but no fresh order by magistrates' court after 16 unless child incapable of self-support (1971, section 9(2) as amended by 1973, Schedule 2, and Children Act 1975, Schedule 3; 1971, sections 12(1) and 15(2)). Payments after 18 can be to the child (1971, section 12(1)). In the case of a person between 18 and 21 who, while a minor has been the subject of an order under the 1971 Act, the court may order either parent to pay maintenance to the person himself or to the other parent, or to anyone else for the benefit of the person (1971, section 12(2)).	The child's mother up to 21, but order ends at 13 unless directed to continue to 16 (1957, sections 5(1) and 6), and is renewable for two years period up to 21 on the application of the mother if the child is engaged in a course of education or training (1957, section 7(2) and (3)). If the mother is of unsound mind, in prison, or dies, payments may be made to the person to whom custody is given, and after the child is 18 to the child itself (1957, sections 5(4) and 7(6); 1969, section 5(2)). Payments may also be made to any person having custody of the child either legally or by an arrangement approved by the court (1957, section 5(3)).	The custodian of the child, *i.e.*, the person in whom legal custody is vested by a custodianship order, up to 18'(1975, section 34(1)); the local authority, when the child is in care up to 18 (1975, section 36(5)).
5. Maintenance; by whom payable.	Either party to the marriage (1970, section 3(2)).	Either party to the marriage (1960, section 2(1)(*h*)).	Either parent (1971, section 9(2), but not putative father (1971, section 14(2)).	Putative father (1957, section 4(2)).	The child's mother or father (or both) (1975, section 34(1)), which includes any person in relation to whom the child was treated as a child of the family (as defined in section 52(1), Matrimonial Causes Act 1973) (1975, section 34(2)). No order may be made against the father of an illegitimate child (1975, section 34(3)).

	Divorce	*Magistrates' Matrimonial Jurisdiction*	*Guardianship*	*Affiliation*	*Custodianship*
6. Committal to care.	If child under 17 and there are exceptional circumstances making it undesirable or impracticable for it to be entrusted to either party to marriage or an individual. Ends at 18 (1965, section 36(4)).	If child under 16 and as for divorce (1960, section 2(1)(*e*)). Ends at 18 (1960, section 3(4)).	If child under 16 and as for divorce (1973, section 2(2)(*b*)). Ends at 18.	None.	Care order may be made on revocation of custodianship order where child would not be in the legal custody of any person, or it would not be in the interests of the child's welfare to be in the legal custody of the person entitled to it; ends at 18 (1975, section 36(2), 36(3) and 36(6)).
7. Supervision	If exceptional circumstances make it desirable, so long as custody lasts (*i.e.*, not beyond 18). (1965, section 37(1)).	As for divorce, but cannot be ordered after 16 and ends at 16. (1960, sections 2(1)(*f*) and 3(9)).	As for divorce, but cannot be ordered after 16 and ends at 16. (1973, sections 2(2)(*a*) and 3(2)).	None.	Supervision order may be made on revocation of custodianship order; ends at 16. (1975, section 36(3)(*b*) and 36(6)).

Note: This summary does not take account of provisions by means of which the State or local authority may apply for the recovery of benefit paid or assistance given in respect of a legitimate or illegitimate child.

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