The Law Commission

Working Paper No. 100

FAMILY LAW
REVIEW OF CHILD LAW:

Care, Supervision and Interim Orders in Custody Proceedings

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It does not represent the final views of the Law Commission. The Law Commission would be grateful for comments on the consultative document before 17 April 1987.

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SUMMARY

This consultative paper is the third in a series about the law relating to the upbringing of children.

It examines the power of courts in custody proceedings to commit a child to local authority care, place him under supervision and to make orders for interim custody and access. The present law contains many inconsistencies and a number of practical difficulties are evident. This paper makes proposals for reconciling the different provisions, simplifying the system wherever possible, and improving it with the aim of better serving the interests of the children and families involved.

A later paper will deal with the wardship jurisdiction.

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CARE, SUPERVISION AND INTERIM ORDERS IN CUSTODY PROCEEDINGS

PART I

INTRODUCTION

1.1 This is the third paper in our review of the private law relating to the upbringing of children.[1] In it we consider the powers of courts in the custody jurisdictions, other than wardship, to make care, supervision and interim orders. All three of these matters were mentioned in our Working Paper on Custody, where we promised to return to them as soon as initiatives elsewhere were further advanced.[2] All will have to be resolved before we can attain our objective[3] of bringing together all the existing statutory jurisdictions relating to the guardianship and custody of children. Some deal with the inter-relationship between those jurisdictions and the child care and family service responsibilities of local authorities, on which the Government has recently announced its policy, in response to the Review of Child Care Law.[4] That has inevitably increased the urgency of some of the questions discussed in this paper.

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1 See Working Papers No. 91 on Guardianship (1985) and No. 96 on Custody (1986).

2 No. 96, para. 7.42.

3 Ibid., para. 1.4.

4 The Law on Child Care and Family Services (1987), Cm. 62, which responded to the Review of Child Care Law, Report to Ministers of an Interdepartmental Working Party (1985).

1.2 Part II of this paper deals with committals to care in "family" proceedings. The Government's recent White Paper on child care law proposes that the grounds for such committals, and their effects, be assimilated with those of care orders made in care proceedings.[5] We consider the implications of this proposal for the procedure adopted in family proceedings before a child is committed to care, including the machinery for representing the child's interests. We suggest that these matters can be brought further into line without undue upheavals in present practice.

1.3 The Review of Child Care Law also suggested that the Commission should consider a number of matters relating to supervision orders made in family proceedings which were causing problems in practice.[6] Part III reviews the law governing such orders and proposes a number of changes. The power to make supervision orders in family proceedings is derived from the courts' supervisory role towards children involved in divorce. Hence, the questions discussed in Part III depend in part upon the future of that supervisory role, which is discussed in our Working Paper on Custody.[7]

1.4 The final subject discussed in this paper is the power to make interim orders for custody and access in family proceedings. In Part IV we suggest that the power to make such orders should be harmonised across the custody jurisdictions. However, we also propose that the court should be given greater responsibility for reducing delays in this litigation.

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5 Op. cit. n. 4, paras. 36 and 59.

6 Op. cit. n. 4, para. 18.30.

7 Part IV.

1.5 In our Working Paper on Custody we referred to two other matters to which we hoped to return.[8] The first was the power to make custody orders in care proceedings. The Government has recently announced its policy on this in its White Paper on child care law.[9] Although the matter may have to be considered once more in the context of the Government's current review of family and domestic jurisdictions,[10] we do not see any value in our reconsidering it in this paper. The other, representation of children's interests in family proceedings generally, is the subject of large-scale research on behalf of D.H.S.S. by the Socio-Legal Centre for Family Studies at Bristol University. We think that it would be premature for us to consider representation, except insofar as is necessary in consequence of the Government's proposals on committals to care, until the findings of that research are known.

1.6 All of the matters in this paper have been the subject of review and comment for some time. We considered that, in the light of this previous discussion, it would be more helpful if we made provisional recommendations at this stage. However, we emphasise that these are indeed provisional and would welcome views on all the options discussed. We also recognise that some points may eventually have to be reconsidered in the light of the outcome of the review of family and domestic jurisdictions.

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8 Para. 7.42.

9 Op. cit. n. 4, para. 63.

10 Interdepartmental Review of Family and Domestic Jurisdiction, A Consultation Paper (1986). Ministers intend to be in a position to take decisions on arrangements for hearing family business not later than December 1987, para. 1.13.

PART II

COMMITTALS TO CARE IN FAMILY PROCEEDINGS

A. Introduction

2.1 Most orders committing a child to local authority care are made in care and in criminal proceedings. However, a child may also be committed to care "in exceptional circumstances" in certain family proceedings, namely in matrimonial and custody litigation between his parents or spouses who have treated him as a member of their family and in applications concerning adoption and custodianship.[1] Similar committals are also possible in wardship,[2] which will be dealt with in a later paper. The grounds for making care orders are quite different in care and in family proceedings. The effect of these orders upon the parents' rights also differs, although it is doubtful whether the differences are very important in practice. The Review of Child Care Law has recommended that both grounds and effects should be made the same in care and family proceedings.[3] They also recommended that we consider the procedural consequences of their proposal, including for the status and representation of the child, in the course of our review of the jurisdictions in which such committals may be made.[4]

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1 Matrimonial Causes Act 1973, s. 43(1); Guardianship Act 1973, s. 2(2)(b); Domestic Proceedings and Magistrates' Courts Act 1978, s. 10(1); Children Act 1975, ss. 17(1)(b) and 34(5). For the slightly different position on revocation of a custodianship order, see para. 2.14 below.

2 Family Law Reform Act 1969, s. 7(2).

3 Report to Ministers of an Interdepartmental Working Party (1985) ('R.C.C.L.'), paras. 8.22 and 15.37.

4 Ibid., paras. 14.18 and 16.41.

2.2 It might be helpful if, before turning to the issues of procedure and representation, we explain the origin of the powers to commit to care in family proceedings, indicate the scale of their use and outline the substantive proposals made in the Review.

Origin

2.3 The power to commit a child to care in matrimonial causes was first introduced in 1959[5] following the Royal Commission on Marriage and Divorce ('the Morton Commission').[6] It was an essential part of the Commission's scheme which required the court to satisfy itself, before a decree of divorce could be made absolute, that the spouses' arrangements for the children were satisfactory or "the best which can be devised in the circumstances".[7] The Commission reasoned that, infrequently, the spouse proposing to care for a child would be unable to offer satisfactory conditions for his upbringing. Having looked to the other spouse and also, "although conditions would have to be really bad before [such a] course could be contemplated", a third party, such as a relative, "the alternative [was] that the child should be received into the care of a local authority".[8] The recommendation was to "require" the local authority to receive the child into care.[9]

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5 Matrimonial Proceedings (Children) Act 1958, s. 5(1), which came into force on January 1 1959.

6 1951-1955 (1956), Cmd. 9678, Chairman: Lord Morton-of Henryton, Recommendation 37, para. 395.

7 As to which see Part V of their Report, in particular para. 373.

8 Ibid., para. 395.

9 Recommendation 37.

2.4 Such receptions are normally voluntary and give the local authority no right to keep the child if the parents wish to resume care.[10] In this case, however, "after the court has made an order in the exercise of this power, a spouse (or any other person) should not be able to get the child back without an order of the court."[11] Thus, the "reception" into care would be as compulsory from the parents' point of view as a care order made by a juvenile court.[12] Nevertheless, parental powers and duties do not vest in the local authority and, except for the prohibition on removal from care, the legal effect of an order was expressed to be "as if" the child had been received into care under a voluntary arrangement.[13] Committals to care in family proceedings still have this somewhat hybrid nature, which is attributable to the original reason for their introduction.

2.5 The Morton Commission also thought that the power to require the local authority to receive the child into care would be useful in matrimonial proceedings in magistrates' courts.[14] In 1960 this recommendation was incorporated in the predecessor to the Domestic Proceedings and Magistrates' Courts Act 1978, in largely the same terms

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10 Child Care Act 1980, s. 2(1)-(3). It has been said that 'voluntary care' is "a not wholly accurate term, but in common use", Lewisham L.B.C. v. Lewisham Juvenile Court Justices [1980] A.C. 273, 304, per Lord Scarman.

11 See n. 8.

12 During such a care order the local authority are required to keep the child in their care "notwithstanding any claim by his parent or guardian", Child Care Act 1980, s. 10(1). A parent may remove his child from voluntary care, although after six months the local authority may require 28 days notice before returning the child, s. 13(2).

13 See now the Matrimonial Causes Act 1973, s. 43(1).

14 Op. cit. n. 6, para. 410 and Recommendation 43.

as in 1958.[15] In 1969 the power was extended to wardship proceedings, following recommendations of the Committee on the Age of Majority, on the ground that it had proved to be a valuable power on divorce,[16] and in 1973 to applications for custody and access under section 9 of the Guardianship of Minors Act 1971.[17] Finally, under the Children Act 1975 the same power was introduced where an adoption application failed[18] and a rather broader power became part of the custodianship scheme which was eventually implemented in 1985.[19]

2.6 There are still a few similar proceedings in which the power does not exist. For example, the power does not extend to proceedings for the appointment of guardians,[20] or to custody applications when a person has been appointed sole guardian of a child to the exclusion of his mother or father[21] or where joint guardians disagree.[22]

2.7 These care committals can only be ordered in "exceptional circumstances" but they form what may be thought a surprisingly large proportion of compulsory admissions to care in civil proceedings. There were 700 admissions to care in family proceedings in the year ending

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15 Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(e).

16 Report (1967), Cmnd. 3342, Chairman: Mr. Justice Latey, paras. 261-262 and Recommendation 22.

17 Guardianship Act 1973, s. 2(2)(b).

18 Section 17(1)(b).

19 Sections 34(5), 36(2) and (3)(a).

20 Guardianship of Minors Act 1971, ss. 3, 4(4), 5, 6 and 7.

21 Ibid., s. 10.

22 Ibid., s. 11.

March 31 1984, forming 17% of all admissions to care under full orders of civil courts.[23] Moreover, on March 31 1984 there were around 7,000 children in compulsory care who had been admitted following family proceedings, some 26% of the compulsory child care population.[24] Since 1977 the total number of children in care under these provisions has nearly doubled.[25]

2.8 Nevertheless, the number of committals is small in relation to the number of family proceedings each year. For example, in 1986 the futures of 155,740 under-16-year-olds were considered in divorce and nullity proceedings.[26] Care committals formed around 3% of the

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23 349 of these admissions were in matrimonial causes, 238 in wardship under the Family Law Reform Act 1969 and 94 in Guardianship of Minors Act proceedings. Since 1980 admissions in England in matrimonial causes have nearly halved, whilst those in wardship have more than doubled. In 1984, 3,200 children were admitted to care in care proceedings under sections 1(2)(a)-(e) of the Children and Young Persons Act 1969, 1,400 more following proof of a criminal offence (including a small number of admissions in care proceedings under section 1(2)(f) of the 1969 Act). A further 2,200 children were admitted under interim orders which had not been converted to full care orders, by March 31 1984: D.H.S.S., Children in Care in England and Wales March 1984 (1986), Table A3.

24 Excluding children in care on that date under interim care orders or following criminal proceedings or proof of the 'offence condition' in care proceedings. Of the total, 4,705 children were in care under orders made in matrimonial causes: ibid., Table A1.

25 In 1977 there were 3,863 of such children, 2,710 under the Matrimonial Causes Act 1973. Given the recent decline in committals to care in matrimonial causes, it may be that a 'backlog' of children who were admitted in the late 1970's/early 1980's have remained in care. Large increases have also occurred in the number of children in care who are wards of court (from 174 in 1977 to 1,345) and who were committed to care in proceedings under the Guardianship of Minors Act 1971 (from 206 to 651): 1977 figures supplied by D.H.S.S., relating to English authorities only.

26 O.P.C.S. Monitor FM2 86/2, Table 7.

number of custody orders made in such causes in 1985, and in one-third of divorce county courts no care committal was made.[27] In magistrates' courts care committals formed only 0.4% of the number of custody orders made in matrimonial disputes.[28]

Grounds for Committal to Care

2.9 The ground for committal to care in family proceedings is at present quite different from those in care proceedings. In the latter there must be proof of specific pre-conditions relating to harm (or risk of harm) to the child or to his behaviour. The court must also find that the child is in need of care or control which he is unlikely to receive if an order is not made.[29] Finally, in deciding whether to commit the child to care, the court should give "first and paramount" consideration to the welfare of the child.[30] In family proceedings, there must simply appear to be "exceptional circumstances making it impracticable or undesirable for the child to be entrusted" to one of the parents or spouses, or to any

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27 Divorce county courts made 550 care committals and 82,059 custody orders in that year. The former figure considerably exceeds the 349 children received into care following matrimonial causes in 1983-4, as recorded by D.H.S.S. Differences may be attributable to the collection and presentation of data. See Priest and Whybrow, Supplement to Working Paper No. 96, Custody Law in Practice in the Divorce and Domestic Courts (1986), paras. 7.9-7.10.

28 Home Office Statistical Bulletin 36/86, Table 2. In 1985 there were 30 committals to care and nearly 8,000 custody and access orders under the Domestic Proceedings and Magistrates' Courts Act 1978. The number of care committals made in domestic courts under the Guardianship of Minors Act 1971 is not recorded.

29 Children and Young Persons Act 1969, s.1(2).

30 Guardianship of Minors Act 1971, s.1; see Re C. (1979) 2 F.L.R. 62, 65.

other individual.[31] The court may then commit the child to care if this is in his best interests.

2.10 The Review of Child Care Law criticised the 'exceptional circumstances' criterion. In their view it added little to the requirement to give paramount consideration to the child's welfare, "given that only in exceptional circumstances would a court or local authority even consider compulsory intervention and given the readiness of the courts ... to assume that generally a child's welfare is best served by his being brought up by his parents".[32]

2.11 The Review considered that for the sake of fairness, as well as logic and simplicity, the grounds for such committals in care and family proceedings should be the same.[33] The effect of compulsory orders is similar in practice in both such proceedings and, under their proposals,[34] would become the same in law. As the Review commented, "it would be difficult to justify having different grounds for what is in effect the same order, depending on what may often be a matter of chance, namely whether the family's problems or circumstances bring the child before the

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31 Matrimonial Causes Act 1973, s.43(1); Guardianship Act 1973, s. 2(2)(b), applied to applications for custodianship by section 34(5) of the Children Act 1975; Domestic Proceeding and Magistrates' Courts Act 1978, s.10(1). In wardship proceedings, impracticability or undesirability is not tied to "entrusting" the child to a person, rather to the ward being or continuing to be under his parents' or any other persons "care", Family Law Reform Act 1969, s. 7(2). Presumably this is because the person caring for a ward is not entrusted with the child in the fullest sense of that word, the court retaining guardianship of the child. As to the meaning of "entrusting", see R. v. G. [1984] Fam. 100.

32 Op. cit. n. 3, para. 15.11.

33 Ibid., paras. 15.35 - 15.38.

34 See paras. 2.15-2.17 below.

court in family or care proceedings".[35] The Review recommended a single set of grounds for all care committals, except in wardship proceedings in relation to which the Review refrained from specific proposals.[36]

2.12 The recommendation was that in care and family proceedings the court should have power to make a care order only where it is satisfied:

> "a. that there is or is likely to be a substantial deficit in the standard of health, development or well-being that can reasonably be expected for the child; and
>
> b. that that deficit or likely deficit is the result either of the child not receiving or being unlikely to receive the care that a reasonable parent can be expected to provide or of his being beyond parental control; and
>
> c. that the order contemplated is the most effective means available to the court of safeguarding and promoting the child's welfare."[37]

2.13 The Review hoped that this formula would clearly reflect "the policy underlying the law and by setting it out would provide better protection in every respect for parents and children than do the present preconditions".[38] It was recognised that the new grounds might not

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35 Op. cit. n. 3, para. 15.35.

36 Para. 15.38.

37 Para. 15.25.

38 Ibid.

cover every case in which a committal to care is currently made in family proceedings, particularly on divorce.[39] We understand that an order under section 43 of the Matrimonial Causes Act may be made relatively commonly to confirm the child's current residence in voluntary care.[40] In contrast, care orders in care proceedings typically involve the child's involuntary admission to care. The Review commented that "it is questionable whether any special aims of orders made in family proceedings should be achieved by compulsory order. Rather, in cases where all that is aimed [at] is the retention or reception of a child into voluntary care it should be achieved by obtaining agreement from the parties".[41] The mere fact of divorce should not be sufficient to turn a voluntary arrangement into a compulsory one. This approach also accords with the proposals in our Working Paper on Custody to reduce the pressure to make orders in respect of children's upbringing on divorce.[42]

Custodianship

2.14 The Review's proposal for assimilated grounds extended to the somewhat broader criterion currently applicable on the revocation of a custodianship order. There, the court must commit a child to care if, on revocation, either (i) there is no one in whose legal custody the child would be, or (ii) it is not desirable in the interests of the child's welfare for a person who would have legal custody to do so.[43] These special rules

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39 Para. 15.36.

40 Priest and Whybrow, op. cit. n. 27, paras. 3.6 - 3.7, 5.35 and 7.11.

41 Para. 15.36.

42 No. 96, paras. 4.17 - 4.21.

43 Children Act 1975, s. 36(2) and (3)(a).

presumably reflect the fact that custodianship was intended as a revocable alternative to adoption, often for children who were already in care.[44] If custodianship breaks down it may clearly be inappropriate for a child simply to return to his parents. These provisions ensure that the authority will take or resume responsibility. However, it is not clear why only in these particular situations the 'exceptional circumstances' criterion was not considered sufficient to protect the child. That criterion too turns on the practicality and the desirability of the child being entrusted to a person with the right to the child's legal custody. Nor is it clear why there is a duty rather than a discretion to commit to care. Hence, the Review saw no reason to exclude the revocation of custodianship from their recommendation.

Legal Effects of Committal to Care

2.15 A care order made by a juvenile court vests parental powers and duties in the local authority.[45] In contrast, committals to care in family proceedings do not transfer parental authority. Although, by virtue of looking after the child [46] the local authority is under certain duties towards him, parental 'rights' remain with the parents, as if the child were in voluntary care, except that he may not be discharged from care without the court's permission.[47] Additionally, when the child has

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44 The background to custodianship is explained in our Working Paper No. 96 on Custody, paras. 5.15 et seq. See also Freeman, Law and Practice of Custodianship (1986), Chapter 6.

45 Child Care Act 1980, s. 10(2).

46 An 'actual custodian' of a child is under the same duties towards him as a legal custodian would be, Children Act 1975, s. 87(2).

47 Matrimonial Causes Act 1973 s. 43(3); Guardianship Act 1973, s. 4(5), applied to adoption and custodianship proceedings by the Children Act, ss. 17(3), 34(5) and 36(6); Domestic Proceedings and Magistrates' Courts Act 1978, s. 10(5).

been commited to care in matrimonial causes or in proceedings in the High Court, the court may give directions to the local authority about the child's upbringing while in care.[48] No such power (except in limited circumstances in relation to access)[49] exists under a care order, nor where a committal is made by a magistrates' court or a county court in other family proceedings. Finally, the local authority's general powers under the Child Care Act 1980 in respect of children in care are slightly restricted for children committed to care in family proceedings. For example, the duty to provide after care to children who leave care after reaching 16 does not apply to them.[50]

2.16 The Review concluded that:

> "The present provisions are in our view unnecessarily complicated and, by not vesting parental power in local authorities [in family proceedings cases], both impede the making of strategic decisions and are a recipe for conflict with the parents. From the point of view of the parents and the child, the committal will usually be tantamount to a full care order since it is compulsory and may last until the child is 18. Further we believe that in practice the directional power of the court is rarely used except perhaps to deal with questions of access. Since we recommend ... that any court which makes a committal to care, or before which the

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48 Matrimonial Causes Act 1973, s. 43(5)(a); Guardianship Act 1973, s. 4(4)(a). As to the exercise of these directional powers see Re Y. [1976] Fam. 125; Turney v. Turney and Devon C.C. (1981) 4 F.L.R. 199; Re R. [1983] 1 W.L.R. 991 and J. v. Devon C.C. [1986] 1 F.L.R. 597.

49 See the Child Care Act 1980, ss. 12A-12G.

50 Matrimonial Causes Act 1973, s. 43(5)(b); Guardianship Act 1973, s. 4(4)(c); Domestic Proceedings and Magistrates' Courts Act 1978, s. 10(4)(a).

upbringing of a child who is in care is being considered, should be able to deal with questions of access, the additional directional powers as in the family statutes will be largely superfluous."[51]

2.17 The Review therefore recommended that the legal effects of committals to care be harmonised with those of a care order. There should be no power to give directions to the local authority except in wardship proceedings, although it would remain possible for the High Court and divorce courts to direct that the child be made a ward.[52] Once again the Review made no proposals as to the effects of wardship. Wardship always enables the court to maintain a supervisory role over the child's welfare.[53]

2.18 The Government has accepted the Review's proposals as to the grounds and effects of care committals.[54] In the remainder of this Part, therefore, we shall consider the procedural implications of these in family proceedings apart from wardship, including such implications for the representation of the child.

B. Procedure

2.19 The Review made a number of proposals concerning rights of participation and representation in care proceedings and to restrict the

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51 Op. cit. n. 3, para. 8.21.

52 Para. 8.22. However, it seems that this power is rarely used and there may be some uncertainty as to how it should operate in contested cases where neither party may wish to bring such proceedings.

53 See para. 8.23.

54 In the White Paper, The Law on Child Care and Family Services (1987), Cm. 62, paras. 36 and 59.

making and duration of interim care orders. Only some of these measures are matched at present in family proceedings. It seems to us that, in principle, once the grounds and effects of care orders are assimilated, the same procedural safeguards thought necessary in care proceedings should also apply in family proceedings.

2.20 The case for procedural assimilation seems to follow from assimilation of the grounds for an order, in that it may be difficult otherwise for the court to consider fully whether those grounds are satisfied. It also seems to follow from assimilation of the effects of the orders in that those affected by the committal should be given the same right to dispute the grounds as they would have in proceedings before a juvenile court. Otherwise, family proceedings committals would remain a 'backdoor' entry to compulsory care. The removal of such anomalies was one of the aims of the Review.[55] We have therefore proceeded in this Part on the basis that any differences between care and family proceedings require specific justification.

The Applicant

2.21 The Review of Child Care Law recommended that only the local authority and others specifically authorised by the Secretary of State (at present only the N.S.P.C.C.) should be entitled to bring care proceedings.[56] They suggested that certain duties be imposed on the applicant such as indicating briefly the facts which are to be proved to support their allegations, serving a statement of plans for the child in the event of an order being made and supplying the court with a list of 'persons interested' in the child's upbringing, such as parents, relatives and others who have cared for him.[57] In family proceedings at present,

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55 Op. cit. n. 3, paras. 2.4-2.7 and see also op. cit. n. 54, paras. 7-8.

56 Op. cit. n. 3, paras. 12.9-12.26.

57 Ibid., paras. 16.5, 16.7-16.9 and 14.19, respectively.

there may be no 'applicant' for a care committal, although a local authority may seek leave to intervene in divorce proceedings for that purpose.[58] We suggest that the local authority in such circumstances, once granted leave to intervene, should be treated as an applicant and be placed under the same duties as if they had made an application in care proceedings.

2.22 The possibility of committal to care in family proceedings may also arise on the court's own initiative. The court may be concerned, having received oral or written evidence and sometimes also a welfare officer's report, that the child should remain in voluntary care or should be removed from (or not returned to) the people proposing to look after him. At present the only procedural requirement before an order may be made is that the local authority be given the chance to make representations to the court.[59] A minimum of 14 days' notice is the prescribed period for most courts,[60] although we understand that in

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58 By implication of the Matrimonial Causes Rules 1977, r. 92(3).

59 Matrimonial Causes Act 1973, s. 43(2); Guardianship Act 1973, s. 4(2); Domestic Proceedings and Magistrates' Courts Act 1978, s. 10(3). If no notice is given the order will have been made without jurisdiction, although in an emergency "a telephone call to the local authority will conceivably short-circuit the procedure": M. v. M. (1978) 1 F.L.R. 327, 329, per Ormrod L.J.

60 Matrimonial Causes Rules 1977, r. 93(1), applied to proceedings in the High Court under the Guardianship Act 1973 by R.S.C. O. 90, r. 11(1); C.C.R. O. 47, r. 6(2) (proceedings under the Guardianship of Minors Act 1971); Adoption Rules 1984, r. 26; Magistrates Courts (Adoption) Rules 1984, r. 26; R.S.C. O. 90, r. 26, applied to county courts by C.C.R. O. 47, r. 7(3) (custodianship); Magistrates' Courts (Custodianship Orders) Rules 1985, r. 9. At least ten days' notice is required by the Magistrates' Courts (Guardianship of Minors) Rules 1974, r. 7 and no time period is specified in the Magistrates' Courts (Matrimonial Proceedings) Rules 1980, r. 7.

practice the period may be extended to give the authority or parents sufficient time to prepare their case. To expect the court itself to carry out the burden of investigation into the care issue would involve a substantial change in its function. Moreover, as the Review commented, it is advantageous for "the social services department [to be] in the lead and firmly identified by themselves and others as having the primary responsibility for the child".[61] In our view it is desirable that the authority be treated as the applicant in these circumstances and be required to carry out the duties of an applicant in care proceedings. If the local authority were to find that there was no case for compulsory care or preferred to argue for supervision they could return to court for further directions.

2.23 Thus, whether it is the court or the local authority which takes the initiative towards a care order, we suggest that the local authority be treated as an applicant in care proceedings. We envisage that the court in family proceedings would make a direction (a 'care direction') converting the issue relating to the child into an application for care. In some cases this would require an adjournment for the parties to prepare their case and, as is explained below, for an independent report to be compiled for the court. In practice, however, we do not think this would amount to a substantial change from the present.

The Child

2.24 Care and family proceedings differ very substantially in the measures taken for representation of the child before a care order is made. In care proceedings, which are largely modelled on the criminal process, an application is brought against the child, who is always the

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61 Op. cit. n. 3, para. 12.17.

respondent and entitled to legal representation.[62] A child who is old enough may instruct his own lawyer. If the child is too young to give instructions, or does not wish to, the lawyer is entitled to decide how to put the child's case and he is not obliged to take instructions from the child's parents.[63] In such circumstances a practice was developed of retaining an independent social worker as an expert witness to investigate where the child's interests lay. However, since 1984 the court itself has had power to appoint a "guardian ad litem" for the child where there is or may be a conflict of interest between parent and child.[64] The guardian ad litem is a social worker who, as is explained in more detail later, is under certain duties towards the child, makes a report to the court and may also be involved in appointing and instructing of the child's solicitor. The Review of Child Care Law recommended that the child remain a party to care proceedings and that such a guardian ad litem be appointed unless it was unnecessary to do so.[65]

2.25 In family proceedings, on the other hand, the child is rarely made a party, even when a committal to care is contemplated, and domestic and (in adoption and custodianship proceedings) county courts

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62 Children and Young Persons Act 1969, s. 1(1); Magistrates' Courts (Children and Young Persons) Rules 1970, rr. 13(2), 14(6)(c) and (d) and 17(1).

63 R. v. Worthing Justices, ex p. Stevenson [1976] 2 All ER 194; Re S. [1978] Q.B. 120, 144, per Cumming-Bruce L.J.

64 Children and Young Persons Act 1969, ss. 32A and 32B; Magistrates' Courts (Children and Young Persons) Rules 1970, r. 14A.

65 Op. cit. n. 3, paras. 14.10-14.17.

have no power to make him one.[66] The proceedings usually take place between his parents or other persons seeking to care for him, such as prospective adopters or custodians. Although a welfare officer's[67] report will often be made available beforehand, generally none is required.[68] If the child is made a party in the High Court or county courts, a guardian ad litem must be appointed for him[69] and in divorce cases it is possible to appoint a guardian without making the child a party.[70] However, such guardians are not social workers and are not covered by the precise rules

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66 See the Adoption Rules 1984, rr. 4(3) and 15(3) (county courts) and the Magistrates' Courts (Adoption) Rules 1984, r. 4(3) and 15(3). In custodianship proceedings the High Court may join the child as a party and appoint a guardian ad litem: R.S.C. O. 90, r. 18, but this rule is excluded in county courts: C.C.R. O. 47, r. 7(4) and a domestic court may only direct that the child be made a defendant in limited circumstances relating to periodical payments: Magistrates' Courts (Custodianship Orders) Rules 1985, r. 5(16).

67 In matrimonial causes the court may request a court welfare officer's report: Matrimonial Causes Rules 1977, r. 95(1). A welfare officer, except at the Principal Registry, is a probation officer, see the Probation Rules 1984, r. 20(3). In the other jurisdictions the court may request a report from either a probation officer or the local social services authority: Guardianship Act 1973, s. 6; Children Act 1975, s. 39; Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(3). A probation officer may also report to the court in adoption proceedings, as a guardian ad litem or reporting officer: Local Authority Circular L.A.C. (83) 21, para. 11; see the Children Act 1975, s. 20; Adoption Rules 1984, rr. 5, 6, 17 and 18 and the Magistrates' Courts (Adoption) Rules 1984, rr. 5, 6, 17 and 18. In this Part the term 'welfare officer' indicates, except for the Principal Registry, an officer of the probation service.

68 A report is sometimes required in adoption, see ibid. A local authority report is mandatory in custodianship applications, Children Act 1975, s. 40.

69 R.S.C. O. 80, r. 2(1); C.C.R. O. 10, r. 1(2).

70 Matrimonial Causes Rules 1977, r. 115.

laid down in care proceedings. They must act through solicitors, unless, of course, the Official Solicitor himself is appointed.[71]

2.26 These differences will become even more marked when the grounds and effects of care orders are assimilated. At present the Centre for Socio-Legal Studies at Bristol University is conducting research into the question of representation of children for all civil proceedings relating to their upbringing. At this stage, therefore, we will simply consider how far, in the light of the Review's recommendations, the family and care regimes could be made more consistent.

2.27 Representation of the child's interests breaks down into two issues: provision of a solicitor to act on his behalf and the appointment of a social worker or welfare officer to protect his interests and report to the court. The Review emphasised the need for an independent report from an officer charged with safeguarding the child's interests. In care proceedings there should be a report from a guardian ad litem "unless it appears unnecessary to do so in order to safeguard the child's interests", a wider criterion than at present.[72] In family proceedings, it does not seem necessary to require a report when a care direction is made since, for example, the court may have already received a welfare officer's report recommending that care be provided. However, given the more stringent grounds and the value of a view independent of the local authority concerned, it may not be unreasonable to require the court on making a 'care direction' to order an independent report unless it is unnecessary to do so to safeguard the child. Such a requirement is unlikely to do other than confirm the courts' current practices.

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71 R.S.C. O. 80, r. 2(3).

72 Op. cit. n. 3, para. 14.12.

2.28 It is less clear who should write the report. In divorce proceedings reports are provided by divorce court welfare officers; save at the Royal Courts of Justice, these are probation officers. In other proceedings reports may be provided by probation officers or the local authority.[73] In care proceedings probation officers are specifically excluded from the local authority-run panels of guardians ad litem.[74] The composition of these panels varies, with some social services departments providing guardians for neighbouring authorities and others employing freelance social workers.[75] The method of selecting guardians can also vary. The guardian must of course be independent of the authority concerned in the case.[76] In some areas the court chooses an appropriate officer from a list supplied by the panel administrator, whilst in others the choice is left to that official.[77] At present it is stipulated that guardians ad litem have a "broad range of experience of work with families and children as well as with children needing to live temporarily or permanently apart from their parents".[78] Indeed, many will have direct experience of work in social services departments. On the other hand, the current panel arrangements have been criticised for not appearing sufficiently independent of the local authority applicant in the case.[79] Moreover, extending guardians' duties to family proceedings

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73 See n. 67.

74 Magistrates' Courts (Children and Young Persons) Rules 1970, r. 14A(2)(c).

75 Murch with Bader, Separate Representation for Parents and Children: An Examination of the Initial Phase (1984), Section III.

76 Op. cit. n. 74, r. 14A(2)(a).

77 Op. cit. n. 75, pp. 98-101.

78 Local Authority Circular L.A.C. (83) 21, para. 10.

79 Legal Action, June 1984, Editorial.

would have serious resource implications. There may also be advantages in drawing on the experience of court welfare and other officers in the field of family disputes. In some cases it may be desirable to maintain a court welfare officer's involvement in a family proceedings case even after a care direction has been made. In many, it would be an unnecessary duplication to require a different person to investigate a case in which he has already been involved.

2.29 We would welcome views on which officers should be expected to report to the court on the care issue in family proceedings. Irrespective of who should perform this task, it seems to us that the reporting officer should be under the same duties whichever court is considering, or being asked to consider, whether to make a care order. The tasks of a guardian ad litem in care proceedings include duties of investigation (for example of such records as he thinks appropriate), report writing and appointing and instructing a solicitor for the child.[80] His overall responsibility is "to safeguard and promote the infant's best interests until he achieves adulthood" and to take into account, and make known to the court, the child's wishes and feelings "having regard to his age and understanding".[81] Aside from the question of appointing and instructing a solicitor, which we discuss below, in our view extending these duties to officers asked to report in family proceedings when a care direction is made would assist in clarifying and making consistent the information which should be presented to a court before a child may be committed to care.

2.30 As to legal representation, adopting the Review's proposals would involve a considerable change in family proceedings. The Review recommended that a solicitor be appointed for the child in four

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80 Magistrates' Courts (Children and Young Persons) Rules 1970, r. 14A(6).

81 Ibid., r. 14A(6)(b).

situations.[82] The first, when the court so directs, would reflect the position in some family proceedings but involve an extension of domestic magistrates' courts' powers and those of the county court in adoption and custodianship proceedings.[83] It seems to us to be as important for a domestic court to be able to appoint a solicitor for the child when this is in the child's interests as it is for a juvenile court to do so. We therefore suggest that a court in family proceedings after a 'care direction' has been made should be able to make the child a party and cause a solicitor to be appointed for him, when it considers it to be in his interests to do so.

2.31 The Review's second proposal was that a solicitor be appointed when the guardian ad litem sought this. The present rules require a guardian to appoint and instruct a solicitor in some circumstances and seek the court's instructions on this in others.[84] If similar guardians ad litem were to be introduced into family proceedings when a care committal is contemplated it would be anomalous to give them lesser powers than they have in care proceedings. For the time being the officer having the same role as a guardian in such cases should be able to ask the court to appoint a lawyer for the child, but we would welcome views on whether he himself should be able to appoint (or instruct) a solicitor. To some extent it may depend upon the success of the present division of responsibility between guardians and solicitors in care cases, which is under investigation in the Bristol University research.

2.32 The third circumstance in which the Review thought that the child should be legally represented was when there was no guardian ad

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82 Op. cit. n. 3, para. 14.17.

83 See para. 2.25 above.

84 Magistrates' Courts (Children and Young Persons) Rules 1970, r. 14A(c) and (d).

litem. This recommendation was presumably directed towards ensuring that, as at present, the child always has someone to represent him in care proceedings, although in some cases the appointment of a guardian may make a lawyer unnecessary. Since at present a child in family proceedings is unlikely to be legally represented that argument does not apply. Rather, this recommendation rests on whether the child's interests always require representation (legal or otherwise). Cases in which there was no guardian ad litem, or the equivalent in family proceedings, would be rare under the Review's proposals and therefore provision of a lawyer under this head would involve little change in practice. In both care and family proceedings it is the child who is most intimately affected by a committal to care. Moreover, the effect of compulsory care is the same irrespective of the forum. A care committal endures, unless discharged, until his eighteen birthday[85] and, under the Review's proposals, the local authority will have parental powers over him for the duration of the order.[86] Such powers may be more extensive than those of a parent in respect of an older child,[87] for example in relation to controlling where he will live and placing him in secure accommodation. Figures supplied by D.H.S.S. suggest that a large proportion of children committed to care in matrimonial causes have tended to remain there for a long time.[88] Hence, the serious

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85 Matrimonial Causes Act 1973, s. 43(4); Guardianship Act 1973, s. 4(1); Domestic Proceedings and Magistrates' Courts Act 1978, s. 10(6).

86 Op. cit., n. 3, para. 8.12.

87 See Gillick v. West Norfolk and Wisbech Area Health Authority [1986] A.C. 112.

88 Figures supplied by D.H.S.S. indicate that, on March 31 1984, 63% of the children in care under the Matrimonial Causes Act 1973 had been in care for over three years. In 1977 the figure was only 35%.

consequences for the child, coupled with the fact that otherwise the court may be proceeding without hearing an independent view, suggest that his interests should always be represented by someone.

2.33 On the other hand, it is commonly argued that the court's duty to further the child's best interests renders his automatic legal representation superfluous. The court, backed by its power to request reports, is said to do all that is necessary to protect the child. Hence in wardship, the courts have discouraged making a child, particularly a young child, a party: "the interests of the child would have been adequately safeguarded, having regard to her very young age, by the proceedings being constituted with the local authority as plaintiffs and the natural mother as defendant", otherwise all that representation (by the Official Solicitor) achieves may simply be "a statement of opinion".[89] Against this, it could be said that the presence of an advocate for the child could enable the court to hear argument from a different standpoint. In particular, a lawyer for the child might expose weaknesses in a plan agreed between the local authority and parents. The child's lawyer could also play an important role in protecting the child's interests during the sometimes protracted period before the hearing. Our present view is that the balance lies in favour of automatic legal representation if no independent report into the care issue has been obtained.

2.34 The arguments against legal representation do not apply as strongly to cases in which the child himself is old enough to instruct a solicitor and wishes to do so. This was the fourth circumstance in which the Review recommended a child be legally represented. Of course, in many cases the child will be too young to instruct a solicitor and in others he may not wish to have his own lawyer. Nevertheless, adopting this proposal would probably involve a greater degree of legal representation

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89 Re F. (1982) 3 F.L.R. 101, 109 per Ormrod L.J.

in family proceedings than occurs at present. For the reasons given above, however, it is difficult to argue against the right of an older child to legal representation if he wishes it. These arguments are strengthened by the Review's recommendation that the child should be entitled to apply for the discharge of a care order.[90] If this recommendation is applied to care committals in family proceedings, it would be anomalous to accord a child who wished to contest his committal to care lesser rights of participation than one who seeks to discharge the court's order.

2.35 To summarise the child's position, therefore, it is suggested that a report should be commissioned when a care direction is made "unless to do so is unnecessary to safeguard the interests of the child", for example because an adequate report has already been obtained. The report should be commissioned from either a member of the guardian ad litem panel or from a court welfare officer under similar responsibilities. Legal representation should be available for the child at least where the court so directs, or the child is old enough to instruct a solicitor and wishes to do so, or no independent report has been obtained. If the guardian ad litem or welfare officer wishes the child to be legally represented we suggest that he should be able to ask the court so to direct.

Parents

2.36 The Review also recommended that the child's parents be made parties to care proceedings. Included in this definition were "those whose parental rights are at stake in the proceedings". That is to say, both parents if they are or have been married to one another, the mother if they have not, a legally appointed guardian and any person granted legal custody, custody or care and control by a court order.[91] A child's

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90 Op. cit. n. 3, para. 20.3.

91 Ibid., para. 14.5.

parents[92] or guardian[93] are already parties in most family proceedings in which care committals are made. A person who has custody will also be heard in most family proceedings.[94] There is some doubt about the ability of a guardian or other non-parent to be heard in a domestic magistrates' court although that may remain in the court's discretion.[95] It

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92 Parents will be parties automatically in adoption and custodianship proceedings and, normally, in proceedings under section 9 of the Guardianship of Minors Act 1971: Adoption Rules 1984, rr. 4(2)(a) and 15(2)(a); Magistrates' Courts (Adoption) Rules 1984, rr. 4(2)(a) and 15(2)(a); R.S.C. O. 90, r. 16(1), applied to county courts by C.C.R. O. 47, r. 7(3); Magistrates' Courts (Custodianship Orders) Rules 1985, r. 5(1)(a). A parent who is not a party probably has the right to intervene in matrimonial causes: see Matrimonial Causes Rules 1977, r. 92(3) and Working Paper No. 96, para. 2.18. A parent who is not a party will be heard in matrimonial proceedings in magistrates' courts: Domestic Proceedings and Magistrates' Courts Act 1978, s. 12(1) and (2).

93 For the position in adoption, custodianship and matrimonial causes, see ibid. Any person appearing to be interested in or affected by an application under section 9 of the Guardianship of Minors Act 1971 must be made a party: R.S.C. O. 90, r. 6(1); C.C.R. O. 47, r. 6(1). No provision is made for joining a child's guardian in magistrates' courts.

94 A person with actual or legal custody of the child must be made defendant to a custodianship application: R.S.C. O. 90, r. 16(1)(e), applied to county courts by C.C.R. O. 47, r. 7(3); Magistrates' Courts (Custodianship Orders) Rules 1985, r. 5(1)(e). In adoption the court has power to direct that a person be made a party: Adoption Rules 1984, rr. 4(3) and 15(3); Magistrates' Courts (Adoption) Rules 1984, rr. 4(3) and 15(3). In matrimonial causes a person with custody or control under a court order may intervene without leave in the proceedings: Matrimonial Causes Rules 1977, r. 92(3). As to the Guardianship of Minors Act 1971 and the Domestic Proceedings and Magistrates' Courts Act 1978, see n. 93.

95 As to the court's discretion in care proceedings, see R. v. Milton Keynes Justices, ex p. R. [1979] 1 W.L.R. 1062 and R. v. Gravesham Juvenile Court ex. p. B. (1982) 4 F.L.R. 312.

could be argued that this doubt should be removed. Such 'parents' would then have to receive notice of the hearing. They could either automatically be made defendants, as they are in the event of a custodianship direction made in magistrates' court proceedings for adoption or between parents or spouses,[96] or they could simply have the right to intervene in the proceedings, as is provided for divorce proceedings by the Matrimonial Causes Rules 1977.[97] Complete assimilation of care committals in whatever forum they arise would require that parents be made parties automatically on the making of a care direction.

2.37 Other people who will become parties to care proceedings are those with a statutory right to apply for custody or access, such as extra-marital fathers and people qualified to apply for custodianship, if they wish to exercise it.[98] These people already have the right to apply to the High Court, a county court or a domestic court[99] and there should be nothing to prevent their applications being heard at the same time, once the court has made a care direction. Similarly, even if there is no statutory right to apply, it is recommended in the Government's White Paper that the juvenile court should be able to permit anyone with a proper interest in the child to be joined as a party, with a view to awarding that person custody should the first two limbs of the grounds be

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96 Magistrates' Courts (Custodianship Orders) Rules 1985, r. 6(1); cf. R.S.C. O. 90, r. 21 (2) and (3), applied to county courts by C.C.R. O. 47, r. 7(3), whereby appointment of further parties is made discretionary.

97 Rule 92(3) and see n. 92 above.

98 See the White Paper, The Law on Child Care and Family Services (1987), Cm. 62, para. 55.

99 Guardianship of Minors Act 1971, ss. 14(1) and 15(1); Children Act 1975, ss. 33(1) and (3) and 100(2).

proved.[100] Courts in most family proceedings already have wide powers to grant custody to third parties[101] and so no adjustment would be needed here.

2.38 Finally, the White Paper proposes that other people should be able to take such part in the proceedings as the court directs, short of being granted full party status.[102] This recommendation would allow participation by "relatives, friends and actual custodians", and was made on the basis that "full participation of a closely involved person would be helpful, sometimes vital".[103] The need for such a power is perhaps equally strong in all proceedings where a child may be committed to care.

C. Interim Orders

2.39 The purpose of an interim care order is to protect the child whilst the parties prepare for the full hearing. In divorce proceedings the court may grant interim "care and control" to the local authority, although in such a case the local authority's statutory powers in respect of children in their care do not apply and the status of the child is uncertain.[104] In other family proceedings there is no statutory power to make interim care orders.

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100 See n. 98.

101 In matrimonial causes the court may make any such order as it thinks fit for the custody or education of the child: Matrimonial Causes Act 1973, s. 42(1). See also the Children Act 1975, s. 37(3) and the Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(3).

102 Op. cit. n. 98, para. 56.

103 R.C.C.L., op. cit. n. 3, para. 14.8.

104 See Re C.B. [1981] 1 W.L.R. 379; Lewisham Borough Council v. M. [1981] 1 W.L.R. 1248.

2.40 The Review's recommendations for care proceedings concentrated on two issues which were causing concern: the circumstances in which interim care orders are made and their duration. Their aim was that "care proceedings should be dealt with as soon as possible" because delay would usually be detrimental to the child's interests and "during an interim care order the child is subject to uncertainty which is inevitably unsettling for him".[105] Hence, the court should keep an application for compulsory care under tight control. At the interim hearing a date should be fixed for the full hearing and an interim order should not be made to last for more than eight weeks. The interim period could only be extended beyond eight weeks, for a further 14 days at a time, in "exceptional circumstances making it necessary".[106] The same time limits would apply to adjournments where the child was not committed to interim care.[107] There could be a further adjournment and/or interim order during the full hearing once the court was satisfied of the first two limbs of the proposed grounds, if it needed further information to decide what order, if any, is likely to be the most effective means of safeguarding and promoting the child's interests.[108]

2.41 The White Paper also accepts the Review's recommendation that the court be satisfied of specific criteria before making an interim order. The court should find that there is reasonable cause to believe that the child is suffering harm, or is likely to suffer harm, as a result of not receiving a reasonable standard of parental care. There should

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105 Op. cit. n. 3, para. 17.4.

106 Para. 17.17.

107 Para. 17.19.

108 Para. 17.22.

also be reasonable cause to believe that the power to remove or detain a child is necessary to safeguard his welfare in the interim period.[109]

2.42 It is arguable that in principle the court in family proceedings should operate the same regime in the interim period as is applicable in care proceedings. The opportunity for delay and the prejudicial effect of an interim order on the outcome of the case may be just as great. This is particularly so where a local authority has intervened to seek the committal of a child who is still at home.

2.43 If total assimilation were to be pursued, several of the Review's recommendations would have to be incorporated into family proceedings. First, some courts would have to be given power to make interim care orders. Secondly, it would have to be stated that an interim order could only be made after a care direction has been made, that is after the machinery of a care application had been set in motion.[110] Thirdly, the grounds and effects of an interim order would have to be the same as in care proceedings, so that the making and the duration of interim care committals would be as closely circumscribed in both the family and care jurisdictions. Fourthly, parents and others would have the same rights to be heard on the interim issue.

2.44 The last two proposals, however, might cause some practical difficulty in that the court, when making a care direction, may consider that the child should be taken into or kept in care pending the full hearing although the case for an interim care committal has not been argued. There may not have been time to arrange an inquiry into the grounds for interim care, and the local authority or the parents and others who would be entitled to contest such a committal may not be present or properly

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109 R.C.C.L., op. cit. n. 3, paras. 17.8 and 17.9 and the White Paper, op. cit. n. 98, para. 61.

110 See R.C.C.L., ibid., para. 17.5.

prepared to substantiate their arguments. However the same problem may arise at present, for example where the court has to adjourn to give notice to the local authority. For the interim period the court has to act on whatever evidence it has.

2.45 We consider, therefore, that there is a case for restricting interim care orders in family proceedings to the same grounds as will apply in care proceedings. These only require that the court has reasonable cause to believe in their existence, but they should ensure that such orders are not made unless it is necessary. Additionally, we consider that if the proposed time limits are practicable in the light of the stringent procedural requirements of care proceedings, there is also a case for imposing them in these family proceedings. The same time limits should also apply to adjournments where no interim care order is made. We do not believe, however, that it will always be practicable to give parents and others a right to be heard before an interim order is made and that strengthens the case for a strict statutory timetable. An even shorter order would normally be appropriate in such cases, to permit the family to appear on the next occasion, but the total period before the full hearing should be no longer.

D. Other Matters

2.46 The Review made a number of recommendations to encourage disclosure of the allegations, evidence and information before the hearing thus making care proceedings "more like ordinary civil proceedings relating to the custody or upbringing of a child".[111] This would be no innovation in the High Court and county courts. It would, however, require some adjustment of the rules and the extension of the Civil

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111 Op. cit. n. 3, para. 16.1; see Chapter 16 generally.

Evidence Acts 1968 and 1972 to domestic proceedings in magistrates' courts.

2.47 The Review proposed a statutory presumption that parents (and some others) should have reasonable access to a child in care. The court in care proceedings should be able to deny access at the time or later and to resolve any disputes about the reasonableness of any access afforded.[112] This is largely in line with the approach to access in family disputes. At present, only the High Court and divorce courts can give directions as to access when committing a child to care.[113] However, other courts have experience of access problems in children's cases generally. An extension of their powers in line with the proposals for care proceedings seems to be desirable in principle and preferable to requiring a different court (presumably a juvenile court), certain to have no previous knowledge of the case, to deal with disputes.

2.48 At present, it seems that courts in custody proceedings should not use their powers under the general law to award access to parents, spouses or grandparents if the child is in care for any reason[114] (although extra-marital fathers, who are excluded from the access scheme under the Child Care Act 1980, may be an exception to this).[115] Given that the principle will in future be essentially the same, we would welcome

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112 Op. cit. n. 3, paras. 21.12-21.16.

113 See para. 2.15 above.

114 Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(7)(b). For the position in wardship, see A. v. Liverpool City Council [1982] A.C. 363.

115 R. v. Oxford Justices ex p. H. [1975] Q.B. 1 and R. v. Oxford Justices ex p. D. [1986] 3 W.L.R. 447 where it was held that magistrates had jurisdiction to hear a father's application under the Guardianship of Minors Act 1971 for access to his daughter who was in care.

views upon whether applicants should always return to the court which made the original care order or whether this restriction could be relaxed.

2.49 The Review's proposals for the grounds for discharge from care were based on the current criterion in family proceedings, the best interests of the child.[116] The Review's proposals would also enlarge the range of potential applicants for discharge and give greater scope for participation by interested persons than exists in some family proceedings.[117] However, arguments concerning participation have been discussed above[118] and there is no reason to think that different considerations apply to discharge in family proceedings.

E. An Alternative Way

2.50 It might be thought that, instead of assimilation, a power to transfer the case to a juvenile court, where care proceedings would be heard, would be more appropriate. This would remove the need for some of the procedural changes outlined above (but not, for example, those concerning interim orders). A further potential advantage of this would be to reduce any possible risk of prejudice carrying over from the court's initial determination that care proceedings should be brought.

2.51 A power of transfer would, however, introduce further complications. For example, if the care court decided that care was not appropriate, should it re-transfer the case to the family proceedings court? Two more realistic difficulties would be the increased scope for delay and the loss of the custody court's familiarity with the case and the

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116 Op. cit. n. 3, paras. 20.11-20.21.

117 Paras. 20.1-20.10.

118 Paras. 2.21-2.38.

sense of continuity. On the question of delay, it might be impossible for the proposals for interim orders to be met if transfer had to be ordered. Together these make a strong case against mandatory transfer and we do not suggest it.

F. Conclusion

2.52 The Review's recommendations for the assimilation of the grounds and effects of orders for compulsory care seem to call for a fuller assimilation of procedural safeguards and rights of participation. Hence, in each civil court where care may be ordered the steps taken before such an order should be virtually identical: in effect, "care proceedings" would be heard in each court with family jurisdiction. Although greater assimilation may make it less easy to obtain care orders in family proceedings, the changes proposed would meet the Review's objective of a simpler, clearer and more modern body of child care law. In summary, therefore, we provisionally recommend that:-

(i) when the court considers that it may be desirable to make a care order in respect of a child involved in family proceedings, it should direct that the local authority be treated as if they had applied for such an order; the authority would then be under the same duties as if they were the applicant in care proceedings;[119]

(ii) the latter direction should also be made if the court grants a local authority leave to intervene to seek a care order;[120]

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119 Para. 2.23.

120 Ibid.

(iii) when making such a direction the court should order that an independent report be compiled unless to do so is unnecessary to safeguard the child's interests;[121]

(iv) such a report might be commissioned either from the court welfare officer or from a member of the local panel of guardians ad litem;[122]

(v) the officer who makes the report to the court should be under the same duties in investigating the case and writing that report as is a guardian ad litem in care proceedings;[123]

(vi) when the court makes a care direction it should have power to make the child a party and to appoint a solicitor to act on his behalf if the court considers that it would be in his interests to do so;[124]

(vii) the child should also be made a party and have the right to legal representation if no independent report has been ordered under (iii) above or if he is old enough to instruct a solicitor and wishes to do so;[125]

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121 Para. 2.27.

122 Para. 2.28.

123 Para. 2.29.

124 Para. 2.30.

125 Paras. 2.32-2.34.

(viii) if the officer appointed to report to the court thinks that it would be in the child's interests to be legally represented, he should be able to ask the court so to direct;[126]

(ix) when making a care direction, the court should make the following persons parties if they are not so already: the child's parents (or if they are not or have not been married to each other, his mother), any legal guardian, any person granted legal custody, custody or care and control by a court order and any person qualified by statute to apply for custody or access, who wishes to do so (this is without prejudice to the court's existing powers to grant others leave to intervene in the proceedings or to direct that they be treated as if they had applied and were qualified to apply for custodianship);[127]

(x) whenever a care direction is made, all courts should have power to permit 'persons interested' in the child's upbringing to take such part in the proceedings (short of full party status) as the court directs;[128]

(xi) the court should be required to set a date for the hearing of the care issue. This date should be within eight weeks of the care direction, extendable in exceptional circumstances for up to 14 days at a time. During the

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126 Para. 2.31.

127 Paras. 2.36-2.37.

128 Para. 2.38.

full hearing the court should be able to adjourn for a further period of up to 28 days in order to decide what order, if any, is the most effective way forward in the child's interests;[129]

(xii) before proof of the grounds for compulsory measures the court in all family proceedings should be able to make an interim care order, if

(a) there is reasonable cause to believe that the child is suffering harm, or is likely to suffer harm, as a result of his not receiving a reasonable standard of care, and

(b) the power to remove or detain the child is necessary to safeguard his welfare in the interim period.[130]

(xiii) if the court adjourns during the full hearing itself to require further information as to what order, if any, would be the most effective in the child's interests, it should be able to make an interim care order during the adjournment if condition (xii)(b) above is satisfied;[131]

(xiv) the Civil Evidence Acts 1968 and 1972 should be extended to domestic proceedings magistrates' courts when a care direction has been made;[132]

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129 Paras. 2.40 and 2.45.

130 Paras. 2.41 and 2.45.

131 Paras. 2.40, 2.41 and 2.45.

132 Para. 2.46.

(xv) the courts should have the same powers in relation to access as has a court in care proceedings;[133]

(xvi) the following persons should be entitled to apply for discharge of a care order made in family proceedings: the local authority, the child, a parent, guardian or any other person who has an independent right to apply for custody or legal custody of the child.[134]

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133 Para. 2.47 and 2.48.

134 Para. 2.49.

PART III

SUPERVISION ORDERS

A. Introduction

3.1 In family proceedings the court may order that a child be supervised by a local authority or a probation officer if there are exceptional circumstances making such supervision desirable. Supervision orders may also be made by juvenile courts in care proceedings, on the same grounds as care orders and with more precise effects than they have in family proceedings. The law governing the making and effect of supervision orders in family proceedings is "brief and inexplicit".[1] Proposals for clarification and amendment of the law have been made for nearly 20 years.[2] The Review of Child Care Law, which made proposals for reform of the supervision orders in care proceedings, also recommended that further consideration be given to a number of aspects of supervision orders in family proceedings, "in the appropriate context and as soon as possible".[3] These matters were:

(i) the circumstances in which supervision may be ordered;

(ii) the powers of the court on ordering supervision;

(iii) whether the court should state the purpose of supervison when an order is made;

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1 Griew and Bissett-Johnson, "Supervision Orders in Matrimonial and Guardianship Cases" (1975) 6 Social Work Today 322, 322.

2 See, for example, Law Commission Published Working Paper No. 15 (1968), pp. 40-42.

3 Report to Ministers of an Interdepartmental Working Party (1985), para. 18.30.

(iv) the powers and duties of the supervisor; and

(v) the duration of the order.

3.2 This Part deals with these and other issues concerning supervision orders in family proceedings. Although we make a number of proposals which might bring them closer to supervision orders made in care proceedings, we do not think that they can be wholly assimilated. Before turning to the law, it may be helpful if we explain why supervision orders were introduced into these proceedings and also what is known of the circumstances in which they are used.

Origin

3.3 The history of supervision orders in family proceedings is similar to that of care committals described in Part II. The Royal Commission on Marriage and Divorce ('the Morton Commission') envisaged that the arrangements for the children after divorce would be fully considered, but in "exceptional cases", on making a custody order, the court might wish that there be "some measure of supervision" of an informal kind, "so that arrangements may be reviewed if necessary".[4] The Commission pictured a welfare officer or a children's officer "visiting the home from time to time", with power to report to the court. If supervision had been ordered, "the court should have power to re-open the question of custody at any time on its own motion".[5] The objective of supervision, therefore, was to oversee the custody arrangements with a view to their possible variation.

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4 Report 1951-1955, (1956) Cmd. 9678, Chairman: Lord Morton of Henryton, para. 396.

5 Ibid.

3.4 This proposal was adopted for divorce and other matrimonial causes in 1958. It was, and remains, an essential part of the court's duty to be satisfied that the arrangements made for each child were satisfactory or the best that could be devised in the circumstances. A supervision order could be made in "exceptional circumstances making it desirable that the child should be under the supervision of an independent person", "as respects any period during which the child is .... committed to the custody of any person".[6] Supervision could not, however, be ordered where the child had been committed to care under what is now section 43 of the Matrimonial Causes Act 1973.[7] Rules of court provided for the supervisor to apply for, amongst other things, a variation in custody or committal to care.[8] Further, during a supervision order, the court could vary an order made in respect of the child's custody, "at the instance of that court itself".[9] Substantially the same provisions are now found in the Matrimonial Causes Act 1973 and the Rules of 1977.

3.5 Gradually, and in conjunction with the power to commit a child to care, supervision orders were extended to other family proceedings: matrimonial proceedings in magistrates' courts,[10]

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6 Matrimonial Proceedings (Children) Act 1958, section 6(1); see now section 44(1) of the Matrimonial Causes Act 1973 under which supervision may be ordered as respects any period during which the child is committed to a person's 'care', so that both custody and care and control orders are covered.

7 Ibid. s. 6(4); see now section 44(3) of the 1973 Act.

8 The supervisor's right to apply without leave was introduced by the Matrimonial Causes Rules 1968, r. 92(3); see now rule 92(3) of the 1977 Rules.

9 Section 6(5) of the 1958 Act; see now section 44(4) of the 1973 Act.

10 Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2(1)(f); see now Domestic Proceedings and Magistrates' Courts Act 1978, s. 9.

applications between parents for custody or access under the Guardianship of Minors Act 1971,[11] adoption[12] and custodianship.[13] This was despite the fact that in none of these proceedings does the court have a duty to satisfy itself as to the arrangements made for the child's future. There are also differences between these orders and those made in divorce proceedings. First, the supervisor has no express power to apply for a variation of custody or committal to care.[14] Secondly, the power to order supervision may not be exercised if a child is in care for whatever reason.[15] Thirdly, it is questionable whether courts other than divorce courts may limit the duration of the supervision order.[16] Supervision orders were also extended to wardship proceedings in 1969,[17] and this jurisdiction will be considered later in our review.

3.6 It seems that, by the time of these later extensions, the original reasoning of the Morton Commission had been forgotten. Indeed,

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11 Guardianship Act 1973, s. 2(2)(a).

12 Children Act 1975, s. 17(1)(a).

13 Children Act 1975, ss. 34(5) and 36(3)(b).

14 Although in matrimonial proceedings, on an application to vary or revoke a supervision order, the court may make a custody or care order if it thinks fit: Domestic Proceedings and Magistrates' Courts Act 1978, s. 21(1) and (7).

15 Guardianship Act 1973, s. 2(2)(a) and Children Act 1975, s. 36(2)(b) which make a supervision order dependent on the child being in a person's legal custody; Domestic Proceedings and Magistrates' Courts Act 1978, s. 9(4).

16 Compare sections 2(2)(a) and 3(2) of the 1973 Act, and section 9(1) and (3) of the 1978 Act, with section 44(1) of the Matrimonial Causes Act 1973, which empowers the court to order supervision "as respects any period during which the child is .... committed to the care of any person". See also [1981] J.P. 137.

17 Family Law Reform Act 1969, s. 7(4).

in the Parliamentary debates leading to the Guardianship Act 1973 no mention was made of the need to review or vary custody. It was explained that supervision orders would be appropriate "for the rare cases"[18] where the parent with custody needed "social support",[19] or where the child was at risk of delinquency following his parents' separation and could be helped by supervision.[20]

The Use of Supervision Orders

3.7 It is difficult to state exactly the number of these supervision orders made each year.[21] The most recent figures indicate that around 5,000 children were placed under supervision in 1985,[22] and that a total of 26,500 children were subject to such orders.[23] There has been a large

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18 Hansard (H.L.) vol. 339, col. 38 per Lord Simon of Glaisdale.

19 Hansard (H.L.) vol. 340, col. 659, per Lord Simon of Glaisdale.

20 Ibid., col. 664.

21 The number of children under supervision of a probation officer or a local authority are collected by the Home Office and D.H.S.S. respectively. The latter's figures relate to the year ending March 31 and, therefore, strictly, an aggregate for both services cannot be given. Also, the Home Office's returns do not differentiate supervision under the Matrimonial Causes Act from that under the Domestic Proceedings and Magistrates' Courts Act. The relevant combined agency figures are substantially higher than the number of orders recorded by the divorce county courts; see Priest and Whybrow, Supplement to Working Paper No. 96, Custody Law in Practice in the Divorce and Domestic Courts (1986), para. 7.19.

22 In 1985, 2,360 children were placed under probation service supervision and provisional figures for D.H.S.S. (England only) record a further 2,760 children placed under local authority supervision. For the former see Home Office Statistical Bulletin 21/86, Table 1. Nearly 2,000 of the children who were under local authority supervision had been so placed in matrimonial causes.

23 Of these children 9,400 were supervised by probation officers, ibid., Table 2. D.H.S.S. figures are provisional and relate to England only.

decline, particularly in orders for supervision by a probation officer, over the last few years.[24] The proportion of orders made is small in relation to the number of family proceedings each year,[25] and hence supervision orders can still be described as 'exceptional'. However, the number of children involved is roughly the same as the numbers in compulsory care (other than by orders made in criminal cases),[26] and the figures point to a considerable increase in supervision orders during the 1970's.

3.8 In deciding whether to make a supervision order the welfare of the child is the first and paramount consideration.[27] Surveys of divorce proceedings have indicated that the recommendations of a welfare officer play an important part.[28] It has been said that "the welfare officer should not propose supervision solely on the grounds of what he perceives to be an inappropriate parental adjustment [to separation or divorce], provided that he is satisfied it is having no adverse effect on the child".[29] However, the child's welfare will often depend on his parents' attitudes and responses to separation and divorce and it may be in the child's

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24 In 1982 around 8,000 children were placed under supervision and 37,000 were under supervision during the year: ibid. and figures supplied by D.H.S.S. relating to English local authorities only. Only supervision in wardship proceedings has not declined.

25 See para. 2.8 above. The decline in probation supervision is in line with the Statement of National Objectives and Priorities for the Probation Service (1984) which gives the civil work of the service lowest priority.

26 See para. 2.7 above.

27 Guardianship of Minors Act 1971, s. 1.

28 Eekelaar and Clive with Clarke and Raikes, Custody After Divorce (1977) Family Law Studies No. 1, Centre for Socio-Legal Studies, Wolfson College, Oxford, para. 13.15.

29 Wilkinson, Children and Divorce (1981), p.133.

interests that supervision take place, even if it is largely concentrated on the adults.

3.9 It was said as long ago as 1975 that the purpose of supervision orders is more positive than mere review of the custody arrangements and that "the notion of supervision [is] a very variable one".[30] In some cases the child's welfare may appear to be at risk, although not such as to warrant his removal from home. Here supervision, at least partially, involves the oversight of the question of custody as well as child protection. In other cases the child or his parents may be in need of social work assistance aimed at promoting their adjustment to the consequences of separation or divorce. Sometimes, supervision may be directed at prompting or facilitating the development of contact with the parent not living with the child, particularly over a period of transition in the family's life.[31] In some courts the supervision order may be specifically "limited to access"[32] to clarify what assistance is intended. A recent survey pointed to a relatively high use of supervision in connection with joint custody orders, which "may indicate the use of supervision to facilitate joint arrangements"[33] for the care of children. It has been suggested that the diversity of purpose of supervision orders calls for their renaming by a more accurate term, such as a 'parental guidance'[34] or 'family supervision' order.[35] Concern has been expressed

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30 Griew and Bissett-Johnson, op. cit. n. 1, p.324.

31 Parkinson, Separation, Families and Divorce (to be published in 1987), Chapter 6.

32 See Practice Direction, 12 March 1980 [1980] 1 W.L.R. 334.

33 Priest and Whybrow, op. cit. n. 21, para. 7.21.

34 Law Commission Published Working Paper No. 15 (1968), p. 42.

35 Parkinson, op. cit. n. 31.

that is is wrong that the child be "saddled with an order which is primarily directed to his parents' needs."[36] We see the force of this point.

3.10 It is not sufficient that supervision, in the sense of welfare assistance or guidance, is desirable. It must also be desirable that there be a court order. It is established, at least on divorce, that the court may informally request continued involvement of a welfare officer in some cases.[37] This request may be coupled with a requirement of a further report to inform the court on the state of play. In other cases parents who are already receiving assistance may continue to do so on a voluntary basis. In both these situations it may be difficult to decide what more an order would achieve, other than formalising the supervisor's position. The comment that an order may "ensure the court's continued oversight and accessibility"[38] perhaps overstates the supervisor's powers and, at least in divorce cases, ignores the ability of any person to apply to the court, with leave, to raise a question concerning the child's welfare.[39]

3.11 In family proceedings each court has power to order supervision either by the local authority or by a probation officer.[40] The

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36 Priest and Whybrow, op. cit. n. 21, para. 7.22.

37 See the Morton Report, op. cit. n. 4, para. 396.

38 Wilkinson, op. cit. n. 29, p. 129.

39 See the Matrimonial Causes Rules 1977, r. 92(3).

40 Matrimonial Causes Act 1973, s. 44(1); Guardianship Act 1973, s. 2(2)(a); Children Act 1975, ss. 17(1)(a), 34(5) and 36(2)(b); Domestic Proceedings and Magistrates' Courts Act 1978, s. 9(1). In matrimonial causes a court welfare officer may have been involved in the case and may undertake supervision. He is a member of the probation service, see the Probation Rules 1984, r. 20(3). The term 'welfare officer' therefore indicates a probation officer.

choice of supervisor seems to depend on a number of factors.[41] The welfare report itself may recommend which agency should undertake supervision. A recommendation may take into account whether the family is currently receiving support from either agency or whether the agencies have agreed between themselves which of them should undertake supervision. In some areas children below a certain age are agreed to be the usual responsibility of social services departments, although in other areas matrimonial supervision orders may be an exception to this division of work. It has also been suggested that where the intention is that the supervisor provide conciliation services or the welfare officer continue his work with the family, the probation service is more appropriate, whereas child protection and related considerations are the province of local authorities.[42] Short term orders aimed at enabling the family to adjust to the immediate crisis of divorce or separation may often be thought more suitable for the welfare officer.[43] An overriding consideration in some courts will be the court's own perception of which agency is more appropriate. In one survey the magistrates interviewed expressed a general preference for the probation service "because of their greater contact with the service".[44]

3.12 We will now turn to consider the issues raised for consideration by the Review of Child Care Law.

B. When may a Supervision Order be made?

3.13 A court hearing divorce or other matrimonial causes has power to place a child under supervision when:-

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41 See Wilkinson, op. cit. n. 29, pp. 137-139.

42 Ibid. p. 138.

43 Parkinson, op. cit. n. 31.

44 Priest and Whybrow, op. cit. n. 21, para. 7.26.

(i) it makes a custody order (or, now, an order for care and control), and

(ii) there are "exceptional circumstances making it desirable that the child should be under the supervision of an independent person".[45]

With two changes the same formula has been extended to other family proceedings. First, in adoption proceedings supervision may be ordered only where the application has been refused.[46] Secondly, on the revocation of custodianship, a supervision order, which also is not connected with the making of a new custody order, is mandatory if it is "desirable in the interests of the welfare of the child".[47] It is difficult to understand why the custodianship court is compelled to order supervision, since any court is effectively compelled to do what is "desirable" in the child's interests.[48] In this section we shall consider requirements (i) and (ii) in turn.

3.14 The Morton Commission envisaged that supervision orders would be made for the purpose of reviewing custody orders. However, there are several arguments against limiting the power to make them to when a custody order is made. First, supervision orders may now be used for quite different purposes and the opportunity to review the disposition of custody may often be of only indirect importance. Secondly, the present law may encourage the court to make a custody order so that supervision can be attached. As was suggested in our Working Paper on

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45 Matrimonial Causes Act 1973, s. 44(1). Both of these matters must be satisfied, see Baczowski v. Baczowski (1980) 10 Fam. Law 218.

46 Children Act 1975, s. 17(1)(a).

47 Ibid., s. 36(3)(b).

48 Guardianship of Minors Act 1971, s.1.

Custody, such custody orders may not always be necessary.[49] For example, if the court wishes that access to a child who is unwilling to see one of his parents be supervised, it may be inappropriate for the court to have to make a custody order. Thirdly, the present law may preclude a supervision order when it is in the child's interests, for example when a custodianship order is refused. We consider, therefore, that there may no longer be any reason in principle to maintain a necessary connection between supervision and custody orders. We do not anticipate that removal of the connection would result in many more supervision orders; rather, it would remove the need in some cases to make custody orders.

3.15 A related question is whether the court should be able to order supervision when a child is in care. Supervision cannot usually be combined with care.[50] The only exception is in matrimonial causes, where it may be ordered unless the child was committed to care in such proceedings.[51] It is difficult to see any purpose in supervising a child in care and the position in other family proceedings seems to be preferable. We suggest, therefore, that the position in divorce proceedings should be assimilated accordingly.

3.16 It could be argued that the grounds for supervision orders should be more specific. One argument in favour of this is that 'exceptional circumstances' is too variable and subjective a standard. It may, on one interpretation, add nothing to a pure welfare test, since the circumstances must be exceptional before the question of supervision

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49 Para. 4.20(b).

50 See para. 3.5 above.

51 Matrimonial Causes Act 1973, s. 44(3).

arises.[52] One survey has indicated that courts' interpretation of when an order could be made varies; the criterion inhibited some courts from ordering supervision, but did not discourage others.[53] Hence, as a safeguard against forcing parents to accept "permanent, long-term intervention in family life on the grounds of divorce",[54] the exceptional circumstances criterion may not be sufficient. An extension of this view is that since supervision orders in care proceedings may only be made on relatively strict criteria, such criteria should equally apply to family proceedings. This argument would be strengthened if the legal effects of supervision orders in both sets of proceedings were further assimilated. As was explained in paragraph 2.12 above, the criteria applied in care proceedings will in future require actual or likely harm to the child which results from the absence of a reasonable standard of care.

3.17 However, there are arguments against such a proposal. First, the purposes of supervision are clearly not limited at present to child protection. In divorce cases they are inextricably linked to the court's duty to investigate and approve the arrangements made. Secondly, to require that the court be satisfied of certain grounds would add considerably to the cost of and time involved in making supervision orders. The court might find it necessary to adjourn the case for investigation and proof of the grounds, as is proposed in Part II for care committals following the assimilation of grounds.[55]

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52 See para. 2.10 above.

53 Griew and Bissett-Johnson, op. cit. n. 1, p. 323. See also James and Wilson, "Reports for the Court: The Work of the Divorce Court Welfare Officer" [1984] J.S.W.L. 89. In 1985 25 divorce county courts made no supervision orders, whilst others made over 50, see Priest and Whybrow, op. cit. n. 21, para. 7.20.

54 Maidment, Child Custody and Divorce (1984), p. 87. See also Hansard (H.L.) vol. 340, col. 659 per Lord Simon of Glaisdale.

55 Para. 2.23.

3.18 In our view, the argument in favour of stricter grounds for supervision carries more weight in respect of supervision by local authorities than in respect of the probation service. The primary responsibility of local authorities in this field is for the protection of children at risk. To ask them to supervise in a broader range of circumstances may dilute to an unacceptable degree their ability to perform their usual child care functions. Therefore, it may be argued that local authority supervision should only be ordered on proof of harm or likely harm to the child. A supervision order might then be made if it was the most effective means of safeguarding and promoting the child's welfare. Full assimilation with the grounds for a care order,[56] by requiring that the harm or likely harm be attributable to the absence of a reasonable standard of care, may not be necessary. This is because supervision, unlike care, does not vest full parental powers and duties in the local authority.

3.19 This proposal would leave intact the court's wider powers in relation to welfare or probation officers. This would serve to draw a sharper distinction between short term supervision aimed at helping the whole family adjust to separation and divorce and longer term intervention designed to protect a child from harm. It may be, however, that local arrangements in some parts of the country would not stretch to giving the court a choice of supervisor.

3.20 On the other hand, it could be argued that the grounds for supervision should be broadened. The Review of Child Care Law commented that in family proceedings "it is clear that actual or likely harm to the child is not always the court's main concern" when making a

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56 See the White Paper, The Law on Child Care and Family Services (1987), Cm. 62, para. 59.

supervision order.[57] Moreover, it has been said that even the 'exceptional circumstances' criterion may act as an undue discouragement against supervision orders.[58] It is clear that the original basis for 'exceptional circumstances' was to complement the Morton Commission's expectation that the children's arrangements on divorce would normally be adequately safeguarded by the court's investigation before granting the decree absolute of divorce. However, this expectation cannot apply to many of the circumstances in which supervision is now ordered, nor did it ever have validity in other family proceedings where the court is not obliged to satisfy itself as to the children's arrangements. Thus, it has been proposed that the court should be able to make a supervision order whenever it is in the child's interests to do so.[59] Such a standard may reflect the current practice in some courts.

3.21 To widen the criterion to a 'best interests of the child' test is open to two objections. First, if such a change resulted in more supervision orders being made, there would be increased pressure on already stretched resources. The present requirement may produce varying results, but may be at least partially effective in concentrating resources where they are most needed. Secondly, it is doubtful whether the 'best interests' criterion would produce more consistent practice, since it is open to the same subjective interpretation.[60]

3.22 On balance, and with one exception, we doubt whether a change in the grounds for supervision is desirable. The only change we would suggest is that the grounds for an order on revocation of

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57 Report to Ministers of an Interdepartmental Working Party (1985), para. 18.18.

58 Law Commission Published Working Paper No.15 (1968), p. 41; Griew and Bissett-Johnson, op. cit. n.1, p.323

59 Ibid.

60 See Working Paper No.96, Part VI ('The Welfare Principle').

custodianship be replaced by the exceptional circumstances criterion. It seems anomalous that revocation of custodianship is singled out when the same break in continuity of care of a child may arise in other jurisdictions, for example on refusal of adoption or variation of custody.

C. The Court and the Supervisor

3.23 At present the court is not required to consult or inform the supervisor before making an order and it is not always clear to the supervisor what prompted the court to make it. In some, perhaps many, cases the supervisor is not informed before a supervision order is made.[61] In others, the welfare officer may have recommended that he or one of his colleagues supervise, or he may have consulted the local authority before suggesting that it is the more appropriate agency, for example because the authority is already providing social work assistance to the family.[62] The court itself may also wish to hear the views of the supervisor before making an order.

3.24 If the supervisor has not been consulted it may be difficult for him to act: he may neither know the facts which call for supervision nor what the court expected of him. Hard-pressed social services departments and probation services may therefore be reluctant to give priority amongst their case-loads to such orders. Particularly when the local authority is appointed supervisor, it seems desirable that they be able to make their views known before an order is made, although it would remain for the court to decide whether or not to make an order.

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61 Report of the Matrimonial Causes Procedure Committee (1985), Chairman: Mrs. Justice Booth ('The Booth Committee'), para. 4.140.

62 41% of nearly 500 divorce court welfare officers interviewed by James and Wilson always consulted social services in the course of their inquiries: op. cit. n. 53, p. 94.

3.25 At present authorities must be notified and given an opportunity to make representations before a committal to care.[63] We do not think that a formal requirement of notification is necessary before supervision is ordered and, indeed, it might cause considerable delay and expense. Instead, the court could be required to satisfy itself that, where practicable, the supervisor had been consulted before the order is made. The welfare officer would therefore be further encouraged to consult the supervising agency when making his report. In other cases, to avoid unnecessary adjournments the court could simply notify the supervisor of the order giving its reasons for making it, as is suggested below, and giving the supervisor the opportunity to return to court to argue against supervision if desired.

3.26 To similar advantage it has been suggested that the court should specify the purpose of the supervision order. The Matrimonial Causes Procedure Committee ('the Booth Committee') suggested that "a brief statement of the reason why a supervision order is necessary" to clarify the situation for the supervisor and the family.[64] The Review of Child Care Law also thought such an explanation would be helpful.[65] The process of consultation suggested in the previous paragraph would be complemented by such a statement.

3.27 We suggest, therefore, that the court should be required to be satisfied that, wherever practicable, the supervisor has been consulted before an order is made and to take account of any representations the proposed supervisor may wish to make, including giving him the

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63 See para. 2.22 above.

64 Op. cit. n. 69. "Some social workers did speak of difficulty in conducting supervision if they did not know what the court had in mind", Griew and Bissett-Johnson, op.cit. n. 1, p.323.

65 Op. cit. n. 57, para. 18.27.

opportunity to attend at a hearing. Secondly, when it makes an order the court should state the reason supervision is necessary and what it hopes that supervision will achieve.

D. The Powers of the Court and the Supervisor

3.28 In this section we consider whether the court should have power to impose requirements upon the child or his parents under a supervision order made in family proceedings. In care proceedings several requirements may be made of the child and the Review of Child Care Law has suggested that the court should be able to make corresponding requirements of parents to facilitate the carrying out of supervision. We also ask what measures should be available to the supervisor if, during the course of the order, he is concerned about the arrangements for the child.

3.29 In family proceedings the court at present retains only limited control over the method of supervision. In some courts an order may be expressly restricted, for example to the question of access, and the court may request a report from the supervisor on the child's welfare.[66] The statutory authority for both of these is unclear. In respect of supervision orders made in adoption, custodianship and in proceedings under the Guardianship of Minors Act 1971 the court's only express power is to vary or revoke the supervision order.[67] It is difficult to understand what "variation" could involve apart from changing the supervising agency, since the court's powers are no greater on variation than on making the original order. On an application to vary or revoke a supervision order

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66 See paras. 3.9 and 3.10 above.

67 Section 3(3) of the Guardianship Act 1973, applied to adoption and custodianship proceedings by sections 17(3), 34(5) and 36(6) of the Children Act 1975.

made under the Domestic Proceedings and Magistrates' Courts Act 1978 the court itself may make a custody order or care committal if it thinks fit.[68] A similar power exists in respect of orders made on divorce.[69]

3.30 The supervisor's powers also vary amongst the jurisdictions. The supervisor under an order made in matrimonial causes may himself apply without leave of the court for a custody order or a care committal to be made.[70] He may also apply for directions as to the exercise of his powers.[71] Presumably the court may indicate to the supervisor how it considers that supervision should proceed. However, its powers of direction are unclear. It has been said that the divorce court's power enables "a difficult situation to be formally and officially ventilated, but this ventilation may only demonstrate that no satisfactory solution is available".[72] There is no express authority for a supervisor to return to court for such directions in other family proceedings.

3.31 In contrast, the position in care proceedings is relatively explicit and vests more power in both court and supervisor. The court may at present impose requirements on the child:

(i) to inform the supervisor of any change of residence or employment;[73]

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68 Section 21(1).

69 The court's power to vary custody and care orders is exercisable at its own instance: Matrimonial Causes Act 1973, s. 44(4).

70 Matrimonial Causes Rules 1977, r. 92(3).

71 Ibid., r. 93(4).

72 Wilkinson, op. cit. n. 29, p.125.

73 Children and Young Persons Act 1969, s. 18(2)(b) and Magistrates' Courts (Children and Young Persons) Rules 1970, r.28(2) and (3).

(ii) to keep in touch with the supervisor in accordance with instructions given by him, including receiving visits from the supervisor at his home;[74]

(iii) to be medically examined in accordance with the supervisor's arrangements;[75]

(iv) to reside with a named individual;[76]

(v) to comply with the supervisor's directions as to, for example, living at a certain place, presenting himself to a specified person and participating in specified activities ("intermediate treatment");[77] and

(vi) in certain circumstances, including the child's consent if aged 14 years or older, to submit to psychiatric treatment.[78]

3.32 The Review of Child Care Law recommended that these powers remain, except for (iv) which would be rendered unnecessary by the proposed introduction of the power to make a custody order (possibly combined with a supervision order) in care proceedings.[79] The Review

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74 Ibid.

75 Ibid.

76 Section 12(1) of the 1969 Act.

77 Ibid., s.12(2).

78 Ibid., s.12(4) and (5).

79 Op. cit. n. 57, para. 18.15.

also recommended that the court should be able to impose requirements on parents when making a supervision order.[80] These requirements would mostly match those which may be imposed on the child. In child protection cases the object of supervision, particularly of young children, is usually to ensure the parents' compliance. By addressing requirements to parents the Review hoped to increase the effectiveness of supervision orders and encourage their use as an alternative to care orders. In particular the Review suggested that the court be able to require that child's parents:-

(i) keep the supervisor informed of their, and the child's address;

(ii) allow the supervisor access to the child in the home and to assess the child's welfare, needs and condition;

(iii) allow the child to be medically examined;

(iv) comply with the supervisor's direction to attend with the child at a specified place (for example a clinic) for the child's medical examination, medical or (in certain circumstances) psychiatric treatment, or participation in specified activities;

(v) permit in certain circumstances the child to receive medical or psychiatric treatment; and

(vi) comply with the supervisor's directions on matters relating to the child's education.[81]

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80 Ibid., paras. 18.6-18.13.

81 Ibid., para. 18.9.

3.33 The Review proposed that parental consent should be necessary before such requirements were attached.[82] Further, no specific sanctions would be appropriate for disobeying a requirement. It was envisaged that the power to seek a variation in the arrangements for the children, in particular in favour of a care order, would be a more appropriate means of encouragement.[83]

3.34 The Review also thought that extending the power to impose requirements to family proceedings would be advantageous.[84] However, they did not wish to prejudice a separate review of family proceedings by making firm recommendations for assimilating the effects of supervision.[85] It is clear from what has been said above that in many cases in family proceedings the need for 'requirements' will not arise, other than the duty to inform the supervisor of a change of address.[86] However, in other cases, where the court is concerned about the standard of care the child is receiving, requirements as to medical examination and treatment and access to the child may be as important as in care proceedings. Superior courts may currently be able to impose some of the Review's requirements, by order or by undertaking, or by reminding them informally of the court's additional power to commit the child to care. A divorce court, for example, is able to "make such orders as it thinks fit for the custody (including access) and education" of the child.[87]

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82 Op. cit. n. 57, para. 18.21.

83 Ibid. para. 18.17.

84 Ibid. para. 18.27.

85 Ibid. para. 18.24.

86 In practice it seems that this requirement is sometimes included in the supervision order: Parkinson, op. cit. n. 31.

87 Matrimonial Causes Act 1973, s.42(1).

Hence, the court itself may make directions as to the education of the child or the people whom the child should see. It is clear that the court may make an order for the child's physical or psychiatric examination before the hearing.[88] It may be that such an order could be made after the hearing, linked to supervision. However, it is clear that questions such as the parent's right to access should not be left to the discretion of a welfare officer.[89] The court also may not give instructions to the welfare officer.[90]

3.35 In this uncertain state of the law it must, we suggest, be desirable to clarify the powers of both courts and supervisors. One argument against assimilating the courts' powers in family proceedings with those in care proceedings is that in the latter specific grounds must have been established as a pre-condition to intervention. Hence, it could be said that the same grounds for compulsory intervention should be established in family proceedings before the court could have power to impose requirements on the child or his parents. As we have explained above,[91] our view is that the arguments for assimilation of grounds for supervision are less strong than for care committals. However, most of the requirements which might be imposed relate to the protection of the child. It may be that if specific grounds relating to risk of harm to the

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88 B.(M.) v. B.(R.) [1968] 1 W.L.R. 1182, Practice Direction, 21 February 1985 [1985] 1 W.L.R. 360 and 1 November 1985 [1985] 1 W.L.R. 1289.

89 Mnguni v. Mnguni (1979) 1 F.L.R. 184, although in V.-P. v. V.-P. (1978) 10 Fam. Law 20 access was ordered "in the discretion of the supervising officer".

90 Re A. (1979) 10 Fam. Law 114, where the judge had instructed the officer to counsel the father on his responsibilities towards the child. In an appropriate case a direction should be made for attempts at resolving a dispute by conciliation, before a report by a welfare officer is ordered: Registrar's Direction, 28 July 1986 [1986] 2 F.L.R. 171.

91 Paras. 3.16-3.22.

child were introduced for local authority supervision, it would be sufficient to empower the court to impose such requirements only in these cases. On the other hand, in our view, irrespective of whether more specific grounds for supervision are introduced, the power to impose some requirements upon children and, with consent, parents would be a useful one in family proceedings. Although there could be a case for distinguishing the simpler requirements (to keep in touch and to receive visits) from the more complex ones, none of them seem unduly intrusive in the light of the requirement of parental consent.

3.36 We suggest therefore that the courts' powers should include the ability to impose the same requirements on the child and his parents as may be imposed in care proceedings. In consequence, the powers of the supervisor himself should be extended so that he would be able to apply for addition to or revocation of the requirements. At such a hearing the court would be able to make an order for custody or care of the child including committal to care if the grounds for care were satisfied. In line with this, we agree with the Review[92] that the power of the supervisor to return to court to seek an order relating to the custody or care of the child in divorce cases should be extended to the other family jurisdictions. Again, this would assimilate the supervisor's powers with those of a supervisor in care proceedings, who may apply to have a supervision order varied to a care order.[93]

E. The Duty of the Supervisor

3.37 The supervisor himself has no statutory duties and "has to operate in an unstructured framework".[94] The Probation Rules require a

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92 Op. cit. n. 57, para. 18.29.

93 Children and Young Persons Act 1969, ss. 15(1) and 16(6)(a).

94 Wilkinson, op. cit. n.29, p.123.

probation officer on request to make a report to the court which ordered supervision and to apply for discharge of the order if it appears to him that such an application can properly be made.[95] The proposals made above would increase the supervisor's powers where the court considers that he may need to insist on seeing the child or to ensure that the child is medically examined or treated. The Review of Child Care Law also suggested that the supervisor be placed under a duty to "advise, assist and befriend" the child and his parents.[96] That duty applies to children under supervision in care proceedings.[97] We agree that this would be helpful and we also consider that, in the light of the proposals made by the Government's White Paper on the Review,[98] the supervisor ought to be under a statutory duty to safeguard and promote the child's welfare.

3.38 The Review also suggested that the duties of a supervisor could be more specifically defined by regulations. The so far unused power to make regulations in respect of local authority supervision orders made in care proceedings[99] could be extended to family proceedings. Alternatively, specific regulations could be devised for supervision orders made in family proceedings, in which case it may be preferable for them to apply to both local authority and probation service supervision. The Review acknowledged that the type of supervision required after family proceedings may differ from that following care proceedings, "but it might be possible for the court to apply or disapply the regulations".[100]

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95 Probation Rules 1984, rr. 38(1) and 39(3).

96 Para. 18.16.

97 Children and Young Persons Act 1969, s.14.

98 The Law on Child Care and Family Services, (1987), Cm. 62, para. 30.

99 Children and Young Persons Act 1969, s.11A.

100 Para. 18.27.

The case for separate regulations would be strengthened if the law were to identify different grounds and effects for local authority and probation supervision.

3.39 There may be value in requiring the supervisor to visit the child or to check on his health or development. The supervisor could also be required to return to court in certain circumstances or to consult a local authority, for example where the child's welfare appears to be at risk. We suggest that there be a general power to make regulations governing the conduct of supervision orders made in family proceedings and that the court should have power to apply or disapply the provisions in those regulations. We welcome views on what duties it would be desirable to cover by regulation.

F. Duration of Supervision Orders

3.40 At present, supervision orders in family proceedings endure, unless discharged, until the child is 18,[101] although in divorce cases, at least, their duration may be fixed by the court.[102] In care proceedings, the juvenile court may also specify the duration of the order and it may not last longer than three years or beyond the child's 18th birthday.[103] The Booth Committee found that "supervision orders may be more effective if made for a defined period" because time limits induce a sense of purpose and make it less likely that supervision will undermine the parents' position in relation to their children. Hence, they recommended that "as a matter of practice ... supervision orders should normally be

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101 Matrimonial Causes Act 1973, s.44(1), which speaks of supervision of a "child"; Guardianship Act 1973, s.3(2), applied to orders made in adoption and custodianship proceedings by the Children Act 1975, ss. 17(3), 34(5) and 36(6); Domestic Proceedings and Magistrates' Courts Act 1978, s.9(3).

102 See para. 3.5 above.

103 Children and Young Persons Act 1969, s.17.

made for a defined period".[104] The Review of Child Care Law thought that "it would be helpful to provide that orders shall last for a set period of, say, one year unless the court specifies a shorter or longer term".[105] In the ordinary case the onus would be to justify extending the order rather than revoking it.

3.41 A general practice of fixing the duration of supervision orders would seem helpful. Time-limits could also assist in allocating resources to the most needy cases and remove the burden of 'inert' orders on hard-pressed local authorities.[106] We propose that supervision orders should be limited in the first instance to one year unless the court specifies a shorter or longer period.

3.42 It has been commented that "supervisors tend ... to be over-cautious in their approach to the question of discharge. They are perhaps overawed by the nominal length of the order".[107] Hence, in longer running cases "there is an imperative need for regular review".[108] Either within the regulations suggested above, or separately, it could be required that the supervisor consider the question of discharge, say, every six months.[109] If discharge is thought to be in the child's interests the supervisor could also be required to apply to the court. At present on

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104 Op. cit. n.61, para. 4.139.

105 Op. cit. n. 57, para. 18.26.

106 Wilkinson, op. cit. n.29, p.126. See also Parkinson, op. cit. n. 31.

107 Wilkinson, ibid.

108 Ibid., p.127.

109 A local authority must consider whether to apply for discharge of a care order at least every six months or as soon as is practicable thereafter: see the Children and Young Persons Act 1969, s. 27(4) and the Child Care Act 1980, s.90(3).

divorce if discharge is consensual it may proceed without a hearing.[110] This arrangement could equally be extended to other proceedings, while retaining the court's power to require that evidence be given on the discharge question.

G. Conclusion

3.43 In this Part we have discussed a number of proposals for reform of supervision orders in family proceedings. In summary, we provisionally recommend that:

(i) the power to make a supervision order should not depend upon whether on order for custody or care and control has been made;[111]

(ii) a supervision order should not be made if the child is in care for any reason;[112]

(iii) the court should remain able to make supervision orders whenever there are exceptional circumstances making supervision desirable; consideration might, however, be given to limiting the courts' power to order supervision by local authorities to cases where there is actual or likely harm to the child and the order is the most effective means of safeguarding and promoting his welfare;[113]

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110 Matrimonial Causes Rules 1977, r. 93(4).

111 Para. 3.14.

112 Para. 3.15.

113 Paras. 3.16-3.22.

(iv) the court should be satisfied that, where practicable, the supervisor has been consulted before a supervision order is made and should take into account any representations he may wish to make;[114]

(v) the court should be required to state the purpose of making a supervision order;[115]

(vi) the court should be able to impose the same requirements on parents (with their consent) and children as may be imposed in care proceedings;[116]

(vii) the supervisor should be entitled to return to court for variation of the supervision requirements or custody arrangements, or for committal to care;[117]

(viii) the supervisor should be placed under a duty to "advise, assist and befriend" the child and "to safeguard and promote the child's welfare";[118]

(ix) the Secretary of State should have power to make regulations, which the court should have power to apply or disapply in a given case, governing the conduct of supervision orders in family proceedings;[119]

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114 Para. 3.27.

115 Ibid.

116 Para. 3.36.

117 Ibid.

118 Para. 3.37.

119 Para. 3.39.

(x) the initial duration of a supervision order should be fixed for a period of one year unless the court otherwise orders;[120]

(xi) the supervisor should be required to consider the question of discharge and, if it is in the child's interests, to return to court.[121]

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120 Para. 3.41.

121 Para. 3.42.

PART IV

INTERIM ORDERS

4.1 In this Part we consider the powers of courts in the custody jurisdictions to make interim orders for custody, care and control and access. Interim orders may be made in all the custody jurisdictions. However, the courts' powers in divorce and other matrimonial causes differ from those in the jurisdictions under the Guardianship of Minors Act 1971, the Domestic Proceedings and Magistrates' Courts Act 1978 and the Children Act 1975, particularly as to the circumstances in which interim orders may be made and as to the maximum duration of such orders. We make a number of suggestions for the unification of these powers.

4.2 It has been said that interim orders are appropriate only "where the court finds that it is necessary to make a temporary order to regulate the child's life pending full investigation of the matter which is about to take place when the parties and everybody else are ready".[1] A common example of this is where the court orders the immediate return of a child who has been snatched from one parent's care or retained following an access visit. Interim orders are usually made where there are disputes concerning children. For some time concern has been expressed that such disputes should be dealt with expeditiously by the courts. With this in mind, we also make suggestions specifically designed to discourage delay pending the full hearing.

A. The Grounds for making an Interim Order

4.3 In matrimonial causes an interim order may be made whenever

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1 H. v. H. (1979) 22 June unreported, C.A., per Ormrod L.J.

it is in the child's best interests.[2] In the other custody jurisdictions the power to make interim orders is restricted to cases "where by reason of special circumstances the court thinks it proper".[3] In deciding whether the circumstances justify the making of an order the court is presumably guided by what it considers best for the child.[4] It is difficult to imagine that a court which thought that an interim order was in the child's interests would feel unable to make the order because the circumstances were not thought to be sufficiently special. As with the exceptional circumstances criterion for committal to care,[5] therefore, it is difficult to see what this criterion adds. It may simply be some discouragement to deferring the final decision in too many cases. If so, it is important to note that the guidance it offers was until recently only applicable in matrimonial proceedings in magistrates' courts.[6] Traditionally, the magistrates' powers have been more specifically defined in statute. The Guardianship Act 1973 introduced parallel interim order provisions for applications in all courts under the Guardianship of Minors Act 1971, but in order to assimilate the powers of magistrates.[7]

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2 Matrimonial Causes Act 1973, s. 42(1) and Guardianship of Minors Act 1971, s. 1.

3 Guardianship Act 1973, s. 2(4)(b), applied to custodianship proceedings by section 34(5) of the Children Act 1975; Domestic Proceedings and Magistrates' Courts Act 1978, s. 19(1)(ii).

4 Guardianship of Minors Act 1971, s. 1; Domestic Proceedings and Magistrates' Courts Act 1978, s. 15.

5 See para. 2.10 above.

6 Under section 6(2)(b) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

7 Hansard (H.L.) vol. 339, col. 23-24 and 43-44 (Viscount Colville of Culross) and Hansard (H.C.) vol. 856, col. 432 (Mr. Mark Carlisle).

4.4 The harmful and prejudicial effect of delay in resolving disputes over children is one reason for deterring the making of interim orders. This is well known and, in itself, would tend to influence the courts against making them. Moreover, restrictive grounds for interim orders do not deal directly with the decision to adjourn a case or the duration of the order. The statutory provisions also permit the operation of an interim order to be suspended indefinitely[8] and, once made, to be renewed (for a specific period) without further proof of special circumstances.[9]

4.5 We also question whether it is in children's interests to discourage interim custody and access orders. As has been noted above, a typical reason for an interim order is to restore the child's residence following a snatch.[10] In those cases, it may be important to re-establish continuity and stability in the child's life as soon as possible.[11] In other cases, regular contact with the child by access visits may be vital in order both to maintain a relationship, particularly with a young child, and to offset the disadvantage of a parent not living with him for some time before the hearing.[12] Again, the argument for a cautious approach to

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8 Guardianship of Minors Act 1971, s. 11A(2), applied to interim orders by section 2(5A) of the Guardianship Act 1973, which itself applies to interim orders in custodianship: Children Act 1975, s. 34(5); Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(6), applied to interim orders by s. 19(4).

9 Guardianship Act 1973, s. 2(5D), applied to interim orders in custodianship by the Children Act 1975, s. 34(5); Domestic Proceedings and Magistrates' Courts Act 1978, s. 19(6).

10 See Jenkins v. Jenkins (1978) 1 F.L.R. 148; W. v. D. (1979) 1 F.L.R. 393; Townson v. Mahon [1986] F.L.R. 690 and, for a review of the case law, see Re R. (1980) 2 F.L.R. 316, and Re B. (1982) 4 F.L.R. 472 (a wardship case).

11 See Edwards v. Edwards [1986] 1 F.L.R. 187, and 205, for the importance of ascertaining the "real status quo".

12 See, for example, Re W. (1982) 4 F.L.R. 492.

interim orders is more powerful in respect of their duration than their making.

4.6 It may be preferable, therefore, for an interim custody or access order to be available simply when it is in the child's best interests as is the case under the Matrimonial Causes Act 1973, for example on a divorce. Even in proceedings in magistrates' courts under the 1971 and 1978 Acts the 'special circumstances' criterion applies only at first instance, since on an appeal the High Court may 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".[13] Our provisional view is that it is not necessary to retain the 'special circumstances' criterion.

B. Duration of Interim Orders

4.7 There is no restriction on the number, duration and renewal of interim orders made on divorce. However, the other statutes forbid more than one interim order on each application in the main proceedings.[14] This order may endure for up to three months[15] and may be continued by order for no longer than three months from the date of the first continuation order.[16] Hence, the maximum duration of interim orders is

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13 Guardianship of Minors Act 1971, s. 16(6) and Domestic Proceedings and Magistrates' Courts Act 1978, s. 29(2).

14 Guardianship Act 1973, s. 2(5E), applied to custodianship by section 34(5) of the Children Act 1975; Domestic Proceedings and Magistrates' Courts Act 1978, s. 19(7). See Edwards v. Edwards [1986] 1 F.L.R. 187 and 205.

15 Ibid.: 1973 Act, s. 2(5C); 1978 Act, s. 19(5).

16 Ibid.: 1973 Act, s. 2(5D); 1978 Act, s. 19(6).

six months. In our Working Paper on Custody it was suggested that in this respect these statutes may be preferable to the Matrimonial Causes Act 1973.[17]

4.8 In 1976, the Commission recommended that time limits on interim orders be retained, on the ground that "an interim order is no substitute for an order made in substantive proceedings and [otherwise] ... unreasonable delay might be encouraged".[18] We understand that an interim order made in a pending divorce suit may sometimes remain in force after the decree absolute if no application is made for a full order. In such a case an interim order does substitute for a full order and, given the parties' acquiescence, no disadvantage need attach to its interim status. However, we see greater force in the argument concerning delay.

4.9 Prolonged litigation over children is undesirable because of the impact of delay on all the people involved. Legal proceedings can be "deeply damaging to the parents and their relationship, rubbing off generally in damage to the children involved".[19] Moreover, the consequences of delay may be that the case of the parent who is not living with the child is severely prejudiced by the time of the full hearing. Reported cases suggest that whilst a period of ten weeks' to two months' separation may be of slight significance,[20] if one parent "has been cut off for a significant period of continuous care for a small child", and the other "has stepped into the breach so that for months or years the child

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17 No. 96, para. 2.71.

18 Report on Matrimonial Proceedings in Magistrates' Courts, Law Com. No. 77 (1976), para. 4.32.

19 B. v. B. [1985] F.L.R. 166, 185, per Cumming-Bruce L.J.

20 Allington v. Allington [1985] F.L.R. 586; Bowley v. Bowley [1984] F.L.R. 791.

has been learning to place its security upon the father ... it becomes in each case a very delicate weighing exercise to decide whether ... to take the risk of uprooting him ... to be brought up by the natural mother".[21] Regular staying access may mitigate the effect of not living with the child.[22] Indeed, the courts have sanctioned changes in a child's residence after a matter of two or three years where circumstances call for it.[23]

4.10 In some cases the pressure of events and resources, for example difficulty in obtaining a welfare report, may cause delays of many months before a case is heard and courts have been advised to proceed without a report in case of considerable delay.[24] During the period of an interim order valuable work may be done towards achieving an agreed solution to the dispute.[25] Nevertheless, the Review of Child Care Law proposed in respect of interim care that a tight timetable should be set, aiming at a full hearing within, at most, eight weeks.[26] The same strict time limits would be applicable to adjournments whether or not an interim care order was made. The experience of the 1973 and 1978 Acts suggests that some time period is practicable for all custody

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21 Re W. (1982) 4 F.L.R. 492, 504, per Cumming-Bruce L.J.

22 Ibid. and Allington v. Allington, op. cit. n. 20.

23 See, for example, L. v. L. (1980) 2 F.L.R. 48; D. v. M. (1982) 4 F.L.R. 247; and for an extreme example, see Re D.W. (1983) Fam. Law 17.

24 Plant v. Plant (1983) 4 F.L.R. 305, 307 per Ormrod L.J.; and see Eekelaar and Clive with Clarke and Raikes, Custody After Divorce (1977) Family Law Studies No. 1, Centre for Socio-Legal Studies, Wolfson College, Oxford, Chapter 6.

25 See Eekelaar, "Children in Divorce: Some Further Data" [1982] O.J.L.S. 63.

26 See paras. 2.39-2.45 above.

disputes where an interim order is made, although no limit is set to the number of adjournments. In divorce proceedings there may be more matters to be resolved between the parties, but the custody decision can always be reviewed in the light of these if necessary. We consider that there is indeed a case for introducing time limits on interim orders in matrimonial causes, but would tentatively favour the more comprehensive solution discussed below.

C. Fixed Time-Limits

4.11 There are two disadvantages in attempting to solve the problem of delay simply by mandatory time limits on interim orders. First, the automatic expiry of the interim order may of itself encourage the parties to return to court and thereby precipitate disputes between them. Secondly, concentrating on interim orders does not deal with the problem of delay directly. It does not discourage lengthy adjournments which may suit the parties better than the child.

4.12 These considerations lead us to suggest a second solution. The court, faced with a custody or access dispute, might be obliged to fix a date for a further hearing or trial of the issue, with a maximum time period of, say, three months within which the case should be heard. During this period the court could make orders as to care and control although, as is suggested generally in our Working Paper on Custody, an order should not have to be made in every case.[27] The orders made need not be termed interim orders. As at present, orders relating to children's upbringing are not final and always remain subject to potential variation. The advantage of dropping the label 'interim' lies in removing the pressure to return to court for a full order if the dispute is resolved. In cases where the parties continue to live together or resume cohabitation for

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27 Op. cit. n. 17, paras. 4.17 - 4.21.

more than six months after the order, the present provisions in the Guardianship Act 1973 and the 1978 Act which render orders in respect of the children unenforceable in these circumstances could be extended to matrimonial causes.[28]

4.13 Requiring the court to fix the date of the next hearing and imposing a fixed time period runs parallel to the recommendations of the Review of Child Care Law in care proceedings.[29] The Matrimonial Causes Procedure Committee ('the Booth Committee'), however, considered that in matrimonial causes fixed return dates should not be mandatory, although they would be "generally helpful".[30] They commented that "we accept that it is primarily for the parties and their advisors to decide what evidence is relevant and to negotiate in the way which seems to them most likely to result in a satisfactory resolution of the issues".[31] However, they did recommend that there should always be an initial hearing in divorces involving children, and that any subsequent hearing of an issue affecting the children should be set at a fixed date "wherever possible".[32] No overall time limit was proposed. Whilst we agree that the law should not hasten the parties to contested family litigation, we are less sure that the interests of children can be served by leaving the course of the proceedings to the parties, because delay will almost always be to the benefit of one of them. Indeed, we believe that the courts should be required to protect the child's position during the

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28 Guardianship Act 1973, s. 5A(1); Domestic Proceedings and Magistrates' Courts Act 1978, s. 25(1).

29 See para. 2.40 above.

30 (1985) Chairman: Mrs. Justice Booth, para. 3.16.

31 Ibid.

32 Ibid., Recommendations 31 and 51.

period pending trial by ensuring that disputes are swiftly resolved. There is no need to tie the resolution of the dispute to the progress of the main suit, for example the divorce petition or application for financial relief.

4.14 Although we have stressed the importance of setting an overall time limit for the hearing of disputes, we consider that such a period should not be absolute. The Review of Child Care Law, for example, recommended that an interim care order could be extended beyond the eight week maximum, but only "in exceptional circumstances" for periods up to 14 days: "indeed the court should be prepared to insist on proceeding even if the applicant would prefer an extension".[33] It may be helpful if the criteria for ordering an extension were prescribed. We suggest that extension of the maximum time period should be permitted only where the court is satisfied such extension is justified and that it will not prejudice the interests of the child.[34] The criterion could be strengthened by a rebuttable presumption that extension is prejudical to the child's interests.

4.15 The Booth Committee were concerned not to prejudice the opportunities for agreed solutions to family disputes[35] and our proposals are also designed with this consideration in mind. If accepted, the Booth Committee's recommendation of an initial hearing in matrimonial causes would assist by providing the parties with information and advice as to conciliation services.[36] Further, it would always be open for the parents

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33 Report to Ministers of an Interdepartmental Working Party (1985), para. 17.17.

34 See, for example, Childrens Act 1984 (Yukon Territory), s.41(1).

35 Op. cit. n. 30, para. 3.15.

36 Ibid., paras. 4.54 - 4.57.

to agree between themselves any variation of the arrangements made for the children. Our proposal would place some administrative burden on the courts, but we understand that some courts are already familiar with setting fixed return dates, at least in wardship cases. We consider that the arguments in favour of court control of proceedings in wardship are just as valid in other contested child litigation.

D. Conclusion

4.16 Hence we provisionally recommend the second option set out above; in summary:

(i) where there is a dispute over the child's upbringing the court should always set a fixed return date;

(ii) a maximum time period, for example three months, should be prescribed, within which any such dispute should be heard;

(iii) the maximum time period should only be extended where such extension is justified and not prejudicial to the child's best interests;

(iv) pending the hearing, the court should be able to make such orders as to custody, care and control or access as it thinks are in the child's interests;

(v) such orders would continue unless discharged at a later hearing, or the child's parents (or the spouses before the court) continue to live together, or resume cohabitation, for six months after the order is made.[37]

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37 Paras. 4.12-4.14.

4.17 If this proposal is not favoured we favour reconciling the present differences between matrimonial causes and the other jurisdictions thus:

(i) the 'special circumstances' criterion for making interim orders in custody proceedings other than matrimonial causes should be abolished,[38] but

(ii) the time limits applicable in other proceedings should be extended to matrimonial causes.[39]

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38 Para. 4.6

39 Para. 4.10.

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