



The Law Commission and The Scottish Law Commission

(LAW COM. No. 138)
(SCOT. LAW COM. No. 91)

FAMILY LAW

**CUSTODY OF CHILDREN—
JURISDICTION AND ENFORCEMENT
WITHIN THE UNITED KINGDOM**

**REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965**

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DRAFT

Child Custody Bill

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D R A F T

O F A

B I L L

T O

A.D. 1984

Amend the law relating to the jurisdiction of courts in the United Kingdom to make orders with regard to the custody of children; to make provision as to the recognition and enforcement of such orders throughout the United Kingdom; to make further provision as to the imposition, effect and enforcement of restrictions on the removal of children from the United Kingdom or from any part of the United Kingdom; to amend the law relating to the jurisdiction of courts in Scotland as to tutory and curatory; and for connected purposes.

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

PART I

PRELIMINARY

1.—(1) Subject to the following provisions of this section, in this Act “custody order” means—

(a) an order made by a court in England and Wales under any of the following enactments—

(i) section 9(1), 10(1)(a), 11(a) or 14A(2) of the Guardianship of Minors Act 1971 or section 2(4)(b) or 2(5) of the Guardianship Act 1973;

(ii) section 42(1) of the Matrimonial Causes Act 1973;

(iii) section 42(2) of the Matrimonial Causes Act 1973;

Orders to which Act applies.

1971 c. 3.
1973 c. 29.

1973 c. 18.

EXPLANATORY NOTES

PART I *Preliminary*

Clause 1

1. In this clause, the meaning of the term “custody order” is defined in relation to England and Wales (subsection (1)(a) and (d)), Scotland (subsection (1)(b)) and Northern Ireland (subsection (1)(c) and (d)). This is necessary both because each of the three parts of the United Kingdom has its own statutory provisions and because the term “custody” is used in different senses in different contexts. The matter is discussed in paragraph 3.3 of the report.

2. The English orders which are affected by the Bill are listed in subsection (1)(a) and (d) and the Northern Ireland orders so affected are listed in subsection (1)(c) and (d). It follows that English or Northern Ireland orders not mentioned in these paragraphs, however they may be described in the legislation under which they are made, are not “custody orders” within the meaning of the term as used in the Bill. In particular, (a) all orders placing a child in the care of a local authority and (b) custody orders made as a step in adoption proceedings are not mentioned and are unaffected by the Bill. The exclusion of these orders is discussed in paragraphs 3.4–3.9 of the report.

Subsection (1)

England and Wales

3. *Subsection (1)(a)(i)* refers to custody orders made under specified provisions of the Guardianship of Minors Act 1971 or the Guardianship Act 1973. Of these provisions, the one most used is section 9(1) of the 1971 Act, which enables the court (i.e. the High Court, a county court or a magistrates’ court) on the application of the mother or father (including the father of an illegitimate child) to make such order relating to the child’s legal custody or the right of access to him as the court thinks fit, having regard to the child’s welfare and to the conduct and wishes of the mother and father. Section 10(1)(a) of the 1971 Act empowers the court to make a custody order or access order where it has ordered under section 4(4) that a person shall be sole guardian to the exclusion of a parent. Section 11(a) empowers the court to make a custody order or access order where joint guardians disagree. Section 14A, which was inserted by the Domestic Proceedings and Magistrates’ Courts Act 1978, relates to access to minors by grandparents. Section 2(4)(b) and (5) of the Guardianship Act 1973 enables the court to make interim orders pending a final decision. (It should be noted that the powers of testamentary guardians or of persons appointed by the court to be guardians of orphans are not covered by the Bill unless a further order giving legal custody to the guardian has been made under one or other of the sections specifically mentioned in the Bill.)

4. *Subsection (1)(a)(ii) and (iii)* refers to custody orders made under section 42(1) of the Matrimonial Causes Act 1973, i.e. to orders made in proceedings for divorce, nullity of marriage or judicial separation, and also to orders made under section 42(2) of the same Act, i.e. as ancillary to financial

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- Part 1
- 1975 c. 72. (iv) section 33(1) of the Children Act 1975 or section 2(4)(b) of the Guardianship Act 1973 as applied by section 34(5) of the Children Act 1975;
- 1978 c. 22. (v) section 8(2) or 19(1)(ii) of the Domestic Proceedings and Magistrates' Courts Act 1978;
- (b) an order made by a court of civil jurisdiction in Scotland under any enactment or rule of law with respect to the custody, care or control of a child, access to a child or the education or upbringing of a child (whether or not any such order has previously been made by the same court in respect of the same child), excluding—
- (i) an order committing the care of a child to a local authority or placing a child under the supervision of a local authority;
- (ii) an adoption order as defined in section 12(1) of the Adoption (Scotland) Act 1978;
- (iii) an order for the custody of a child made in the course of proceedings for the adoption of the child (other than an order made following the making of a direction under section 53(1) of the Children Act 1975);
- 1980 c. 44. (iv) an order made under the Education (Scotland) Act 1980;
- 1968 c. 49. (v) an access order made under section 17B of the Social Work (Scotland) Act 1968;
- (vi) an order for the delivery of a child or other order for the enforcement of a custody order;
- (vii) an order relating to the tutory or curatory of a child;
- (c) an order made by a court in Northern Ireland under any of the following enactments—
- 1886 c. 27. (i) section 5 of the Guardianship of Infants Act 1886 (except so far as it relates to costs);
- S.I. 1978/1045 (N.I. 15). (ii) Article 45(1) of the Matrimonial Causes (Northern Ireland) Order 1978;
- (iii) Article 45(2) of the Matrimonial Causes (Northern Ireland) Order 1978;
- S.I. 1980/563 (N.I. 5). (iv) Article 10(2) or 20(1)(ii) of the Domestic Proceedings (Northern Ireland) Order 1980;
- (d) an order made by the High Court in the exercise of its jurisdiction relating to wardship so far as it gives the care and control of a child to any person or provides for the education of, or for access to, a child, excluding an order relating to a child of whom care or care and control is (immediately after the making of the order) vested in a local authority or in the Northern Ireland Department of Health and Social Services.

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Clause 1 (continued)

orders made in consequence of a failure by one spouse to maintain the other spouse and/or the children of the marriage. It is necessary to distinguish these two types of orders because they are treated differently in the Bill for jurisdictional purposes (see clauses 2(1) and 4(1)).

5. *Subsection (1)(a)(iv)* refers to custodianship orders made under Part II of the Children Act 1975, or under section 2(4)(b) of the Guardianship Act 1973 as applied by the Children Act 1975, including orders relating to access and interim orders. When Part II is brought into force, the intention is that the Bill should apply to custodianship orders (which would grant legal custody of the child in question to certain persons other than parents) in the same way as to other orders relating to custody.

6. *Subsection (1)(a)(v)* refers to custody orders made under Part I of the Domestic Proceedings and Magistrates' Courts Act 1978, which enables a magistrates' court to make orders for financial provision for parties to a marriage or children of the family, and also, where such financial provision has been applied for, to make orders relating to the legal custody of and access to such children of the family. The main power is to be found in section 8 of the 1978 Act. Section 19 gives the court power to make interim orders (including interim custody orders).

Scotland

7. *Subsection (1)(b)* identifies the Scottish orders to which the Bill applies. Since in Scotland custody orders are to a large extent governed by the common law, they cannot be identified by reference to specific enactments, as is done for England and Wales and Northern Ireland in subsection (1)(a), and (c). Identification is achieved by the inclusion of a general definition of the term "custody order" combined with specific exclusions relating to orders committing the care of a child to or placing him under the supervision of a local authority (sub-paragraph (i)), orders in adoption proceedings (sub-paragraphs (ii) and (iii)), orders under the Education (Scotland) Act 1980—e.g. relating to the school in which a child is to be placed (sub-paragraph (iv)), orders for access to a child in respect of whom a local authority has assumed parental rights (sub-paragraph (v)), orders for enforcement of custody orders (sub-paragraph (vi)), and orders relating to tutory or curatory (sub-paragraph (vii)). All orders made by criminal courts in Scotland are excluded by the reference to "a court of civil jurisdiction". Similar orders made in England and Wales and Northern Ireland are excluded by reason of their not being referred to in subsection (1)(a), (c) or (d).

8. A further consequence of the form of subsection (1)(b) is that the definition of a custody order in relation to orders made by courts in Scotland (unlike those made in England and Wales and in Northern Ireland) includes an order which varies or recalls an existing custody order. For this reason the drafting technique relating to such orders which has been adopted in Part III of the Bill (Jurisdiction of Courts in Scotland) differs from that adopted in Parts II and IV (Jurisdiction of Courts in England and Wales and in Northern Ireland). The effect is however the same (see paragraphs 3.3 and 4.30 of the Report).

Child Custody

Part 1

(2) The following orders are not custody orders for the purposes of this Act—

1971 c. 3.

- (a) an order which is made under any enactment mentioned in subsection (1)(a) or (c) above and which varies or revokes a previous order made under that enactment;
- (b) an order under section 14A(2) of the Guardianship of Minors Act 1971 which varies a previous custody order;
- (c) an order within paragraph (d) of subsection (1) above which varies or revokes a previous order within that paragraph.

EXPLANATORY NOTES

Clause 1 (continued)

Northern Ireland

9. *Subsection (1)(c)* defines specific Northern Ireland orders to which the Bill applies. The technique followed is the same as that in subsection (1)(a) in relation to England and Wales. Subsection (1)(c)(i) to (iv) corresponds to subsection (1)(a)(i), (ii), (iii) and (v).

10. *Subsection (1)(d)* relates to certain orders made in wardship proceedings in England and Wales and Northern Ireland. It refers to an order made by the High Court in the exercise of its jurisdiction relating to wardship “so far as it gives the care and control to any person or provides for the education of, or for access to, a child.” The wardship order itself is therefore not a “custody order” for this purpose. Hence, although a child becomes a ward of court by virtue of the making of the application, this fact will not of itself enable the main provisions of the Bill to be invoked (but see clause 38). If, on the other hand, the High Court in the exercise of its wardship jurisdiction makes an order giving care and control of the child to a named individual, or an order relating to access to the child or his education, that will be a “custody order” governed by the Bill.

11. The reference to “care and control” reflects the terms of orders made in wardship in favour of a named individual. Subsection (1)(d) specifically excludes the cases where the court, when exercising wardship jurisdiction, commits the care of a ward to a local authority, or orders that the ward be under the supervision of a welfare officer or of a local authority (whether under the Family Law Reform Act 1969, s.7 or under its inherent powers). It is not intended that the provisions of the Bill should apply to orders of this kind, however made; see paragraphs 3.4–3.6 of the report.

12. The term “High Court” means the High Court in England and Wales or Northern Ireland as appropriate (Interpretation Act 1978, Sch. 1).

Subsection (2)

13. This subsection provides that certain orders made in England and Wales and in Northern Ireland are not custody orders for the purposes of the Bill. The subsection does not apply to Scotland, because of the different drafting technique used in relation to the definition of Scottish custody orders. The subsection is necessary partly because the terminology in earlier legislation is not consistent, and partly because it is necessary later in the Bill to distinguish between an original custody order and an order varying or revoking an earlier order. One consequence of the exclusion of variation or revocation orders from the definition of “custody order” in its application to England and Wales and Northern Ireland is that the jurisdictional rules in Parts II and IV relating to the making of custody orders in England and Wales and in Northern Ireland will not apply to variations or revocations, except where they are specifically mentioned (as, e.g., in clause 6(3)). Subject to those exceptions and to cases where the Bill specifically restricts the jurisdiction to vary, a court in England and Wales or in Northern Ireland will retain any jurisdiction it now has

EXPLANATORY NOTES

Clause 1 (continued)

to vary or revoke a custody order made by it, even though it would no longer have jurisdiction under the Bill to make the order which is varied or revoked. This matter is mentioned in paragraph 4.30 of the report.

14. By reason of clause 41(5), references to custody orders include references to custody orders as varied, except where the context otherwise requires. Clause 41(5) also provides for certain types of orders to be treated as variation orders even if they are not expressly so called.

Child Custody

PART II

JURISDICTION OF COURTS IN ENGLAND AND WALES

Jurisdiction in cases
other than divorce,
etc.
1973 c. 18.

2.—(1) A court in England and Wales shall not have jurisdiction to make a custody order within section 1(1)(a) of this Act, other than an order under section 42(1) of the Matrimonial Causes Act 1973, unless the condition in section 3 of this Act is satisfied.

(2) The High Court in England and Wales shall have jurisdiction to make a custody order within section 1(1)(d) of this Act if, and only if,—

(a) the condition in section 3 of this Act is satisfied, or

(b) the ward is present in England and Wales on the relevant date (within the meaning of section 3(6) of this Act) and the court considers that the immediate exercise of its powers is necessary for his protection.

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PART II *Jurisdiction of courts in England and Wales*

Clause 2

Subsection (1)

1. This subsection paves the way for clause 3 by providing that a court in England and Wales shall not have jurisdiction to make a custody order within clause 1(1)(a) of the Bill, other than an order under clause 42(1) of the Matrimonial Causes Act 1973, unless the condition set out in clause 3 is satisfied. The proceedings referred to are proceedings for a custody order under the Guardianship of Minors Acts, under section 42(2) of the Matrimonial Causes Act 1973 (i.e. ancillary to an application for financial relief under section 27 of that Act), under Part II of the Children Act 1975 (i.e. custodianship proceedings) or under section 8 or 19 of the Domestic Proceedings and Magistrates' Courts Act 1978 (i.e. ancillary to proceedings for financial provision in magistrates' courts under Part I of that Act).

Subsection (2)

2. This subsection relates to the jurisdiction of the High Court in wardship. It preserves the special emergency jurisdiction to deal with any ward who is present in England and Wales where the court considers that the immediate exercise of its powers is necessary for his protection. Otherwise, the provisions of clause 3 apply. The subsection implements the recommendation in paragraph 4.22(1) of the report.

Child Custody

Part II
Habitual
residence or
presence of child.

3.—(1) The condition referred to in section 2 of this Act is that on the relevant date the child concerned—

- (a) is habitually resident in England and Wales, or
- (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom,

and, in either case, the jurisdiction of the court is not excluded by subsection (2) below.

(2) For the purposes of subsection (1) above, the jurisdiction of the court is excluded if, on the relevant date, proceedings for divorce, nullity or judicial separation are continuing in a court in Scotland or Northern Ireland in respect of the marriage of the parents of the child concerned.

(3) Subsection (2) above shall not apply if the court in which the other proceedings there referred to are continuing has made—

- (a) an order under section 13(6) or 21(5) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or
- (b) an order under section 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling proceedings with respect to the custody of the child concerned to be taken in England and Wales,

and that order is in force.

(4) Subject to subsections (5) and (6) below, in this section “the relevant date” means the date of the commencement of the proceedings in which the custody order falls to be made.

(5) In a case where an application is made for an order under section 9(1) or 14A(2) of the Guardianship of Minors Act 1971 or section 33(1) of the Children Act 1975, “the relevant date” means the date of the application (or first application, if two or more are determined together).

(6) In the case of a custody order within section 1(1)(d) of this Act “the relevant date” means—

- (a) where an application is made for an order, the date of the application (or first application, if two or more are determined together), and
- (b) where no such application is made, the date of the order.

1971 c. 3.
1975 c. 72.

EXPLANATORY NOTES

Clause 3

Subsection (1)

1. This subsection establishes the habitual residence of the child as a new basis of jurisdiction in proceedings other than proceedings for divorce, nullity or judicial separation. The proceedings affected fall into two classes, i.e. (a) those which are directed primarily to determination of who should have the custody of the child—namely, proceedings in wardship, guardianship or custody—and (b) custody proceedings which are ancillary to proceedings between the parents for financial relief. The term “habitual residence” is not defined in the Bill, although certain provisions as to habitual residence after removal without consent of all the persons having the right to determine where the child is to reside, or in contravention of a court order, are included in clause 40. The term is also used without definition in several other statutes, notably sections 5, 6, 7, 8, 13 and 14 of the Domicile and Matrimonial Proceedings Act 1973 and section 24 of the Children Act 1975. The subsection implements the recommendation in paragraph 4.18 of the report.

2. The subsection also provides that the physical presence of the child shall be a ground for the exercise of jurisdiction where the child is not habitually resident in any part of the United Kingdom. For the reasons explained in paragraphs 4.23–4.26 of the report, in the absence of such a provision the applicant might be left without any remedy in any part of the United Kingdom. The subsection implements the recommendation in paragraph 4.26 of the report.

Subsection (2)

3. This subsection gives priority over custody proceedings in England and Wales based on the habitual residence or presence of the child to proceedings in Scotland or Northern Ireland for divorce, nullity or judicial separation in respect of the “marriage of the parents” (see clause 41(4)). Similar provisions giving priority to proceedings in England and Wales for divorce, nullity of marriage or judicial separation of the child’s parents are to be found in clause 13(3) (Scotland) and clause 20(2) (Northern Ireland). It follows that if, on the “relevant date” as defined in subsection (6), such divorce, etc. proceedings are “continuing” in Scotland or Northern Ireland, the English court (except the High Court in an emergency—see clause 2(2)(b)) will have no jurisdiction to make a custody order. The meaning in this context of the term “continuing” is defined in clause 41(2) and (3). The subsection implements the recommendations in paragraph 4.3 and 4.96 of the report.

Subsection (3)

4. This subsection restores the jurisdiction taken away by subsection (2) in cases where the divorce, etc. court in Scotland or Northern Ireland decides to waive its custody jurisdiction or to sist or stay custody proceedings before it, in favour of the English court. The subsection, together with the provisions of the

EXPLANATORY NOTES

Clause 3 (continued)

Bill to which it refers, implements the first recommendation in paragraph 4.97 of the report.

Subsection (4)

5. This subsection defines the term the “relevant date” for the purpose of the preceding subsections. The definition is important because the “relevant date” is the point of time with reference to which jurisdiction is determined. Generally—as stated in subsection (4)—this will be the date of the commencement of the proceedings in which the custody order falls to be made. However, special provision is made in subsections (5) and (6) for particular orders in relation to which the effect of this general provision would otherwise be uncertain. The point is mentioned in paragraph 4.27 of the Report.

6. Where the court makes an order of its own motion in other proceedings—as it is often able to do—the “relevant date” is the date of commencement of those proceedings. Thus if a magistrates’ court is asked under Part I of the Domestic Proceedings and Magistrates’ Courts Act 1978 to make provision for the maintenance of a child, and subsequently decides to make a custody order—a question which it is required by section 8(1) of that Act to consider before making a final order on the application—the “relevant date” would be the date of the application for an order under Part I of the Act.

Subsection (5)

7. This subsection relates to three particular orders.

- (a) Applications for custody under section 9(1) of the Guardianship of Minors Act 1971 may be made after or in the course of proceedings for the appointment of a guardian to deal with the child’s property. In this case the “relevant date” is the date of the application for custody.
- (b) An application may be made under section 14A(2) of the Guardianship of Minors Act 1971 by a grandparent for access to a grandchild, where one or both of the child’s parents has died. In this case the “relevant date” is the date of the application by the grandparent.
- (c) An application may be made for a custodianship order under section 33 of the Children Act 1975. These applications have to be mentioned specially because the application may be made, or be deemed to be made, in the course of some other proceedings—e.g. if the court directs, under the powers given to it by section 37 of the Children Act 1975, that an application for adoption be treated as if it had been made by the applicant under section 33. In this case the “relevant date” is the date on which the application is made, or treated as made, under section 33.

In all these cases, the “relevant date” is the date of the “first application, if two or more are determined together”. This wording is used to cover the possibility of cross-applications.

EXPLANATORY NOTES

Clause 3 (continued)

Subsection (6)

8. This subsection refers to custody orders made in wardship proceedings, i.e. orders relating to the care and control or education of or access to a child who is a ward of court. Such orders may either be applied for or be made by the court of its own motion. The subsection, by providing that the "relevant date" for determining jurisdiction is the date of the application for the custody order (or first application if two or more are determined together) or, if there is no application, the date of the order, takes account of the possibility that the question whether a custody order should be made may arise some considerable time after the child has become a ward of court, and that when the question does arise, jurisdiction in custody now rests, under the scheme embodied in the Bill, with a court elsewhere. In such a case, the wardship court would not have jurisdiction to make a custody order merely because the child had been warded in the past. The subsection implements the recommendation in paragraph 4.28 of the report.

Child Custody

Part II

Jurisdiction
in divorce
proceedings,
etc.

1973 c. 18.

4.—(1) The enactments relating to the jurisdiction of courts in England and Wales to make orders under section 42(1) of the Matrimonial Causes Act 1973 shall have effect subject to the modifications provided for by this section.

(2) In section 42(1)(b) of that Act (which enables orders as to custody and education to be made immediately, or within a reasonable period, after the dismissal of proceedings for divorce, etc.) for the words “within a reasonable period” there shall be substituted the words “(if an application for the order is made on or before the dismissal)”.

(3) A court shall not have jurisdiction to make an order under section 42(1)(a) of that Act after the grant of a decree of judicial separation if, on the relevant date, proceedings for divorce or nullity in respect of the marriage concerned are continuing in Scotland or Northern Ireland.

(4) Subsection (3) above shall not apply if the court in which the other proceedings there referred to are continuing has made—

(a) an order under section 13(6) or 21(5) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or

(b) an order under section 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling proceedings with respect to the custody of the child concerned to be taken in England and Wales,

and that order is in force.

(5) Where a court—

(a) has jurisdiction to make an order under section 42(1) of the Matrimonial Causes Act 1973 in or in connection with proceedings for divorce, nullity of marriage or judicial separation, but

(b) considers that it would be more appropriate for matters relating to the custody of the child to be determined outside England and Wales,

the court may by order direct that, while the order under this subsection is in force, no order under section 42(1) with respect to the child shall be made by any court in or in connection with those proceedings.

(6) In this section “the relevant date” means—

(a) where an application is made for an order under section 42(1)(a), the date of the application (or first application, if two or more are determined together), and

(b) where no such application is made, the date of the order.

EXPLANATORY NOTES

Clause 4

1. As explained in relation to clause 3, the general effect of the Bill is that a court in which proceedings for divorce, nullity or judicial separation of the parents are continuing has exclusive jurisdiction in relation to the custody of a child of the family, even though the child in question is habitually resident in another part of the United Kingdom. To enable this principle to be applied, however, specific provision has to be made for the following possibilities:

- (a) the application for divorce, etc. may be dismissed;
- (b) a decree of judicial separation may be followed by proceedings for divorce or nullity;
- (c) the court dealing with divorce, etc. may itself wish to waive its jurisdiction in favour of another court.

Specific provision for these matters, so far as England and Wales is concerned, is made in clause 4. Similar provisions for Scotland and Northern Ireland are to be found in clauses 13 and 21.

2. The meaning of the term "continuing" is defined in clause 41(2) and (3) (interpretation) i.e. that the proceedings, if not dismissed, are to be treated as continuing until the child concerned attains the age of eighteen (England and Wales and Northern Ireland) or sixteen (Scotland). It follows that the divorce, etc. court would have and retain exclusive jurisdiction both up to and after the grant of a decree even if the child or some or all of the parties have since ceased to have any connection with the part of the United Kingdom in which the divorce, etc. proceedings were begun.

Subsection (1)

3. This subsection specifies the jurisdiction affected, i.e. that conferred by section 42(1) of the Matrimonial Causes Act 1973.

Subsection (2)

4. This subsection limits jurisdiction to make a custody order after the dismissal of proceedings for divorce, nullity or judicial separation to the case where the application for the order was made on or before the dismissal of the main proceedings. The effect of this provision is to narrow section 42(1)(b) of the Matrimonial Causes Act 1973, which at present allows such an application to be entertained if it is made "within a reasonable period after the dismissal". Since under clause 3(2) jurisdiction to make custody orders on the basis of the child's habitual residence or presence in England and Wales is excluded by divorce, etc. proceedings elsewhere in the United Kingdom only when those proceedings are "continuing", it is desirable that the jurisdiction to make a custody order after dismissal of divorce, etc. proceedings (i.e. when they are not continuing) is limited more strictly than it is by the term "reasonable period". The subsection imposes such a limitation and thus reduces the possibility of jurisdictional conflicts. The subsection implements the first recommendation in paragraph 4.98 of the report.

EXPLANATORY NOTES

Clause 4 (continued)

Subsection (3)

5. This subsection caters for the possibility that proceedings for divorce or nullity are begun in one part of the United Kingdom after the grant of a decree of judicial separation in another part. In that event, the jurisdiction to make a custody order passes to the divorce, etc. court. The effect of the subsection is to prevent a further order relating to custody being made in the court by which the judicial separation was granted, even though the judicial separation proceedings might be regarded as still “continuing” within the meaning of the term as defined in clause 41(2) of the Bill.

Subsection (4)

6. This subsection restores the jurisdiction taken away by subsection (3) in cases where the divorce, etc. court in Scotland or Northern Ireland decides to waive its custody jurisdiction or to sist or stay custody proceedings before it, in favour of the English court.

Subsection (5)

7. This subsection gives power to an English court in connection with proceedings for divorce, nullity or judicial separation to waive its custody jurisdiction in favour of a court outside England and Wales. As explained in paragraph 2 above, the Bill gives the divorce, etc. court exclusive jurisdiction. This jurisdiction continues even if the original jurisdictional basis has ceased to apply. It also continues even if the divorce, etc. court made no custody order before or when granting the divorce decree. The courts of another part of the United Kingdom cannot assume jurisdiction (except in an emergency—as to which, see clauses 12 and 19(2)(b)) so long as the proceedings are continuing within the meaning of clause 41(2). It may well be however that, on the particular facts, it would clearly be more sensible for the custody issues to be dealt with elsewhere. Subsection (5) accordingly gives the divorce, etc. court power to waive its own exclusive jurisdiction, where it thinks this would be appropriate, by making an order to that effect. The subsection enables the court to waive custody jurisdiction without having an application for custody before it. It should be noted that the power of an English court to waive custody jurisdiction is not limited to the case where the court considers that it would be more appropriate for the custody issue to be determined in Scotland or Northern Ireland, but also extends to determination in another country. The subsection implements the recommendations in paragraph 4.97 of the report.

8. Where, under subsection (5), the English court waives its custody jurisdiction, a court in Scotland or Northern Ireland is enabled by clause 13(5) (Scotland) or clause 20(3) (Northern Ireland) to exercise the jurisdiction it could have exercised under the Bill but for the English divorce, etc. proceedings.

Subsection (6)

9. Subsection (6) defines “the relevant date” for the purpose of limiting jurisdiction in judicial separation proceedings under subsection (3).

EXPLANATORY NOTES

Clause 4 (continued)

Ordinarily, as stated in sub-paragraph (a), this will be the date of the application for a custody order under section 42(1)(a) of the Matrimonial Causes Act 1973 (or the date of the first application where two or more are determined together). Sometimes however there may be no application, but the court may conclude on the facts that it should make a custody order of its own motion. In such a case, the "relevant date" to determine whether it has jurisdiction to do so is the date on which it makes the order. The point is referred to in paragraph 4.27 of the report.

Child Custody

Part II

Power of court to refuse application or stay proceedings

5.—(1) A court in England and Wales which has jurisdiction to make a custody order may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside England and Wales.

(2) Where, at any stage of the proceedings on an application made to a court in England and Wales for a custody order, or for the variation of a custody order, it appears to the court—

- (a) that proceedings with respect to the matters to which the application relates are continuing outside England and Wales, or
- (b) that it would be more appropriate for those matters to be determined in proceedings to be taken outside England and Wales,

the court may stay the proceedings on the application.

(3) The court may remove a stay granted in accordance with subsection (2) above if it appears to the court that there has been unreasonable delay in the taking or prosecution of the other proceedings referred to in that subsection, or that those proceedings are stayed, sisted or concluded.

(4) Nothing in this section shall affect any power exercisable apart from this section to refuse an application or to grant or remove a stay.

EXPLANATORY NOTES

Clause 5

1. This clause is designed to give courts a discretion either to refuse an application relating to the custody of a child or to stay custody proceedings before them pending the outcome of other proceedings elsewhere. As is explained in paragraphs 4.108 and 4.111 of the report, this general discretion is intended to enable courts to deal with various complex situations which may arise, and which are not capable of resolution by the application of strict rules.

2. The clause overlaps with, but does not replace, clause 4(5). Clause 4(5) enables the court to waive its potential jurisdiction without first having to have a custody application before it. This is necessary because the ancillary custody jurisdiction in proceedings for divorce, nullity or judicial separation exists and continues indefinitely even if no application relating to the children of the family is pending before the court. Clause 5 is not designed to deal with that specific situation, but to give courts a general discretion in any custody proceedings either to refuse any application or to stay the proceedings before them. The exercise of the discretion is not limited to the case where the other proceedings are or were in the United Kingdom; it may also be exercised in favour of proceedings in foreign countries.

Subsection (1)

3. This subsection deals with the case where the matter in question has already been determined in proceedings outside England and Wales. The subsection enables the court to refuse to allow the custody issue to be reopened before it, even though it has jurisdiction, where it considers that the issue has already been fully explored and that there has been no change of circumstances justifying a re-hearing. The subsection implements the recommendation in paragraph 4.111 of the report.

Subsection (2)

4. This subsection deals with two further possibilities, namely (a) that proceedings relating to custody are continuing outside England and Wales; (b) that, although no such proceedings have been commenced, the English court considers it would be more appropriate for the custody matters to be determined in proceedings outside England and Wales. In either circumstance, the court is given a discretion, if it thinks fit, to stay the proceedings before it. This discretion is designed, *inter alia*, to enable courts to dispose of applications which are made as a delaying tactic or to resolve cases in which more than one court has jurisdiction. The subsection implements the first recommendation in paragraph 4.103 of the report.

Subsection (3)

5. This subsection enables a court which has granted a stay under subsection (2) to revoke that stay and resume hearing the proceedings if, in the event, the other proceedings originally expected to continue or to be begun in another country are unreasonably delayed or are themselves stayed, sisted or

EXPLANATORY NOTES

Clause 5 (continued)

concluded. This could occur where, for example, the court in the other country has not dealt with the custody issues, or where one of the parties has said he intends to raise the custody issue in the other country but then fails to do so. The subsection implements the second recommendation in paragraph 4.103 of the report.

Subsection (4)

6. This subsection preserves any other existing powers to refuse an application or to grant or remove a stay.

Child Custody

Part II

Duration and
variation of
custody
orders.

6.—(1) If a custody order made by a court in Scotland or Northern Ireland (or a variation of such an order) comes into force with respect to a child at a time when a custody order made by a court in England and Wales has effect with respect to him, the latter order shall cease to have effect so far as it makes provision for any matter for which the same or different provision is made by (or by the variation of) the order made by the court in Scotland or Northern Ireland.

(2) Where by virtue of subsection (1) above a custody order has ceased to have effect so far as it makes provision for any matter, a court in England and Wales shall not have jurisdiction to vary that order so as to make provision for that matter.

(3) A court in England and Wales shall not have jurisdiction—

(a) to vary a custody order, other than an order made under section 42(1)(a) of the Matrimonial Causes Act 1973, or

(b) after the grant of a decree of judicial separation, to vary an order made under section 42(1)(a) of that Act,

if, on the relevant date, proceedings for divorce, nullity or judicial separation are continuing in Scotland or Northern Ireland in respect of the marriage of the parents of the child concerned.

(4) Subsection (3) above shall not apply if the court in which the proceedings there referred to are continuing has made—

(a) an order under section 13(6) or 21(5) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or

(b) an order under section 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling proceedings with respect to the custody of the child concerned to be taken in England and Wales,

and that order is in force.

(5) Subsection (3) above shall not apply in the case of a variation of a custody order within section 1(1)(d) of this Act if the ward is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.

(6) Where any person who is entitled to the actual possession of a child under a custody order made by a court in England and Wales ceases to be so entitled by virtue of subsection (1) above, then, if there is in force an order for the supervision of that child made under—

(a) section 7(4) of the Family Law Reform Act 1969,

(b) section 44 of the Matrimonial Causes Act 1973,

(c) section 2(2)(a) of the Guardianship Act 1973,

(d) section 34(5) of the Children Act 1975, or

(e) section 9 of the Domestic Proceedings and Magistrates' Courts Act 1978,

1969 c. 46.

1973 c. 29.

1975 c. 72.

1978 c. 22.

EXPLANATORY NOTES

Clause 6

Subsection (1)

1. This subsection provides that if a custody order (or a variation of a custody order) made in another part of the United Kingdom by a court with jurisdiction under the Bill comes into force at a time when an order made in England and Wales is in effect, then the later order will prevail over the English order to the extent to which it overlaps. This situation might occur, for example, where the jurisdictional basis of the first order was the habitual residence of the child in England and Wales and the child has since become habitually resident in Scotland. The subsection implements the first recommendation in paragraph 4.115 of the report.

Subsection (2)

2. This subsection provides that, where an English order has ceased to have effect in whole or in part by reason of a later order having been made in Scotland or Northern Ireland, the English court is not to have power to vary its own order so as to make provision for the matters covered by that later order. The subsection is necessary because there is no general jurisdictional provision in the Bill relating to variations by a court in England and Wales (since, by reason of clause 1(2), a variation is not a custody order for the purposes of the Bill). The subsection, together with subsection (6), implements the second recommendation in paragraph 4.115 of the report.

Subsection (3)

3. This subsection provides that if, on the relevant date (as defined in subsection (7)), proceedings in respect of the marriage of the child's parents are "continuing" (within the meaning of clause 41(2) or (3)) in Scotland or Northern Ireland, the English court is not to have jurisdiction to vary its own custody order, unless the English order itself was made (a) in divorce or nullity proceedings or (b) in judicial separation proceedings and the variation is made before decree. The subsection implements the recommendations in paragraphs 4.113 and 4.114 of the report.

Subsection (4)

4. This subsection provides for the possibility that the court in Scotland or Northern Ireland in which the divorce, etc. proceedings are continuing decides to waive its jurisdiction to make a custody order or to sist or stay custody proceedings before it, in favour of the English court. In that event, the power to vary an earlier English order revives.

Subsection (5)

5. This subsection preserves the overriding right of the High Court in wardship to vary its own order in respect of a ward who is present in England on

Child Custody

Part II

that order shall also cease to have effect.

(7) In this section “the relevant date” means—

- (a) where an application is made for a variation, the date of the application (or first application, if two or more are determined together), and
- (b) where no such application is made, the date of the variation.

EXPLANATORY NOTES

Clause 6 (continued)

the relevant date if the court considers that the immediate exercise of its powers is necessary for the child's protection.

Subsection (6)

6. This subsection provides for the cessation of supervision orders which were made in conjunction with custody orders which have ceased to have effect. Under the statutory provisions listed in the subsection, a court in England and Wales may, instead of or in addition to making a custody order, place a child under the supervision of a local authority welfare worker or probation officer. Where a custody order has been superseded by a later custody order and has ceased to have effect in accordance with subsection (1), so that a person ceases to be entitled to possession of the child, any supervision order dependent on the former custody order should also cease to have effect. The subsection so provides. The supervision orders in question are specified in the subsection so as to avoid inclusion of supervision orders made in criminal proceedings or in care or adoption proceedings, which are outside the scope of the Bill. The subsection, together with subsection (2), implements the second recommendation in paragraph 4.115 of the report.

Subsection (7)

7. The term "the relevant date" is here defined as the date of the application for the variation (or of the first application for variation where two or more are determined together), or, where no application is made, the date on which the variation falls to be made. The latter provision is necessary to cover the possibility that the court may be considering making a variation of a custody order of its own motion in the course of proceedings for some other purpose, e.g. an application for variation of an order for periodical payments for the child's maintenance under Part I of the Domestic Proceedings and Magistrates' Courts Act 1978. The point is referred to in paragraph 4.30 of the report.

Child Custody

Part II
Interpretation
of Part II.

7. In this Part of this Act "child" means a person who has not attained the age of eighteen.

EXPLANATORY NOTES

Clause 7

This clause applies to Part II the English definition of “child” in relation to custody, i.e. a person who has not attained the age of 18. It is necessary to adopt this definition for the purposes of Part II because this Part defines the jurisdiction of courts in England and Wales to make custody orders generally (see Clause 2(1)). However, an order made in England and Wales relating to a child who has attained the age of 16, though valid in England and Wales by reason of this definition, will not be recognised or enforced in Scotland or Northern Ireland, by reason of the provisions of clauses 25(1) and 27(5). The matter is discussed in paragraph 1.22 of the report.

Child Custody

PART III

JURISDICTION OF COURTS IN SCOTLAND

Jurisdiction in independent proceedings.

8. A court in Scotland may entertain an application for a custody order otherwise than in matrimonial proceedings only if it has jurisdiction under section 9, 10, 12 or 15(2) of this Act.

EXPLANATORY NOTES

PART III *Jurisdiction of courts in Scotland*

Clause 8

This clause makes it clear that clauses 9, 10, 12 and 15(2) provide the exclusive grounds of jurisdiction in independent custody proceedings.

Child Custody

Part III
Habitual
residence.

9. Subject to section 11 of this Act, an application for a custody order otherwise than in matrimonial proceedings may be entertained by—

- (a) the Court of Session, if, on the date of the application, the child concerned is habitually resident in Scotland;
- (b) the sheriff, if, on the date of the application, the child concerned is habitually resident in the sheriffdom.

EXPLANATORY NOTES

Clause 9

1. This clause establishes the habitual residence of the child as the primary basis of jurisdiction in independent custody proceedings, that is in proceedings other than proceedings for divorce, nullity of marriage or judicial separation. The term "habitual residence" is not defined in the Bill although certain provisions as to habitual residence are contained in clause 40. The clause implements recommendations contained in paragraphs 4.18 and 4.68 of the report.

2. Jurisdiction is conferred on the Court of Session and the sheriff if, on the date of the application, the child concerned is habitually resident in Scotland and in the sheriffdom respectively. Jurisdiction is, however, excluded in terms of clause 11(1) if matrimonial proceedings are continuing in another court in the United Kingdom. Provisions as to the "date of the application" are contained in clause 18(2) and (3).

Child Custody

Part III
Presence of
child.

10. Subject to section 11 of this Act, an application for a custody order otherwise than in matrimonial proceedings may be entertained by—

- (a) the Court of Session, if, on the date of the application, the child concerned—
 - (i) is present in Scotland; and
 - (ii) is not habitually resident in any part of the United Kingdom;
- (b) the sheriff, if, on the date of the application,—
 - (i) the child is present in Scotland;
 - (ii) the child is not habitually resident in any part of the United Kingdom; and
 - (iii) either the pursuer or the defender in the application is habitually resident in the sheriffdom.

EXPLANATORY NOTES

Clause 10

1. This clause creates a residual ground of jurisdiction in independent custody proceedings based on the presence of the child. It is available only if the child is not habitually resident anywhere in the United Kingdom. The clause implements recommendations contained in paragraphs 4.26 and 4.68 of the report.

2. Jurisdiction is conferred on both the Court of Session and the sheriff, but not in identical terms. The Court of Session may exercise jurisdiction if the child is present in Scotland and not habitually resident anywhere in the United Kingdom. The sheriff's jurisdiction is subject to the additional requirement of habitual residence of either the pursuer or the defender in the sheriffdom. This is to avoid potential conflicts of jurisdiction between competing sheriff courts and to ensure that custody is determined by the most appropriate court with which the parties have some substantial connection. In both cases, jurisdiction is subject to the priority given to the matrimonial jurisdiction under clause 11(1).

Child Custody

Part III

Provisions
supplementary
to sections 9
and 10.

11.—(1) Subject to subsection (2) below, the jurisdiction of the court to entertain an application for a custody order with respect to a child by virtue of section 9, 10 or 15(2) of this Act is excluded if, on the date of the application, matrimonial proceedings are continuing in a court in any part of the United Kingdom in respect of the marriage of the parents of the child.

(2) Subsection (1) above shall not apply in relation to an application for a custody order if the court in which the matrimonial proceedings are continuing has made one of the following orders, that is to say—

- (a) an order under section 4(5), 13(6) or 21(5) of this Act (not being an order made by virtue of section 13(6)(a)(ii)); or
- (b) an order under section 5(2), 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling proceedings with respect to the custody of the child concerned to be taken in Scotland or, as the case may be, in another court in Scotland,

and that order is in force.

EXPLANATORY NOTES

Clause 11

1. This clause enacts the principle that priority should be given to matrimonial jurisdiction over jurisdiction in independent custody proceedings. It implements recommendations contained in paragraphs 4.96 and 4.114 of the report.

Subsection (1)

2. This subsection gives overriding priority to custody applications made in matrimonial proceedings by providing that, subject to the qualification in subsection (2), a court may not entertain a custody application in exercise of its habitual residence or presence jurisdiction if matrimonial proceedings are “continuing” anywhere in the United Kingdom in respect of the marriage of the parents of the child concerned. The definition in clause 41(4) of “proceedings in respect of the marriage of the parents of a child” is such that it includes proceedings where one of the parties to the marriage is the child’s parent and the child has been accepted by the other as a child of the family.

Subsection (2)

3. This subsection provides that subsection (1) shall not apply if the matrimonial court in any part of the United Kingdom has made an order (under clause 4(5), 13(6)(a)(i) or 21(5)), declining jurisdiction or has made an order (under clause 5(2), 14(2) or 22(2)), sisting or staying proceedings to enable custody to be determined elsewhere. In either case, a Scottish court is then entitled to assume jurisdiction on the basis of the child’s habitual residence or presence by virtue of clause 9 or 19. Corresponding provision is made for England and Wales and Northern Ireland in clauses 3(3) and 20(3).

Child Custody

Part III
Emergency
jurisdiction.

12. Notwithstanding that any other court, whether within or outside Scotland, has jurisdiction to entertain an application for a custody order, the Court of Session or the sheriff shall have jurisdiction to entertain such an application if —

- (a) the child concerned is present in Scotland or, as the case may be, in the sheriffdom on the date of the application; and
- (b) the Court of Session or sheriff considers that, for the protection of the child, it is necessary to make such an order immediately.

EXPLANATORY NOTES

Clause 12

This clause provides that both the Court of Session and the sheriff have jurisdiction to make an emergency custody order for the protection of the child. Jurisdiction is based respectively on the presence of the child in Scotland and his presence in the sheriffdom on the date on which the application is made (see also clause 18(2)). An emergency order may be made notwithstanding that matrimonial proceedings are continuing or that the child is habitually resident in the United Kingdom. The clause implements recommendations contained in paragraphs 4.22 and 4.99 of the report.

Child Custody

Part III
Jurisdiction
ancillary to
matrimonial
proceedings.

1958 c. 40.

13.—(1) The jurisdiction of a court in Scotland to entertain an application for a custody order in matrimonial proceedings shall be modified by the following provisions of this section.

(2) A court in Scotland shall not have jurisdiction, after the dismissal of matrimonial proceedings or after decree of absolvitor is granted therein, to entertain an application for an order under section 9(1) of the Matrimonial Proceedings (Children) Act 1958 with respect to the custody or education of a child unless the application therefor was made on or before such dismissal or the granting of the decree of absolvitor.

(3) Where, after a decree of separation has been granted, an application is made in the separation process for a custody order, a court in Scotland shall not have jurisdiction to entertain that application if, on the date of the application, proceedings for divorce or nullity of marriage in respect of the marriage concerned are continuing in another court in the United Kingdom.

(4) A court in Scotland shall not have jurisdiction to entertain an application for the variation of an order made under section 9(1) of the Matrimonial Proceedings (Children) Act 1958 if, on the date of the application, matrimonial proceedings in respect of the marriage concerned are continuing in another court in the United Kingdom.

(5) Subsections (3) and (4) above shall not apply if the court in which the other proceedings there referred to are continuing has made—

- (a) an order under section 4(5) or 21(5) of this Act or under subsection (6) below (not being an order made by virtue of paragraph (a)(ii) of that subsection), or
- (b) an order under section 5(2), 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling proceedings with respect to the custody of the child concerned to be taken in Scotland or, as the case may be, in another court in Scotland,

and that order is in force.

(6) A court in Scotland which has jurisdiction in matrimonial proceedings to entertain an application for a custody order with respect to a child may make an order declining such jurisdiction if—

- (a) it appears to the court with respect to that child that but for—
 - (i) section 11(1) of this Act, another court in Scotland would have jurisdiction to entertain an application for a custody order, or
 - (ii) section 3(2), 6(3), 20(2) or 23(3) of this Act, a court in another part of the United Kingdom would have jurisdiction to make a custody order or an order varying a custody order; and

EXPLANATORY NOTES

Clause 13

1. This clause modifies the Scottish courts' existing jurisdiction to entertain an application for a custody order in matrimonial proceedings. "Matrimonial proceedings" are defined in clause 18(1) as "proceedings for divorce, nullity of marriage or judicial separation". The modification deals with circumstances where

- (a) the matrimonial proceedings are dismissed or decree of absolvitor is granted therein (subsection (2));
- (b) a decree of judicial separation is followed by proceedings for divorce or nullity (subsections (3) and (5));
- (c) fresh matrimonial proceedings are commenced after the first proceedings have been dismissed (subsections (4) and (5)); or
- (d) the court dealing with the matrimonial proceedings wishes to waive its jurisdiction in favour of another in the United Kingdom (subsection (6)).

2. By virtue of clause 11(1), a court entertaining matrimonial proceedings is given exclusive jurisdiction to deal with custody so long as those proceedings are continuing. The term "continuing" is defined in clause 41(3) to the effect that, unless dismissed or decree of absolvitor is granted therein, proceedings before a Scottish court are treated as continuing until the child attains the age of 16. For England and Wales and Northern Ireland, matrimonial proceedings are regarded as continuing until the child attains the age of 18 (see clause 41(2)). It follows that the matrimonial court will retain jurisdiction after decree has been granted to the exclusion of courts which would otherwise have jurisdiction to entertain an independent application for custody, even if the child or some or all of the parties have ceased to have any connection with the part of the United Kingdom in which the proceedings were begun.

Subsection (1)

3. This subsection paves the way for the amendment to the courts' jurisdiction contained in the following subsections. Section 10 of the Domicile and Matrimonial Proceedings Act 1973 provides that jurisdiction to make a custody order in matrimonial proceedings depends on there being jurisdiction to entertain the main proceedings on one of the grounds specified in section 7 or 8 of that Act.

Subsection (2)

4. This subsection limits jurisdiction to make a custody order after the dismissal of matrimonial proceedings or after decree of absolvitor is granted therein to the case where the application for custody is made on or before dismissal of the main proceedings or on or before the granting of decree of absolvitor. The effect of this provision is to narrow section 9(1) of the Matrimonial Proceedings (Children) Act 1958 which allows such an application

Child Custody

Part III

- (b) the court considers that it would be more appropriate for matters relating to the custody of that child to be determined in that other court or part.
- (7) The court may recall an order made under subsection (6) above.

EXPLANATORY NOTES

Clause 13 (continued)

to be entertained provided it is made “either forthwith or within a reasonable time after the action has been dismissed or decree of absolutor granted therein”. This provision therefore reduces the possibility of conflict arising between the court exercising its matrimonial jurisdiction which, after dismissal of the proceedings or the granting of decree of absolutor, no longer has priority under the scheme and another court in the United Kingdom which may be entitled to exercise jurisdiction on the ground of the child’s habitual residence or presence. The subsection implements the first recommendation in paragraph 4.98 of the report.

Subsection (3)

5. This subsection deals with the case where, after decree of separation has been granted by a Scottish court, proceedings for divorce or nullity of marriage are begun in another court in Scotland or in a court in another part of the United Kingdom. The effect of the subsection is to disapply the “continuing” proceedings rule (see paragraph 2 above) so far as the separation proceedings are concerned so that the court in which the decree of separation was obtained is prevented from entertaining an application for custody, and jurisdiction is given instead to the court dealing with the proceedings for divorce or nullity. This and the following subsection implement the recommendation in paragraph 4.113 of the report.

Subsection (4)

6. This subsection deals with the case where a custody order has been made having been applied for on or before the dismissal of matrimonial proceedings or the granting of decree of absolutor and, since dismissal or decree of absolutor, fresh matrimonial proceedings have been commenced either in another court in Scotland or in another part of the United Kingdom. In these circumstances, the original court is prohibited from entertaining an application for variation of the order. Jurisdiction passes instead to the court in which the fresh proceedings have been commenced.

Subsection (5)

7. This subsection disapplies the prohibition contained in subsections (3) and (4) on the court’s entertaining an application for custody, if the second court in which the proceedings for divorce or nullity of marriage or, as the case may be, in which the fresh matrimonial proceedings have commenced has either waived its jurisdiction in favour of the original court or sisted or stayed its proceedings to enable custody to be dealt with by the original court.

Subsection (6)

8. This subsection, implementing the recommendation in paragraph 4.97 of the report, empowers a court with jurisdiction to entertain a custody application in matrimonial proceedings to waive its jurisdiction in favour of either another court in Scotland or the courts in another part of the United Kingdom. As explained in paragraph 2 above, the matrimonial court’s exclu-

EXPLANATORY NOTES

Clause 13 (continued)

sive jurisdiction continues even if the original ground of jurisdiction has ceased to apply, because, for example, the parties no longer have any connection with the country in which the proceedings were begun. It continues even if the matrimonial court did not make any custody order on granting decree. No other United Kingdom court can assume jurisdiction except in an emergency (see clauses 2(2)(b), 12 and 19(2)(b)). It may, however, be more appropriate for questions of custody to be dealt with in another court in Scotland or elsewhere in the United Kingdom. The subsection gives the matrimonial court power, in such circumstances, to make an order declining jurisdiction to entertain an application for custody. An order under this subsection achieves broadly the same result as an order under clause 14(2) sisting proceedings to enable custody to be determined by a more appropriate court elsewhere. The difference is that an order under clause 14(2) can be made in both matrimonial and independent custody proceedings and is appropriate only where there is an application for custody before the court: an order under this subsection enables the matrimonial court to yield jurisdiction without an application for custody having been made.

9. It should be noted that the power to decline jurisdiction is restricted to the case where the court considers that it would be more appropriate for custody to be determined by another court in Scotland or by the courts in another part of the United Kingdom. The object of the provision is to “trigger off” either a habitual residence or a presence jurisdiction in the United Kingdom which would otherwise be barred by the priority given to the matrimonial court. It is of no relevance outwith this context. Where an order is made, jurisdiction on the grounds of the child’s habitual residence or presence is acquired by another court in Scotland or by the courts in England and Wales or Northern Ireland by virtue of clause 11(2), clause 4(4) or clause 21(4) respectively.

Child Custody

Part III
Power of
court to refuse
application or
sist
proceedings.

14.—(1) A court in Scotland which has jurisdiction to entertain an application for a custody order may refuse the application in any case where the matter in question has already been determined in other proceedings.

(2) Where, at any stage of the proceedings on an application made to a court in Scotland for a custody order, it appears to the court—

(a) that proceedings with respect to the matters to which the application relates are continuing outside Scotland or in another court in Scotland; or

(b) that it would be more appropriate for those matters to be determined in proceedings outside Scotland or in another court in Scotland and that such proceedings are likely to be taken there,

the court may sist the proceedings on that application.

EXPLANATORY NOTES

Clause 14

1. This clause gives the courts a discretion either to refuse to grant an application because the matter has already been determined, or to sist proceedings on an application pending the outcome of other proceedings elsewhere. It should be noted that the courts' discretion is not limited to the case where the other proceedings are or were taking place in the United Kingdom: it may be exercised in favour of proceedings in foreign countries.

Subsection (1)

2. This subsection deals with the case where the matter has already been determined in other proceedings, whether in Scotland or elsewhere. The court may refuse to grant an application if, for example, it considers that the issue has been fully explored in the other proceedings and that there has been no change of circumstances which would justify a fresh hearing. The subsection implements the recommendation in paragraph 4.111 of the report.

Subsection (2)

3. This subsection deals with two further possibilities, either that custody proceedings are already continuing in Scotland or elsewhere, or that the court considers it would be more appropriate for proceedings to be taken in another Scottish court or outside Scotland. In either case, the court may sist the proceedings. No express provision is made as to the circumstances in which the sist may be recalled. Under the general principles affecting procedures for sist, the sist may be recalled where, for example, the other proceedings have themselves been sisted or have been unreasonably delayed, or generally where it is thought desirable, in the interests of the child, to resume consideration of the custody application.

4. This provision is similar in effect to clause 13(6) but, as explained in relation to that clause, it is designed to give the courts a general discretion to sist proceedings on any custody application whereas clause 13(6) deals with a specific problem in the context of the exclusive matrimonial jurisdiction. The subsection implements the recommendation contained in paragraph 4.103 of the report.

Child Custody

Part III
Duration,
variation and
recall of
orders.

15.—(1) Where, after the making by a court in Scotland of a custody order (“the existing order”) with respect to a child,—

- (a) a custody order, or an order varying a custody order, competently made by another court in any part of the United Kingdom with respect to that child; or
- (b) an order for the custody of that child which is made outside the United Kingdom and recognised in Scotland by virtue of section 26 of this Act,

comes into force, the existing order shall cease to have effect so far as it makes provision for any matter for which the same or different provision is made by the order of the other court in the United Kingdom or, as the case may be, the order so recognised.

(2) Subject to sections 11(1) and 13(3) and (4) of this Act, a court in Scotland which has made a custody order (“the original order”) may, notwithstanding that it would no longer have jurisdiction to make the original order, make an order varying or recalling the original order; but if the original order has by virtue of subsection (1) above ceased to have effect so far as it makes provision for any matter, the court shall not have power to vary that order under this subsection so as to make provision for that matter.

(3) In subsection (2) above, an order varying an original order means any custody order made with respect to the same child as the original order was made.

(4) Where any person who is entitled to the custody of a child under a custody order made by a court in Scotland ceases to be so entitled by virtue of subsection (1) above, then, if there is in force an order made by a court in Scotland under section 12(1) of the Matrimonial Proceedings (Children) Act 1958 or section 11(1)(b) of the Guardianship Act 1973 providing for the supervision of that child by a local authority, that order shall cease to have effect.

1958 c. 40.
1973 c. 29.

EXPLANATORY NOTES

Clause 15

Subsection (1)

1. This subsection provides in effect that, where a later custody order is made by another Scottish court or by a court in another part of the United Kingdom or is made elsewhere and is recognised in Scotland, that order will prevail over an earlier Scottish order so far as it deals with the same matter. The ground of recognition of foreign orders is dealt with in clause 26. This subsection implements the recommendations in paragraphs 4.115 and 5.15 of the report.

Subsection (2)

2. This subsection empowers a court to vary or recall its own order, unless precluded from doing so by the special provisions in clauses 11(1) and 13(3) and (4) in relation to matrimonial proceedings, even if it has ceased to have jurisdiction to make the order. The power to vary is limited to those aspects of the order which have not been superseded by a later order in terms of subsection (1). The subsection implements the recommendation in paragraph 4.30 of the report.

Subsection (3)

3. This subsection defines a varying order for the purposes of subsection (2) as any custody order within the meaning of clause 1(1)(b) which is made with respect to the same child as the original order was made. When read in the context of subsection (2), the definition is further limited to an order made by the same court as made the original order.

Subsection (4)

4. This subsection deals with the case where the court, in making a custody order, has placed the child under the supervision of a local authority. It provides that, where that custody order is superseded by a later order in terms of subsection (1), the supervision order shall also cease to have effect. The subsection implements the recommendation in paragraph 4.115 of the report.

Child Custody

Part III
Tutary and
curatory.

16.—(1) Subject to subsections (2) and (3) below, an application for an order relating to the tutory and curatory of a pupil or minor may be entertained by—

- (a) the Court of Session if, on the date of the application, the pupil or minor is habitually resident in Scotland;
- (b) the sheriff if, on the date of the application, the pupil or minor is habitually resident in the sheriffdom.

(2) Subsection (1) above shall not apply to an application for the appointment or removal of a factor loco tutoris or of a curator bonis or any application made by such factor or curator.

(3) Subsection (1) above is without prejudice to any other ground of jurisdiction on which the Court of Session or the sheriff may entertain an application mentioned therein.

EXPLANATORY NOTES

Clause 16

1. This clause, implementing the recommendation in paragraph 4.73 of the report, provides an additional ground of jurisdiction to make orders relating to tutory and curatory based on the habitual residence of the pupil or minor.

Subsection (1)

2. This subsection confers jurisdiction on both the Court of Session and the sheriff based on the habitual residence of the child in Scotland and in the sheriffdom respectively. It corresponds to the habitual residence jurisdiction to make custody orders contained in clause 9.

Subsection (2)

3. This subsection makes it clear that this ground of jurisdiction is not applicable to the appointment of a judicial factor to act solely in relation to the administration of a child's property in Scotland.

Subsection (3)

4. This subsection provides that this jurisdiction is in addition to any other existing ground of jurisdiction.

Child Custody

Part III

Orders for delivery of child.

17.—(1) Subject to subsection (2) below, an application by one parent of a child for an order for the delivery of the child from the other parent, where the order is not sought to implement a custody order, may be entertained by the Court of Session or a sheriff if, but only if, the Court of Session or, as the case may be, the sheriff would have jurisdiction under this Part of this Act to make a custody order with respect to the child concerned.

(2) Subsection (1) above is without prejudice to the grounds of jurisdiction on which the Court of Session or a sheriff may entertain an application by a parent who is entitled to the custody of a child for an order for the delivery of the child from a parent who is not so entitled.

(3) Subsection (1) above shall apply to an application by one party to a marriage for an order for the delivery of the child concerned from the other party where the child is the child of one of the parties and has been accepted as one of the family by the other party as it applies to an application by one parent of a child for an order for the delivery of the child from the other parent.

EXPLANATORY NOTES

Clause 17

1. This clause prevents a parent from circumventing the rules of the uniform jurisdictional scheme by applying for a delivery order instead of a custody order. It implements the recommendation contained in paragraph 4.72 of the Report.

Subsection (1)

2. This subsection provides that, where a delivery order is sought by one parent against the other, in circumstances which do not amount to implementation of a custody order, the Court of Session or sheriff court may only entertain the application if it would have jurisdiction under the scheme to make a custody order with respect to the child concerned.

Subsection (2)

3. This subsection makes it clear that this restriction does not apply where the application for delivery is made by a parent who is entitled to custody against one who is not. This would be the case where a custody order has been made in favour of one parent or where, by law, an unmarried mother of a child has a right to custody as against the father. In these circumstances, the existing grounds of jurisdiction to make a delivery order are unaffected.

Subsection (3)

4. This subsection follows the definition of "child of the family" in section 7(1) of the Matrimonial Proceedings (Children) Act 1958 so as to apply the restriction in subsection (1) to applications for delivery not only between one parent and the other, but also between the parties to a marriage where the child is the child of one party and has been accepted by the other as a child of the family.

Child Custody

Part III

Interpretation
of Part III.

18.—(1) In this Part of this Act—

“child” means a person who has not attained the age of sixteen;

“matrimonial proceedings” means proceedings for divorce, nullity of marriage or judicial separation.

(2) In this Part of this Act, “the date of the application” means, where more than one application is pending, the date of the first of those applications; and, for the purposes of this subsection, an application is pending until a custody order or, in the case of an application mentioned in section 16(1) of this Act, an order relating to the tutory or curatory of a pupil or minor, has been granted in pursuance of the application or the court has refused to grant such an order.

(3) In order to determine the date of an application for the purposes of this Part of this Act, an act of sederunt may be made prescribing what constitutes an application.

EXPLANATORY NOTES

Clause 18

Subsection (1)

1. The definition of “child” in subsection (1) means that the jurisdictional scheme contained in Part III of the Bill applies only to children under 16. This is in accordance with the general powers of the Scottish courts to deal with custody matters.

Subsection (2)

2. This subsection defines the date of the application, for the purposes of jurisdiction in independent custody proceedings or in tutory and curatory, as meaning the date on which the first application is made, in cases where there is more than one application pending before the court. The subsection ensures, for example, that a court dealing with a custody application on the basis of the child’s habitual residence will retain jurisdiction to deal with a counter-application made in the same proceedings before the initial application is disposed of, notwithstanding a change in the child’s habitual residence since the initial application was made. The subsection makes it clear that an application is regarded as pending until an order has been granted in pursuance of it or the court has refused to grant such an order. This means, for example, that once a court in independent custody proceedings has made an order, and assuming that no other application is still pending, any subsequent application in those proceedings is treated as an application for variation of that order. Accordingly, the jurisdictional test under clause 11(1) (absence of matrimonial proceedings continuing elsewhere) must be satisfied as at the date on which the second application is made.

Subsection (3)

3. This subsection enables provision to be made by act of sederunt prescribing what is meant by an application for the purpose of determining the date on which an application is made. Often an application will be made by conclusion or crave in a summons, initial writ or petition and in such cases it is intended that the date of the application should correspond to the date of commencement of the proceedings. Sometimes, however, this will not be so. For example, the application may be by minute for variation of an existing order made by the same court or it may be made in the course of, and long after the commencement of, unrelated proceedings, e.g. for aliment. In either case, it is intended that the jurisdictional test should be satisfied not at the commencement of the original or unrelated proceedings, but at the date of the application itself.

Child Custody

PART IV

Jurisdiction of Courts in Northern Ireland

Jurisdiction
in cases other
than divorce,
etc.
S.I. 1978/1045
(N.I. 15).

19.—(1) A court in Northern Ireland shall not have jurisdiction to make a custody order within section 1(1)(c) of this Act, other than an order under Article 45(1) of the Matrimonial Causes (Northern Ireland) Order 1978, unless the condition in section 20 of this Act is satisfied.

(2) The High Court in Northern Ireland shall have jurisdiction to make a custody order within section 1(1)(d) of this Act if, and only if,—

- (a)** the condition in section 20 of this Act is satisfied, or
- (b)** the ward is present in Northern Ireland on the relevant date (within the meaning of section 20(6) of this Act) and the court considers that the immediate exercise of its powers is necessary for his protection.

EXPLANATORY NOTES

PART IV *Jurisdiction of courts in Northern Ireland*

Clause 19

Subsection (1)

1. This subsection paves the way for clause 20 by providing that the court in Northern Ireland shall not have jurisdiction to make a custody order within clause 1(1)(c) of the Bill, other than an order under Article 45(1) of the Matrimonial Causes (Northern Ireland) Order 1978, unless the condition set out in clause 20 of the Bill is satisfied. The proceedings referred to are proceedings for a custody order under the Guardianship of Infants Act 1886, under Article 45(2) of the Matrimonial Causes (Northern Ireland) Order 1978 (i.e. ancillary to an application for financial relief under Article 29 of that Order), or under Article 10(2) or 20(1)(ii) of the Domestic Proceedings (Northern Ireland) Order 1980 (i.e. ancillary to proceedings for financial provision in magistrates' courts under Part I of that Order).

Subsection (2)

2. This subsection relates to the jurisdiction of the High Court in wardship. It preserves the special emergency jurisdiction to deal with any ward who is present in Northern Ireland where the court considers that the immediate exercise of its powers is necessary for his protection. Otherwise, the provisions of clause 20 apply. The subsection implements the recommendation in paragraph 4.22(1) of the Report.

Child Custody

Part IV
Habitual
residence or
presence of
child.

20.—(1) The condition referred to in section 19 of this Act is that on the relevant date the child concerned—

- (a) is habitually resident in Northern Ireland, or
- (b) is present in Northern Ireland and is not habitually resident in any part of the United Kingdom,

and, in either case, the jurisdiction of the court is not excluded by subsection (2) below.

(2) For the purposes of subsection (1) above, the jurisdiction of the court is excluded if, on the relevant date, proceedings for divorce, nullity or judicial separation are continuing in a court in England and Wales or Scotland in respect of the marriage of the parents of the child concerned.

(3) Subsection (2) above shall not apply if the court in which the other proceedings there referred to are continuing has made—

- (a) an order under section 4(5) or 13(6) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or
- (b) an order under section 5(2) or 14(2) of this Act which is recorded as made for the purpose of enabling proceedings with respect to the custody of the child concerned to be taken in Northern Ireland,

and that order is in force.

(4) Subject to subsections (5) and (6) below, in this section “the relevant date” means the date of the commencement of the proceedings in which the custody order falls to be made.

1886 c. 27

(5) In the case of an order under section 5 of the Guardianship of Infants Act 1886 “the relevant date” means the date of the application for the order (or first application, if two or more are determined together).

(6) In the case of a custody order within section 1(1)(d) of this Act “the relevant date” means—

- (a) where an application is made for an order, the date of the application (or first application, if two or more are determined together), and
- (b) where no such application is made, the date of the order.

EXPLANATORY NOTES

Clause 20

Subsection (1)

1. This subsection establishes the habitual residence of the child as a new basis of jurisdiction in proceedings other than proceedings for divorce, nullity or judicial separation. The proceedings affected fall into two classes, i.e. (a) those which are directed primarily to determination of who should have the custody of a child—namely, proceedings in wardship or guardianship and (b) custody proceedings which are ancillary to proceedings between the parents for financial relief. The term “habitual residence” is not defined in the Bill, although certain provisions as to habitual residence after removal without consent of all the persons having the right to determine where the child is to reside, or in contravention of a court order, are included in clause 40. The term is also used without definition in several other enactments, notably Article 49 of the Matrimonial Causes (Northern Ireland) Order 1978. The subsection implements the recommendation in paragraph 4.18 of the report.

2. The subsection also provides that the physical presence of the child in Northern Ireland shall be a ground for the exercise of jurisdiction where the child is not habitually resident in any part of the United Kingdom. For the reasons explained in paragraphs 4.23–4.26 of the report, in the absence of such a provision the applicant might be left without any remedy in any part of the United Kingdom. The subsection implements the recommendation in paragraph 4.26 of the report.

Subsection (2)

3. This subsection gives priority over custody proceedings in Northern Ireland based on the habitual residence or presence of the child to proceedings in England and Wales or Scotland for divorce, nullity or judicial separation in respect of the “marriage of the parents” (see clause 41(4)). Similar provisions giving priority to proceedings in Northern Ireland for divorce, nullity of marriage or judicial separation of the child’s parents are to be found in clause 3(2) (England and Wales) and clause 13(3) (Scotland). It follows that if, on the “relevant date” as defined in subsections (4) to (6), such divorce, etc. proceedings are “continuing” in England and Wales or Scotland, the Northern Ireland court (except the High Court in an emergency—see clause 19(2)(b)) will have no jurisdiction to make a custody order. The meaning in this context of the term “continuing” is defined in clause 41(2) and (3). The subsection implements the recommendations in paragraphs 4.3 and 4.96 of the report.

Subsection (3)

4. This subsection restores the jurisdiction taken away by subsection (2) in cases where the divorce, etc. court in England and Wales or Scotland decides to waive its custody jurisdiction or to sist or stay custody proceedings before it, in favour of the Northern Ireland court. The subsection, together with the provisions of the Bill to which it refers, implements the first recommendation in paragraph 4.97 of the report.

EXPLANATORY NOTES

Clause 20 (continued)

Subsection (4)

5. This subsection defines the term “the relevant date” for the purpose of the preceding subsections. The definition is important because “the relevant date” is the point of time with reference to which jurisdiction is determined. Generally—as stated in subsection (4)—this will be the date of the commencement of the proceedings in which the custody order falls to be made. However, special provision is made in subsections (5) and (6) for particular orders in relation to which the effect of this general provision would otherwise be uncertain. The point is mentioned in paragraph 4.27 of the report.

6. Where the court makes an order of its own motion in other proceedings—as it is often able to do—the “relevant date” is the date of commencement of those proceedings. Thus if a magistrates’ court is asked under Part I of the Domestic Proceedings (Northern Ireland) Order 1980 to make provision for the maintenance of a child, and subsequently decides to make a custody order—a question which it is required by Article 10(1) of that Order to consider before making a final order on the application—the “relevant date” would be the date of the application for an order under Part I of the Order.

Subsection (5)

7. Applications for custody under section 5 of the Guardianship of Infants Act 1886 may be made after or in the course of proceedings for the appointment of a guardian to deal with the child’s property. In this case the “relevant date” is the date of the application for custody. This wording is used to cover the possibility of cross-applications.

Subsection (6)

8. This subsection refers to custody orders made in wardship proceedings, i.e. orders relating to the care and control or education of or access to a child who is a ward of court. Such orders may either be applied for or be made by the court of its own motion. The subsection, by providing that the “relevant date” for determining jurisdiction is the date of the application for the custody order (or first application if two or more are determined together) or, if there is no application, the date of the order, takes account of the possibility that the question whether a custody order should be made may arise some considerable time after the child has become a ward of court, and that when the question does arise, jurisdiction in custody now rests, under the scheme embodied in the Bill, with a court elsewhere. In such a case, the wardship court would not have jurisdiction to make a custody order merely because the child had been warded in the past. The subsection implements the recommendation in paragraph 4.28 of the report.

Child Custody

Part IV

Jurisdiction
in divorce
proceedings,
etc.

S.I. 1978/1045
(N.I. 15).

21.—(1) The enactments relating to the jurisdiction of courts in Northern Ireland to make orders under Article 45(1) of the Matrimonial Causes (Northern Ireland) Order 1978 shall have effect subject to the modifications provided for by this section.

(2) In Article 45(1)(b) of that Order (which enables orders as to custody and education to be made immediately, or within a reasonable period, after the dismissal of proceedings for divorce, etc.), for the words “within a reasonable period” there shall be substituted the words “(if an application for the order is made on or before the dismissal)”.

(3) A court shall not have jurisdiction to make an order under Article 45(1)(a) of that Order after the grant of a decree of judicial separation if, on the relevant date, proceedings for divorce or nullity in respect of the marriage concerned are continuing in England and Wales or Scotland.

(4) Subsection (3) above shall not apply if the court in which the other proceedings there referred to are continuing has made—

- (a) an order under section 4(5) or 13(6) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or
- (b) an order under section 5(2) or 14(2) of this Act which is recorded as made for the purpose of enabling proceedings with respect to the custody of the child concerned to be taken in Northern Ireland,

and that order is in force.

(5) Where a court—

- (a) has jurisdiction to make an order under Article 45(1) of the Matrimonial Causes (Northern Ireland) Order 1978 in or in connection with proceedings for divorce, nullity of marriage or judicial separation, but
- (b) considers that it would be more appropriate for matters relating to the custody of the child to be determined outside Northern Ireland,

the court may by order direct that, while the order under this subsection is in force, no order under Article 45(1) with respect to the child shall be made by any court in or in connection with those proceedings.

(6) In this section “the relevant date” means—

- (a) where an application is made for an order under Article 45(1)(a), the date of the application (or first application, if two or more are determined together), and
- (b) where no such application is made, the date of the order.

EXPLANATORY NOTES

Clause 21

1. As explained in relation to clause 20, the general effect of the Bill is that a court in which proceedings for divorce, nullity or judicial separation of the parents are continuing has exclusive jurisdiction in relation to the custody of a child of the family, even though the child in question is habitually resident in another part of the United Kingdom. To enable this principle to be applied, however, specific provision has to be made for the following possibilities:

- (a) the application for divorce, etc. may be dismissed;
- (b) a decree of judicial separation may be followed by proceedings for divorce or nullity;
- (c) the court dealing with the divorce, etc. may itself wish to waive its jurisdiction in favour of another court.

Specific provision for these matters, so far as Northern Ireland is concerned, is made in clause 21. Similar provisions for England and Wales and Scotland are to be found in clauses 4 and 13.

2. The meaning of the term "continuing" is defined in clause 41(2) and (3) (interpretation) i.e. that the proceedings, if not dismissed, are to be treated as continuing until the child concerned attains the age of eighteen (England and Wales and Northern Ireland) or sixteen (Scotland). It follows that the divorce, etc. court would have and retain exclusive jurisdiction both up to and after the grant of a decree even if the child or some or all of the parties have since ceased to have any connection with the part of the United Kingdom in which the divorce, etc. proceedings were begun.

Subsection (1)

3. This subsection specifies the jurisdiction affected, i.e. that conferred by Article 45(1) of the Matrimonial Causes (Northern Ireland) Order 1978.

Subsection (2)

4. This subsection limits jurisdiction to make a custody order after the dismissal of proceedings for divorce, nullity or judicial separation to the case where the application for the order was made on or before the dismissal of the main proceedings. The effect of this provision is to narrow Article 45(1)(b) of the 1978 Order, which at present allows such an application to be entertained if it is made "within a reasonable period after the dismissal". Since under clause 20(2) jurisdiction to make custody orders on the basis of the child's habitual residence or presence in Northern Ireland is excluded by divorce, etc. proceedings elsewhere in the United Kingdom only when those proceedings are "continuing", it is desirable that the jurisdiction to make a custody order after dismissal of divorce, etc. proceedings (i.e. when they are not continuing) is limited more strictly than it is by the term "reasonable period". The subsection imposes such a limitation and thus reduces the possibility of jurisdictional conflicts. The subsection implements the first recommendation in paragraph 4.98 of the report.

EXPLANATORY NOTES

Clause 21 (continued)

Subsection (3)

5. This subsection caters for the possibility that proceedings for divorce or nullity are begun in one part of the United Kingdom after the grant of a decree of judicial separation in another part. In that event, the jurisdiction to make a custody order passes to the divorce, etc. court. The effect of the subsection is to prevent a further order relating to custody being made in the court by which the judicial separation was granted, even though the judicial separation proceedings might be regarded as still “continuing” within the meaning of the term as defined in clause 41(2) of the Bill.

Subsection (4)

6. This subsection restores the jurisdiction taken away by subsection (3) in cases where the divorce, etc. court in England and Wales or Scotland decides to waive its custody jurisdiction or to sist or stay custody proceedings before it, in favour of the Northern Ireland court.

Subsection (5)

7. This subsection gives power to a Northern Ireland court before which proceedings for divorce, nullity or judicial separation are “continuing” (as defined in clause 41(2)) to waive its jurisdiction in favour of a court outside Northern Ireland. As explained in paragraph 2 above, the Bill gives the divorce, etc. court exclusive jurisdiction. This jurisdiction continues even if the original jurisdictional basis has ceased to apply. It also continues even if the divorce, etc. court made no custody order before or when granting the divorce decree. The courts of another part of the United Kingdom cannot assume jurisdiction (except in an emergency—as to which, see clauses 2(2)(b) and 12(b)) so long as the proceedings are continuing within the meaning of clause 41(2). It may well be however that, on the particular facts, it would clearly be more sensible for the custody issues to be dealt with elsewhere. Subsection accordingly gives the divorce, etc. court power to waive its own exclusive jurisdiction, where it thinks this would be appropriate, by making an order to that effect. The subsection enables the court to waive custody jurisdiction without having an application for custody before it. It should be noted that the power of a Northern Ireland court to waive custody jurisdiction is not limited to the case where the court considers that it would be more appropriate for the custody issue to be determined in England and Wales or Scotland, but also extends to determination in another country. The subsection implements the recommendations in paragraph 4.97 of the report.

8. Where, under subsection (5), the Northern Ireland court waives its custody jurisdiction, a court in England and Wales or Scotland is enabled by clause 3(3) (England and Wales) or clause 13(5) (Scotland) to exercise the jurisdiction it could have exercised under the Bill but for the Northern Ireland divorce, etc. proceedings.

EXPLANATORY NOTES

Clause 21 (continued)

Subsection (6)

9. Subsection (6) defines “the relevant date” for the purpose of limiting jurisdiction in judicial separation proceedings under subsection (3). Ordinarily, as stated in sub-paragraph (a), this will be the date of the application for a custody order under Article 45(1)(a) of the Matrimonial Causes (Northern Ireland) Order 1978 (or the date of the first application where two or more are determined together). Sometimes however there may be no application, but the court may conclude on the facts that it should make a custody order of its own motion. In such a case, the “relevant date” to determine whether it has jurisdiction to do so is the date on which it makes the order. The point is referred to in paragraph 4.27 of the report.

Child Custody

Part IV

Power of
court to
refuse
application
or stay
proceedings.

22.—(1) A court in Northern Ireland which has jurisdiction to make a custody order may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside Northern Ireland.

(2) Where, at any stage of the proceedings on an application made to a court in Northern Ireland for a custody order, or for the variation of a custody order, it appears to the court—

(a) that proceedings with respect to the matters to which the application relates are continuing outside Northern Ireland,
or

(b) that it would be more appropriate for those matters to be determined in proceedings to be taken outside Northern Ireland,

the court may stay the proceedings on the application.

(3) The court may remove a stay granted in accordance with subsection (2) above if it appears to the court that there has been unreasonable delay in the taking or prosecution of the other proceedings referred to in that subsection, or that those proceedings are stayed, sisted or concluded.

(4) Nothing in this section shall affect any power exercisable apart from this section to refuse an application or to grant or remove a stay.

EXPLANATORY NOTES

Clause 22

1. This clause is designed to give courts a discretion either to refuse an application relating to the custody of a child or to stay custody proceedings before them pending the outcome of other proceedings elsewhere. As is explained in paragraphs 4.108 and 4.111 of the report, this general discretion is intended to enable courts to deal with various complex situations which may arise, and which are not capable of resolution by the application of strict rules.

2. The clause overlaps with, but does not replace, clause 21(5). Clause 21(5) enables the court to waive its potential jurisdiction without first having to have a custody application before it. This is necessary because the ancillary custody jurisdiction in proceedings for divorce, nullity or judicial separation exists and continues indefinitely even if no application relating to the children of the family is pending before the court. Clause 22 is not designed to deal with that specific situation, but to give courts a general discretion in any custody proceedings either to refuse any application or to stay the proceedings before them. The exercise of the discretion is not limited to the case where the other proceedings are or were in the United Kingdom; it may also be exercised in favour of proceedings in foreign countries.

Subsection (1)

3. This subsection deals with the case where the matter in question has already been determined in proceedings outside Northern Ireland. The subsection enables the court to refuse to allow the custody issue to be reopened before it, even though it has jurisdiction, where it considers that the issue has already been fully explored and that there has been no change of circumstances justifying a re-hearing. The subsection implements the recommendation in paragraph 4.111 of the report.

Subsection (2)

4. This subsection deals with two further possibilities, namely (a) that proceedings relating to custody are continuing outside Northern Ireland; (b) that, although no such proceedings have been commenced, the Northern Ireland court considers it would be more appropriate for the custody matters to be determined in proceedings outside Northern Ireland. In either circumstance, the court is given a discretion, if it thinks fit, to stay the proceedings before it. This discretion is designed, *inter alia*, to enable courts to dispose of applications which are made as a delaying tactic or to resolve cases in which more than one court has jurisdiction. The subsection implements the first recommendation in paragraph 4.103 of the report.

Subsection (3)

5. This subsection enables a court which has granted a stay under subsection (2) to revoke that stay and resume hearing the proceedings if, in the event,

EXPLANATORY NOTES

Clause 22 (continued)

the other proceedings originally expected to continue or to be begun in another country are unreasonably delayed or are themselves stayed, sisted or concluded. This could occur where, for example, the court in the other country has not dealt with the custody issues, or where one of the parties has said he intends to raise the custody issue in the other country but then fails to do so. The subsection implements the second recommendation in paragraph 4.103 of the report.

Subsection (4)

6. This subsection preserves any other existing powers to refuse an application or to grant or remove a stay.

Child Custody

Part IV
Duration and
variation of
custody
orders.

23.—(1) If a custody order made by a court in England and Wales or Scotland (or a variation of such an order) comes into force with respect to a child at a time when a custody order made by a court in Northern Ireland has effect with respect to him, the latter order shall cease to have effect so far as it makes provision for any matter for which the same or different provision is made by (or by the variation of) the order made by the court in England and Wales or Scotland.

(2) Where by virtue of subsection (1) above a custody order has ceased to have effect so far as it makes provision for any matter, a court in Northern Ireland shall not have jurisdiction to vary that order so as to make provision for that matter.

(3) A court in Northern Ireland shall not have jurisdiction—

(a) to vary a custody order, other than an order made under Article 45(1)(a) of the Matrimonial Causes (Northern Ireland) Order 1978, or

(b) after the grant of a decree of judicial separation, to vary an order made under Article 45(1)(a) of that Order,

if, on the relevant date, proceedings for divorce, nullity or judicial separation are continuing in England and Wales or Scotland in respect of the marriage of the parents of the child concerned.

(4) Subsection (3) above shall not apply if the court in which the proceedings there referred to are continuing has made—

(a) an order under section 4(5) or 13(6) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or

(b) an order under section 5(2) or 14(2) of this Act which is recorded as made for the purpose of enabling proceedings with respect to the custody of the child concerned to be taken in Northern Ireland,

and that order is in force.

(5) Subsection (3) above shall not apply in the case of a variation of a custody order within section 1(1)(d) of this Act if the ward is present in Northern Ireland on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.

(6) Where any person who is entitled to the actual possession of a child under a custody order made by a court in Northern Ireland ceases to be so entitled by virtue of subsection (1) above, then, if there is in force an order for the supervision of that child made under—

(a) Article 47 of the Matrimonial Causes (Northern Ireland) Order 1978, or

(b) Article 11 of the Domestic Proceedings (Northern Ireland) Order 1980,

S.I. 1978/1045
(N.I. 15).

S.I. 1980/563
(N.I. 5).

EXPLANATORY NOTES

Clause 23

Subsection (1)

1. This subsection provides that if a custody order (or a variation of a custody order) made in another part of the United Kingdom by a court with jurisdiction under the Bill comes into force at a time when an order made in Northern Ireland is in effect, then the later order will prevail over the Northern Ireland order to the extent to which it overlaps. This situation might occur, for example, where the jurisdictional basis of the first order was the habitual residence of the child in Northern Ireland and the child has since become habitually resident in Scotland. The subsection implements the first recommendation in paragraph 4.115 of the report.

Subsection (2)

2. This subsection provides that, where a Northern Ireland order has ceased to have effect in whole or in part by reason of a later order having been made in England and Wales or Scotland, the Northern Ireland court is not to have power to vary its own order. The subsection is necessary because there is no general jurisdictional provision in the Bill relating to variations by a court in Northern Ireland (since, by reason of clause 1(2), a variation is not a custody order for the purposes of the Bill). The subsection, together with subsection (6), implements the second recommendation in paragraph 4.115 of the report.

Subsection (3)

3. This subsection provides that if, on the relevant date (as defined in subsection (7)), proceedings in respect of the marriage of the child's parents are "continuing" (within the meaning of clause 41(2) or (3)) in England and Wales or Scotland the Northern Ireland court is not to have jurisdiction to vary its own custody order, unless the Northern Ireland order itself was made (a) in divorce or nullity proceedings or (b) in judicial separation proceedings and the variation is made before decree. The subsection implements the recommendations in paragraphs 4.113 and 4.114 of the report.

Subsection (4)

4. This subsection provides for the possibility that the court in England and Wales or Scotland in which the divorce, etc. proceedings are continuing decides to waive its jurisdiction to make a custody order or to sist or stay custody proceedings before it, in favour of the Northern Ireland court. In that event, the power to vary an earlier Northern Ireland order revives.

Subsection (5)

5. This subsection preserves the overriding right of the High Court in wardship to vary its own order in respect of a ward who is present in Northern Ireland on the relevant date if the court considers that the immediate exercise of its power is necessary for the child's protection.

Part IV

that order shall also cease to have effect.

(7) In this section “the relevant date” means—

- (a) where an application is made for a variation, the date of the application (or first application, if two or more are determined together), and
- (b) where no such application is made, the date of the variation.

EXPLANATORY NOTES

Clause 23 (continued)

Subsection (6)

6. This subsection provides for the cessation of supervision orders which were made in conjunction with custody orders which have ceased to have effect. Under the statutory provisions listed in the subsection, a court in Northern Ireland may, instead of or in addition to making a custody order, place a child under the supervision of a local authority welfare worker or probation officer. Where a custody order has been superseded by a later custody order and has ceased to have effect in accordance with subsection (1), so that a person ceases to be entitled to possession of the child, any supervision order dependent on the former custody order should also cease to have effect. The subsection so provides. The supervision orders in question are specified in the subsection so as to avoid inclusion of supervision orders made in criminal proceedings or in care or adoption proceedings, which are outside the scope of the Bill. The subsection, together with subsection (2), implements the second recommendation in paragraph 4.115 of the report.

Subsection (7)

7. The term "the relevant date" is here defined as the date of the application for the variation (or of the first application for variation where two or more are determined together), or, where no application is made, the date on which the variation falls to be made. The latter provision is necessary to cover the possibility that the court may be considering making a variation of a custody order of its own motion in the course of proceedings for some other purpose, e.g. an application for variation of an order for periodical payments for the child's maintenance under Part I of the Domestic Proceedings (Northern Ireland) (Order 1980. The point is referred to in paragraph 4.30 of the report.

Child Custody

Part IV
Interpretation
of Part IV.

24. In this Part of this Act, "child" means a person who has not attained the age of eighteen.

EXPLANATORY NOTES

Clause 24

This clause applies to Part IV the Northern Ireland definition of "child" in relation to custody, i.e. a person who has not attained the age of 18. It is necessary to adopt this definition for the purposes of Part IV because this Part defines the jurisdiction of courts in Northern Ireland to make custody orders generally (see clause 19(1)). However, an order made in Northern Ireland relating to a child who has attained the age of 16, though valid in Northern Ireland by reason of this definition, will not be recognised or enforced in England and Wales or Scotland, by reason of the provisions of clauses 25(1) and 27(5). The matter is discussed in paragraph 1.22 of the report.

Child Custody

PART V

RECOGNITION AND ENFORCEMENT

Recognition
of custody
orders:
general.

25.—(1) Where a custody order made by a court in any part of the United Kingdom is in force with respect to a child who has not attained the age of sixteen, then, subject to subsection (2) below, the order shall be recognised in any other part of the United Kingdom as having the same effect in that other part as if it had been made by the appropriate court in that other part and as if that court had had jurisdiction to make it.

(2) Where a custody order includes provision as to the means by which rights conferred by the order are to be enforced, subsection (1) above shall not apply to that provision.

(3) A court in a part of the United Kingdom in which a custody order is recognised in accordance with subsection (1) above shall not enforce the order unless it has been registered in that part of the United Kingdom under section 27 of this Act and proceedings for enforcement are taken in accordance with section 29 of this Act.

EXPLANATORY NOTES

PART V *Recognition and enforcement*

Clause 25

Subsection (1)

1. This subsection provides that a custody order relating to a child under 16 which has been made by a United Kingdom court is to be recognised in other parts of the United Kingdom as having the same effect as if it had been made in that part by the “appropriate court” as defined in clause 32—i.e. the High Court in England and Wales or Northern Ireland, or the Court of Session in Scotland—and as if that court had had jurisdiction to make it. The subsection implements the recommendation in paragraph 5.15(1) of the report.

Subsections (2) and (3)

2. These subsections make it clear that recognition does not of itself enable a person entitled under an order to demand the assistance of court officers in its enforcement and does not extend to any provisions in the custody order as to the means by which it is to be enforced. The reasons for these limitations are explained in paragraph 5.10 of the report. Where enforcement is necessary, it is intended that the order should first be registered (as provided in clause 27) in the part of the United Kingdom in which enforcement is sought (see also clause 29(3)).

Child Custody

Part V

Recognition:
special
Scottish rule.

26.—Any rule of law whereby an order for the custody of a child made outside the United Kingdom is recognised in Scotland shall continue to have effect, except that, after the commencement of this Act, the ground for such recognition shall be that the order was made in the country where the child was habitually resident and not where he was domiciled.

EXPLANATORY NOTES

Clause 26

As explained in paragraphs 5.3 to 5.4 of the report, Scots law already provides for recognition of custody orders made outside Scotland, where the child is domiciled in the country in which the order is made. This rule is superseded by clause 25(1) as regards orders made in England and Wales and Northern Ireland. However, to reduce the potential for conflicts between foreign orders and orders made in the United Kingdom, and also because of the increased international acceptance of habitual residence as a jurisdictional criterion, both in the custody field and in other areas of family law, the clause amends Scots law by substituting the child's habitual residence for the child's domicile as the jurisdictional criterion for recognition of orders made outside the United Kingdom. The clause implements the recommendation in paragraph 5.15(2) of the report.

Child Custody

Part V
Registration.

27.—(1) Any person on whom any rights are conferred by a custody order may apply to the court which made it for the order to be registered in another part of the United Kingdom under this section.

(2) An application under this section shall be made in the prescribed manner and shall contain the prescribed information and be accompanied by such documents as may be prescribed.

(3) On receiving an application under this section the court which made the custody order shall, unless it appears to the court that the order is no longer in force, cause the following documents to be sent to the appropriate court in the part of the United Kingdom specified in the application, namely—

- (a) a certified copy of the order, and
- (b) where the order has been varied, prescribed particulars of any variation which is in force, and
- (c) a copy of the application and of any accompanying documents.

(4) Where the prescribed officer of the appropriate court receives a certified copy of a custody order under subsection (3) above, he shall forthwith cause the order, together with particulars of any variation, to be registered in that court in the prescribed manner.

(5) An order shall not be registered under this section in respect of a child who has attained the age of sixteen, and the registration of an order in respect of a child who has not attained the age of sixteen shall cease to have effect on the attainment by the child of that age.

EXPLANATORY NOTES

Clause 27

1. This clause specifies a procedure, similar to that in the Maintenance Orders Act 1950, for the registration of a custody order made in one part of the United Kingdom in the "appropriate court" (as defined in clause 32) in another part of the United Kingdom. Such registration would be a preliminary step to facilitate enforcement in that part. The clause implements the recommendations in paragraph 5.38(1) to (3) of the report.

Subsection (1)

2. This subsection provides that any person on whom any rights are conferred by a custody order may apply for registration and that the application should be to the court which made the order.

Subsection (2)

3. This subsection provides that the manner of application and the information to be supplied are to be as prescribed by rules of court (see paragraph 5.26 of the report).

Subsection (3)

4. This subsection provides that the court which made the order is to forward the application, together with a certified copy of the order, to the appropriate court in the part of the United Kingdom specified in the application, unless it appears to the court that the order is no longer in force.

Subsection (4)

5. This subsection provides that the prescribed officer in the court to which the application is transmitted is to cause the order to be registered forthwith. The subsection does not give him any discretion as to registration. Any person who wishes to challenge the order or its enforcement should proceed as provided in clauses 30 and 31.

Subsection (5)

6. This subsection restricts the orders which may be registered to those relating to a child under 16, and provides that a previously registered order shall cease to have effect when the child in question reaches the age of 16. This limitation reflects Scots law on custody. The reasons for its adoption in relation to the Bill generally are explained in paragraph 1.22 of the report. An order made in England and Wales or in Northern Ireland will continue in force in the part of the United Kingdom in which it was made until the child reaches the age of 18, but will be outside the scheme for recognition and enforcement in other parts of the United Kingdom.

Child Custody

Part V
Cancellation
and variation
of registration.

28.—(1) A court which revokes, recalls or varies an order registered under section 27 of this Act shall cause notice of the revocation, recall or variation to be given in the prescribed manner to the prescribed officer of the court in which it is registered and, on receiving the notice, the prescribed officer—

- (a) in the case of the revocation or recall of the order, shall cancel the registration, and
- (b) in the case of the variation of the order, shall cause particulars of the variation to be registered in the prescribed manner.

(2) Where—

- (a) an order registered under section 27 of this Act ceases (in whole or in part) to have effect in the part of the United Kingdom in which it was made, otherwise than because of its revocation, recall or variation, or
- (b) an order registered under section 27 of this Act in Scotland ceases (in whole or in part) to have effect there as a result of the making of an order in proceedings outside the United Kingdom,

the court in which the order is registered may, of its own motion or on the application of any person who appears to the court to have an interest in the matter, cancel the registration (or, if the order has ceased to have effect in part, cancel the registration so far as it relates to the provisions which have ceased to have effect).

EXPLANATORY NOTES

Clause 28

This clause, which implements the recommendation in paragraph 5.38(4) of the report, provides for the possibility that a registration may need to be cancelled, or a registered order varied, because of subsequent events. This need may arise in several ways:—

- (a) The order may be revoked, recalled or varied in the country in which it was originally made, e.g. by the court which made it (or, conceivably, by another court in the same country to which the case has been transferred under its internal law). In such an event, the clause provides in *subsection (1)* that the court which revokes, recalls or varies the order is to notify the registering court, and that the prescribed officer is then to cancel the registration, or, as the case may be, to cause the particulars of the variation to be registered.
- (b) The registered order may cease to have effect in the country in which it was made (and also, therefore, in the country in which it is registered) because it has been superseded by a later order made by a United Kingdom court with jurisdiction (see clauses 6(1), 15(1) and 23(1)). (For example, a Northern Ireland order registered in England would be superseded by a later order made in divorce proceedings by an English or Scottish court). *Subsection (2)(a)* provides for this eventuality.
- (c) A Scottish order registered in England or Northern Ireland may be superseded in Scotland by an order made outside the United Kingdom in a country in which the child is habitually resident (see clause 26 and paragraph 5.13 of the report). In such a case, the registration will need to be cancelled. This possibility is also covered by *subsection (2)(a)*.
- (d) Finally, an English or Northern Ireland order registered in Scotland may cease to have effect there because a later order has been made in a country outside the United Kingdom in which the child is habitually resident and is therefore recognised in Scotland (see clause 26). In such a case the Scottish registration will need to be cancelled, although the registered order may still be valid in the country in which it was made (see paragraph 5.13 of the report). *Subsection (2)(b)* provides for this possibility.

Child Custody

Part V Enforcement.

29.—(1) Where a custody order has been registered under section 27 of this Act, the court in which it is registered shall have the same powers for the purpose of enforcing the order as it would have if it had itself made the order and had jurisdiction to make it; and proceedings for or with respect to enforcement may be taken accordingly.

(2) Where an application has been made to any court for the enforcement of an order registered in that court under section 27 of this Act, the court may, at any time before the application is determined, give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.

(3) The references in subsection (1) above to a custody order do not include references to any provision of the order as to the means by which rights conferred by the order are to be enforced.

EXPLANATORY NOTES

Clause 29

Subsection (1)

1. This subsection provides that the registering court shall have the same enforcement powers as it would have in respect of its own orders. It follows that the court in which the order is registered will use its own enforcement machinery, subject to the procedures and safeguards embodied in its own country's legislation. The registering court will be the High Court in England and Wales or Northern Ireland or the Court of Session in Scotland, irrespective of the level of the court which made the registered order. The subsection implements the principal recommendation in paragraph 5.38(5) of the report.

Subsection (2)

2. This subsection confers on the registering court a power to give interim directions. As the wording indicates, these interim directions may be necessary either to prevent the circumstances being changed (e.g. the court might direct that the child is not to be removed from the United Kingdom) or to secure the child's welfare for an interim period, e.g. where a stay of enforcement has been granted under clause 30 (see paragraph 5.30 of the report). The subsection implements the recommendation in paragraph 5.38(5)(a) of the report.

Subsection (3)

3. This subsection provides in effect that any provision of the registered order as to the means by which rights conferred by the order are to be enforced is not to be treated as having been made by the registering court. The subsection thus implements the general policy explained in paragraph 5.29 of the report that a registered order is to be enforced as directed by the registering court. (See also subsections (2) and (3) of clause 25, which provide that recognition of an order does not extend to provisions as to means of enforcement and that an order, though recognised, is not to be enforced by a court unless registered.)

Child Custody

Part V

Staying or
sisting of
enforcement
proceedings.

30.—(1) Where in accordance with section 29 of this Act proceedings are taken in any court for the enforcement of an order registered in that court, any person who appears to the court to have an interest in the matter may apply for the proceedings to be stayed or sisted on the ground that he has taken or intends to take other proceedings (in the United Kingdom or elsewhere) as a result of which the order may cease to have effect, or may have a different effect, in the part of the United Kingdom in which it is registered.

(2) If after considering an application under subsection (1) above the court considers that the proceedings for enforcement should be stayed or sisted in order that other proceedings may be taken or concluded, it shall stay or sist the proceedings for enforcement accordingly.

(3) The court may remove a stay or recall a sist granted in accordance with subsection (2) above if it appears to the court—

- (a) that there has been unreasonable delay in the taking or prosecution of the other proceedings referred to in that subsection, or
- (b) that those other proceedings are concluded and that the registered order, or a relevant part of it, is still in force.

(4) Nothing in this section shall affect any power exercisable apart from this section to grant, remove or recall a stay or sist.

EXPLANATORY NOTES

Clause 30

1. The purpose of this clause, which implements the recommendations in paragraph 5.38(5)(b) of the Report, is to indicate the grounds on which a person with an interest may ask the court in which a custody order made in another United Kingdom country has been registered to suspend enforcement of the order, and the action which the court may take if such an application is made.

Subsection (1)

2. This subsection specifies the grounds on which application may be made for enforcement to be suspended (i.e. for the grant of a stay of the enforcement proceedings or, in Scotland, the grant of a *sist*), namely that the applicant has taken or intends to take other proceedings which might result in the registered order being superseded or changed. Such an application might be based on, for example,

- (i) a claim that the original order was made without jurisdiction, and should therefore be revoked in the country in which it was made; or
- (ii) a claim that, because of a change of circumstances since it was made, the order should be varied or revoked.

In either case, the stay or *sist* would be sought because the objector had made or wished to make a fresh application to a court in the part of the United Kingdom in which the order was made.

3. If the registered order was made or registered in Scotland, the objector could also claim that it might be superseded by an order which he has applied for or intends to apply for in a country outside the United Kingdom in which the child is now habitually resident (see clauses 26 and 28(2)(b)).

Subsection (2)

4. This subsection gives the registering court a discretion to stay or *sist* the enforcement proceedings in order that the other proceedings may be taken or concluded. The power is discretionary so as to enable the registering court to refuse a stay if it considers that the objector has made out a *prima facie* case.

Subsection (3)

5. The purpose of this subsection is to enable the registering court to retain some control over objections, and thereby to prevent the exploitation of the provisions of the clause to delay enforcement indefinitely. It also enables the stay or *sist* to be removed if the decision in the court elsewhere is adverse to the objector's claim.

EXPLANATORY NOTES

Clause 30 (continued)

Subsection (4)

6. This subsection is designed to preserve the registering court's residual power to grant a stay or sist on grounds not covered by subsection (1). It is not expected that the subsection will often be invoked, but there are possibilities which cannot be defined in advance, such as that the child is undergoing medical treatment which it would be inadvisable to interrupt at the time enforcement is sought.

Child Custody

Part V

Dismissal of enforcement proceedings.

31.—(1) Where in accordance with section 29 of this Act proceedings are taken in any court for the enforcement of an order registered in that court, any person who appears to the court to have an interest in the matter may apply for those proceedings to be dismissed on the ground that the order has (in whole or in part) ceased to have effect in the part of the United Kingdom in which it was made.

(2) Where in accordance with section 29 of this Act proceedings are taken in the Court of Session for the enforcement of an order registered in that court, any person who appears to the court to have an interest in the matter may apply for those proceedings to be dismissed on the ground that the order has (in whole or in part) ceased to have effect in Scotland as a result of the making of an order in proceedings outside the United Kingdom.

(3) If, after considering an application under subsection (1) or (2) above, the court is satisfied that the registered order has ceased to have effect, it shall dismiss the proceedings for enforcement (or, if it is satisfied that the order has ceased to have effect in part, it shall dismiss the proceedings so far as they relate to the enforcement of provisions which have ceased to have effect).

EXPLANATORY NOTES

Clause 31

1. This clause, which implements paragraph 5.38(5)(c) of the report, provides for the possibility that the registered order of which enforcement is sought has since ceased to have effect in the United Kingdom. In general, this would result from the making of a later order. (See paragraph 5.32 of the report.)

Subsection (1)

2. This subsection provides for the normal case, i.e. that the registered order has been superseded by a later order. The later order would have this effect if

- (i) it was made by the same court which made the original order, or by another court in the same part of the United Kingdom;
- (ii) it was made by a court in another part of the United Kingdom having jurisdiction under the Bill (e.g. where the original order was made in independent custody proceedings in Scotland when the child was habitually resident there but a later custody order in respect of the same child has been made in Northern Ireland in divorce proceedings between the parents);
- (iii) the original order was made in Scotland, and the later custody order was made by a court outside the United Kingdom in a country in which the child was habitually resident (see clause 26).

The decision whether the original order has ceased to have effect in such circumstances will be taken by the court of registration.

Subsection (2)

3. This subsection, which relates only to Scotland, provides for the possibility that an order registered in Scotland but made in England and Wales or in Northern Ireland is superseded in Scots law by a later order made in the country of the child's habitual residence, though it remains valid in the part of the United Kingdom in which it was made. (See paragraph 5.32 of the report.)

Subsection (3)

4. This subsection requires the registering court to dismiss the proceedings for enforcement if it is satisfied that the registered order has ceased to have effect.

Child Custody

Part V

Appropriate
court.

32. In this Part of this Act “the appropriate court” means—

- (a) in relation to England and Wales, the High Court;
- (b) in relation to Scotland, the Court of Session;
- (c) in relation to Northern Ireland, the High Court.

EXPLANATORY NOTES

Clause 32

This clause defines the term “appropriate court” for the purposes of Part V of the Bill as the High Court in England and Wales and Northern Ireland and the Court of Session in Scotland. The clause implements the recommendation in paragraph 5.15(1) of the report (see also paragraphs 5.17(3) and 5.22).

Child Custody

PART VI

MISCELLANEOUS AND SUPPLEMENTAL

Power to
order
disclosure
of child's
whereabouts.

33.—(1) Where in proceedings for or relating to a custody order in respect of a child there is not available to the court adequate information as to where the child is, the court may order any person who it has reason to believe may have relevant information to disclose it to the court.

(2) A person shall not be excused from complying with an order under subsection (1) above by reason that to do so may incriminate him or his spouse of an offence; but a statement or admission made in compliance with such an order shall not be admissible in evidence against either of them in proceedings for any offence other than perjury.

(3) A court in Scotland before which proceedings are pending for the enforcement of an order for the custody of a child made outside the United Kingdom which is recognised in Scotland shall have the same powers as it would have under subsection (1) above if the order were its own.

EXPLANATORY NOTES

PART VI *Miscellaneous and supplemental*

Clause 33

1. This clause confers on all courts powers in proceedings for or relating to a custody order (including enforcement of a registered order) to require any person who it has reason to believe may have information relevant to where the child is to disclose that information to the court. Disclosure to the court includes, by implication, disclosure to anyone appointed by the court to receive the information. The clause implements the recommendation in paragraph 6.44 of the report.

2. As explained in the report (paragraphs 6.41 to 6.42) the High Court in England and Wales already has power to make a summary order to this effect in wardship proceedings, and the Court of Session in Scotland also has extensive powers. It is uncertain however what powers, if any, are exercisable in custody proceedings by other courts, or what the extent of the High Court's powers may be where the child in question is not a ward of court. The clause is accordingly drafted in general terms, to cover all courts in all parts of the United Kingdom.

3. The clause does not specify what measures may be taken in the event of non-compliance. It is envisaged that failure to comply would be punishable as a contempt or, in the case of a magistrates' court in England and Wales, under section 63 of the Magistrates' Courts Act 1980.

Subsection (1)

4. This subsection confers the general power to require disclosure of information relevant to where the child is, where the court does not have available adequate information as to this.

Subsection (2)

5. This subsection relates to protection against self-incrimination. It is a general rule of law in England and Wales and Northern Ireland that a person has a lawful excuse for a failure to answer a question if the answer would incriminate him or his spouse, although the court must be able to see for itself that there is reasonable ground to fear that the answer would have this effect. The subsection provides that a person shall not be excused from supplying information relevant to the child's whereabouts by reason that to do so might incriminate him or his spouse of an offence but that any statement or admission made in complying with an order for disclosure should not be admissible in evidence against either of them in proceedings for an offence other than perjury. Thus, a person who had unlawfully removed or detained a child contrary to section 2 of the Child Abduction Act 1984 would not be able to refuse to say where the child was on the grounds that this might incriminate him of an offence under the 1984 Act, but his answer could not be used as evidence against him in criminal proceedings for that offence.

EXPLANATORY NOTES

Clause 33 (continued)

Subsection (3)

6. This subsection makes it clear that in Scotland the powers to require disclosure of a child's whereabouts are to apply where the proceedings are for the enforcement of a custody order made outside the United Kingdom. No corresponding provision is required in relation to courts in England and Wales or Northern Ireland, because they have no power to enforce an order made outside the United Kingdom, and are not given any such power by the Bill.

Child Custody

Part VI

Power to
order
recovery of
child.

34.—(1) Where—

- (a) a person is required by a custody order, or an order for the enforcement of a custody order, to give up a child to another person (“the person concerned”), and
- (b) the court which made the order imposing the requirement is satisfied that the child has not been given up in accordance with the order,

that court may make an order authorising an officer of the court or a constable to take charge of the child and deliver him to the person concerned.

(2) The authority conferred by subsection (1) above includes authority—

- (a) to enter and search any premises where the person acting in pursuance of the order has reason to believe the child may be found, and
- (b) to use such force as may be necessary to give effect to the purpose of the order.

(3) Where by virtue of—

- (a) section 13(1) of the Guardianship of Minors Act 1971, section 43(1) of the Children Act 1975 or section 33 of the Domestic Proceedings and Magistrates’ Courts Act 1978, or
- (b) Article 37 of the Domestic Proceedings (Northern Ireland) Order 1980,

1971 c. 3.
1975 c. 72.
1978 c. 22.

S.I. 1980/563
(N.I. 5).

a custody order (or a provision of a custody order) may be enforced as if it were an order requiring a person to give up a child to another person, subsection (1) above shall apply as if the custody order had included such a requirement.

(4) This section is without prejudice to any power conferred on a court by or under any other enactment or rule of law.

(5) This section shall not extend to Scotland.

EXPLANATORY NOTES

Clause 34

1. This clause implements the recommendations in paragraphs 6.37 and 6.40 of the report.

Subsection (1)

2. This subsection is designed to give to courts in England and Wales and Northern Ireland, when seeking to enforce the delivery of a child to another person in accordance with a custody order, a power to authorise an officer of the court or a constable to take charge of the child and deliver him to the person concerned. As explained in the report (paragraphs 6.35 to 6.40), the High Court already has analogous powers in relation to a ward of court, but it is uncertain to what extent, if at all, other courts have similar powers. Since some courts (e.g. magistrates' courts in England and Wales) do not have officers of court to whom such an authorisation could appropriately be issued, the clause also permits the authorisation to be given to a constable.

Subsection (2)

3. This subsection gives authority to a person authorised under subsection (1) to enter and search premises and to use such force as may be necessary to give effect to the purpose of the order. The powers thereby extended to constables and to court officers of all courts are analogous to those already possessed by the tipstaff in relation to a ward of court in England and Wales.

Subsection (3)

4. This subsection provides an additional method of enforcement of custody orders made by magistrates' courts in England and Wales or Northern Ireland. The statutory provisions mentioned in the subsection provide that once a copy of a custody order has been served on a person who has the child, the custody order may be enforced as if it were an order of a magistrates' court requiring that person to give up the child to the person entitled to actual custody. The only existing method of enforcement is as provided in section 63(3) of the Magistrates' Courts Act 1980, i.e. by the imposition of a financial penalty and/or imprisonment for up to two months. The subsection enables the court to take more direct action by making use of the powers specified in subsections (1) and (2).

Subsection (4)

5. This subsection makes it clear that the powers conferred by the clause are in addition to and not in substitution for any existing powers a court may possess.

Subsection (5)

6. This subsection excludes Scotland, where existing powers are considered to be adequate.

Child Custody

Part VI

Powers to restrict removal of child from jurisdiction.

35.—(1) In each of the following enactments (which enable courts to restrict the removal of a child from England and Wales)—

- (a) section 13A(1) of the Guardianship of Minors Act 1971,
- (b) section 43A(1) of the Children Act 1975, and
- (c) section 34(1) of the Domestic Proceedings and Magistrates' Courts Act 1978,

for the words "England and Wales" there shall be substituted the words "the United Kingdom, or out of any part of the United Kingdom specified in the order,".

S.I. 1980/563
(N.I. 5).

(2) In Article 38(1) of the Domestic Proceedings (Northern Ireland) Order 1980 (which enables courts to restrict the removal of a child from Northern Ireland) for the words "Northern Ireland" there shall be substituted the words "the United Kingdom, or out of any part of the United Kingdom specified in the order,".

(3) A court in Scotland—

- (a) at any time after the commencement of proceedings in connection with which the court would have jurisdiction to make a custody order, or
- (b) in any proceedings in which it would be competent for the court to grant an interdict prohibiting the removal of a child from its jurisdiction,

may, on an application by—

- (i) any party to the proceedings,
- (ii) the tutor or curator of the child concerned, or
- (iii) any other person who has or wishes to obtain the custody or care of the child,

grant interdict or interim interdict prohibiting the removal of the child from the United Kingdom or any part of the United Kingdom, or out of the control of the person in whose custody the child is.

(4) In subsection (3) above "the court" means the Court of Session or the sheriff; and for the purposes of subsection (3)(a), proceedings shall be held to commence—

- (a) in the Court of Session, when a summons is signeted or a petition is presented;
- (b) in the sheriff court, when the warrant of citation is signed.

EXPLANATORY NOTES

Clause 35

1. This clause and clause 36 implement the recommendations in paragraph 6.17 of the report to remove the present anomaly whereby a restriction imposed by a court in one part of the United Kingdom on taking a child abroad is of no effect in the two other parts. This clause paves the way for clause 36 by modifying the existing powers of certain courts to make orders restricting a child's removal—in particular, by enabling courts to make orders prohibiting a child's removal from the United Kingdom.

Subsection (1)

2. This subsection and subsection (2) implement the first recommendation in paragraph 6.17 of the report. Subsection (1) amends certain statutory provisions enabling courts to prohibit the removal of a child from England and Wales so as to allow for the making of orders prohibiting or restricting the removal of a child either from the United Kingdom as a whole or from any part of the United Kingdom specified in the order.

Subsection (2)

3. This subsection amends Article 38(1) of the Domestic Proceedings (Northern Ireland) Order 1980 on the same lines as is proposed for corresponding provisions applying in England and Wales.

Subsections (3) and (4)

4. These subsections clarify and extend existing Scots law as to the granting of interdict and interim interdict prohibiting the removal of a child from the United Kingdom or any part of it, or out of the control of the person in whose custody the child is. The Court of Session's powers are already extensive, but there is doubt as to the extent of the existing powers of the sheriff court, which will now be defined statutorily. The subsections replace section 13 of the Matrimonial Proceedings (Children) Act, 1958 which is repealed (see Schedule 2). Consequential amendments to the rules of court will be required in relation to both the Court of Session and the sheriff court. The subsections implement the recommendation in paragraph 6.18 of the Report.

Child Custody

Part VI
Effect of
orders
restricting
removal.

36.—(1) This section applies to any order made by a court in the United Kingdom prohibiting the removal of a child from the United Kingdom or from any specified part of it.

(2) An order to which this section applies shall have effect in each part of the United Kingdom other than the part in which it was made—

(a) as if it had been made by the appropriate court in that other part, and

(b) in the case of an order which has the effect of prohibiting the child's removal to that other part, as if it had included a prohibition on his further removal to any place except one to which he could be removed consistently with the order.

(3) The references in subsections (1) and (2) above to prohibitions on a child's removal include references to prohibitions subject to exceptions; and in a case where removal is prohibited except with the consent of the court, nothing in subsection (2) above shall be construed as affecting the identity of the court whose consent is required.

(4) In this section—

“the appropriate court” has the same meaning as in Part V of this Act, and

“child” means a person who has not attained the age of sixteen;

and this section shall cease to apply to an order relating to a child when he attains the age of sixteen.

EXPLANATORY NOTES

Clause 36

1. The main purpose of this clause is to ensure that, so far as is practicable after taking into account the differences in the legal systems, an order made in one part of the United Kingdom prohibiting the removal of a child from the United Kingdom or any part of it shall automatically have effect in other parts of the United Kingdom. The provision is necessary to enable civil remedies to be invoked. To that extent, it is complementary to the Child Abduction Act 1984, under which the unlawful removal of a child may be a criminal offence. The clause implements the second recommendation in paragraph 6.17 of the report.

Subsection (1)

2. This subsection recites that the clause applies to an order by a United Kingdom court prohibiting the removal of a child from the United Kingdom or from any specified part of it.

Subsection (2)

3. This subsection specifies the effect in a part of the United Kingdom other than the part in which it was made of an order prohibiting a child's removal. If, for example, a court in Scotland had ordered that a child should not be removed from Scotland without the leave of the court, but the child had nevertheless come to England, the Scottish order would automatically take effect in England as if

- (a) it had been made by the English High Court, (i.e. the "appropriate court" referred to in subsection (2)(a)); and
- (b) it had directed that no person was to take the child out of England except back to Scotland.

In other words, the order would have the effect in England of prohibiting the child's further removal to Northern Ireland or abroad.

Subsection (3)

4. This subsection provides that the references in the clause to prohibition include references to prohibitions subject to exceptions—e.g. a prohibition on the removal of a child from England and Wales except for short visits to a parent in Scotland. The subsection also provides against the possibility that subsection (2) might be read as giving a power to a fresh court to give consent to the child's removal. This power would ordinarily be exercisable only by the court which imposed the prohibition. Thus, in the example quoted above in relation to subsection (2), leave to take the child to Northern Ireland or abroad could usually be given only by the Scottish court which made the order.

Subsection (4)

5. This subsection does two things:

- (a) it imports into the clause the definition of "appropriate court" now in clause 32 (i.e., in England and Wales and Northern Ireland, the High Court, and in Scotland, the Court of Session);

EXPLANATORY NOTES

ause 36 (continued)

- (b) it defines the term "child" for the purposes of the clause as a person who has not attained the age of 16, and provides that the section shall cease to apply to an order relating to a child when he attains 16. If, therefore, an English court had prohibited the removal of a child until he attained the age of 18, the child, if he had attained the age of 16, could be removed from Scotland without any breach of Scots law, although the removal would still constitute a contempt of the English court.

Child Custody

Part VI

Surrender of
passports.

37.—(1) Where there is in force an order prohibiting or otherwise restricting the removal of a child from the United Kingdom or from any specified part of it, the court by which the order was in fact made, or by which it is treated under section 36 of this Act as having been made, may require any person to surrender any United Kingdom passport which has been issued to, or contains particulars of, the child.

(2) In this section “United Kingdom passport” means a current passport issued by the Government of the United Kingdom.

EXPLANATORY NOTES

Clause 37

1. The purpose of this clause is to extend to all United Kingdom courts with jurisdiction to forbid removal of a child from the United Kingdom or any part of it the power already possessed by the High Court in England and Wales (referred to in Practice Direction (Minor: Passport) [1981] 1 W.L.R. 558) to order the surrender of any United Kingdom passport issued to or containing particulars of that child. This provision implements the recommendation in paragraph 6.22 of the report.

2. The reference to clause 36 of the Bill is inserted to make it clear that the power to require the surrender of a passport would also be exercisable by the courts of a part of the United Kingdom other than the part in which the prohibition or restriction on removal had been imposed.

Child Custody

Part VI

Automatic
restriction on
removal of
wards of
court.

38.—(1) The rule of law which (without any order of the court) restricts the removal of a ward of court from the jurisdiction of the court shall, in a case to which this section applies, have effect subject to the modifications in subsection (3) below.

(2) This section applies in relation to a ward of court if—

(a) proceedings for divorce, nullity or judicial separation in respect of the marriage of his parents are continuing in a court in another part of the United Kingdom (that is to say, in a part of the United Kingdom outside the jurisdiction of the court of which he is a ward), or

(b) he is habitually resident in another part of the United Kingdom,

except where that other part is Scotland and he has attained the age of sixteen.

(3) Where this section applies, the rule referred to in subsection (1) above shall not prevent—

(a) the removal of the ward of court, without the consent of any court, to the other part of the United Kingdom mentioned in subsection (2) above, or

(b) his removal to any other place with the consent of either the appropriate court in that other part of the United Kingdom or the court mentioned in subsection (2)(a) above.

(4) In this section “appropriate court” has the same meaning as in Part V of this Act.

EXPLANATORY NOTES

Clause 38

1. The purpose of this clause, which implements the recommendations in paragraph 6.28 of the Report, is to limit the effect of the rule of law applying in England and Wales and in Northern Ireland which, without any order of the court, restricts the removal of a ward of court from the court's jurisdiction. This rule, which is emphasised by a Practice Direction [1977] 1 W.L.R. 1067, is that it is a criminal contempt to take a ward out of England and Wales, or Northern Ireland as the case may be, without prior leave of the court. The rule takes effect immediately on the making of the application to make the child a ward, and operates for 21 days or, if an application for an appointment for a hearing is made within that period, until the determination of the application (Supreme Court Act 1981, s.41; R.S.C., O. 90, r.4(1)). The limitation embodied in the clause is designed to enable the child to be removed to another part of the United Kingdom if he is habitually resident there or if proceedings for divorce, nullity or judicial separation are continuing there in respect of the marriage of his parents (see also clause 41(4)).

Subsection (1)

2. This subsection specifies the scope of the clause.

Subsection (2)

3. This subsection defines the persons to whom the clause applies, i.e. (a) wards the marriage of whose parents is the subject of proceedings for divorce, nullity or judicial separation in another part of the United Kingdom, or (b) wards who are habitually resident in another part of the United Kingdom.

4. Because of the proviso, the provision does not apply where the other part of the United Kingdom is Scotland and the child has attained the age of sixteen. The differing views of the Law Commissions on this matter are set out in paragraphs 6.29 and 6.30 of the report. If the views of the Scottish Law Commission were to be preferred, the proviso would affect only paragraph (a) of the subsection; see paragraph 6.30 of the report.

Subsection (3)

5. This subsection contains the substantive limitations on the existing rule of law referred to in subsection (1).

6. In the case dealt with in paragraph (a), the ward is habitually resident in another part of the United Kingdom or there are continuing divorce, etc. proceedings in another part in respect of the marriage of his parents. In such a case, the rule of law is modified so as to allow his removal to the other part without a contempt of court being committed.

7. In the case dealt with in paragraph (b), an application is made for leave to remove a ward to some place other than the part of the United Kingdom permitted by paragraph (a). Under existing law such leave may be given by the wardship court itself. Paragraph (b), however, enables leave also to be given by

EXPLANATORY NOTES

Clause 38 (continued)

either the High Court, (England and Wales and Northern Ireland) or the Court of Session (Scotland) *or* by the court before which divorce, etc. proceedings are continuing. Thus, if a court in Scotland were to award custody of a ward of the English High Court to a parent resident abroad, not only the High Court but also the Court of Session or (if custody were determined in Scottish divorce proceedings) the divorce court, could give consent to the child being taken abroad.

8. It should be noted that the clause applies only to the automatic operation of wardship. If a judge of the English or Northern Ireland court makes an order specifically prohibiting the child's removal without leave, that leave can only be given by the court which made the order (or by a higher court of that part of the United Kingdom). If, for example, the English High Court had made such an order, the removal of the child from (say) Scotland without the leave of the English court would still be a contempt of the English court even though the child was habitually resident in Scotland or subject to divorce, etc. proceedings there. (Since, however, a custody order made in Scotland with jurisdiction under the Bill would be registrable in the High Court in England under clause 27, it may be assumed that any existing English order would be revoked or amended to the extent necessary for implementation of the Scottish order once it had been registered.)

Child Custody

Part VI

Duty to
furnish
particulars
of other
proceedings.

39. Parties to proceedings for or relating to a custody order shall, to such extent and in such manner as may be prescribed, give particulars of other proceedings known to them which relate to the child concerned (including proceedings instituted abroad and proceedings which are no longer continuing).

EXPLANATORY NOTES

Clause 39

This clause requires parties to proceedings for or relating to a custody order (which would include proceedings for the enforcement of a custody order) to give particulars of any other proceedings known to them which relate to the child concerned, wherever they took place, and whether or not they are continuing. This is necessary to reduce the likelihood of concurrent proceedings. The provision is not limited to proceedings within the United Kingdom, because proceedings elsewhere might also be relevant—e.g. if they are in the country of the child's habitual residence and a Scottish custody order is in issue. A court in England and Wales might also wish to use the discretion given it by clauses 4(5) and 5(2), or a court in Northern Ireland to use the discretion given by clauses 21(5) and 22(2), to dismiss or stay the proceedings before it because it considers that a foreign court is a more appropriate tribunal in the particular circumstances. The extent of such particulars and the manner of giving them may be prescribed by rules of court or act of sederunt (see clause 41(1)). The clause implements the recommendation in paragraph 4.118 of the report.

Part VI

Habitual
residence after
removal
without
consent, etc.

40.—(1) Where a child who—

(a) has not attained the age of sixteen, and

(b) is habitually resident in a part of the United Kingdom,

becomes habitually resident outside that part of the United Kingdom in consequence of circumstances of the kind specified in subsection (2) below, he shall be treated for the purposes of this Act as continuing to be habitually resident in that part of the United Kingdom for the period of one year beginning with the date on which those circumstances arise.

(2) The circumstances referred to in subsection (1) above exist where the child is removed from or retained outside, or himself leaves or remains outside, the part of the United Kingdom in which he was habitually resident before his change of residence—

(a) without the agreement of the person or all the persons having, under the law of that part of the United Kingdom, the right to determine where he is to reside, or

(b) in contravention of an order made by a court in any part of the United Kingdom.

(3) A child shall cease to be treated by virtue of subsection (1) above as habitually resident in a part of the United Kingdom if, during the period there mentioned,—

(a) he attains the age of sixteen, or

(b) he becomes habitually resident outside that part of the United Kingdom with the agreement of the person or persons mentioned in subsection (2)(a) above and not in contravention of an order made by a court in any part of the United Kingdom.

EXPLANATORY NOTES

Clause 40

1. This clause, which implements the recommendation in paragraph 4.18(2) of the Report, is designed to deter the unauthorised removal of a child from one jurisdiction to another for the purpose of delaying enforcement of a custody order or of initiating or reopening custody proceedings in a forum which the person removing the child thinks may be more favourable to him. The clause also provides for the possibility of a child not being returned at the end of a period of staying access. The general intention is that, despite a wrongful removal or retention, the courts of the part of the United Kingdom in which the child was habitually resident immediately before the removal or retention will retain jurisdiction for one year.

Subsection (1)

2. This subsection sets out the main principle embodied in the clause, i.e. that if a child under sixteen is removed from or retained outside the part of the United Kingdom in which he was previously habitually resident in consequence of circumstances as specified in subsection (2), he is to be treated for one year thereafter as if he were still habitually resident in that part of the United Kingdom. This provision is to the same effect as Articles 3 and 12 of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction.

Subsection (2)

3. This subsection defines the circumstances in which subsection (1) is to apply. These arise if the child is removed from or retained outside his habitual residence in contravention of a United Kingdom court order, or without the agreement of all the persons having the right to determine where he is to reside. A common example of the latter situation arises where parents have equal custody rights (as is the case where the child was born of their marriage but there is no court order) and one parent takes the child out of the part of the United Kingdom where the child habitually resides, or keeps him outside that part, without the consent of the other.

4. The wording adopted is designed to ensure that the court of the previous habitual residence retains jurisdiction for one year even if the child is removed or retained whilst outside the United Kingdom—e.g. when on holiday abroad—and even if, after being removed to one country, he is then removed to a second or third country. It also provides for the possibility that the child himself left, or remained outside, the country of his habitual residence—thus avoiding the need to prove an actual abduction.

Subsection (3)

5. This subsection covers two circumstances in which subsection (1) should become inapplicable within the one year period. In case (a) the child reaches the age of 16 during the course of the year. In case (b), the lack of authority for the removal or retention is remedied by the agreement (of all the persons entitled to determine where he is to reside) to his acquiring a new habitual residence—e.g. if one parent removes the child from Scotland to England without the consent of the other, but the other parent later agrees to the child remaining in England. Case (b) applies only where the removal or retention is not in contravention of a court order.

Child Custody

Part VI

Interpretation.

41.—(1) In this Act—

“certified copy”, in relation to an order of any court, means a copy certified by the prescribed officer of the court to be a true copy of the order or of the official record of the order;

“prescribed” means prescribed by rules of court or act of sederunt.

(2) For the purposes of this Act proceedings in England and Wales or in Northern Ireland for divorce, nullity or judicial separation in respect of the marriage of the parents of a child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of eighteen (whether or not a decree has been granted and whether or not, in the case of a decree of divorce or nullity of marriage, that decree has been made absolute).

(3) For the purposes of this Act, matrimonial proceedings in a court in Scotland which has jurisdiction in those proceedings to make a custody order with respect to a child shall, unless they have been dismissed or decree of absolvitor has been granted therein, be treated as continuing until the child concerned attains the age of sixteen.

(4) Any reference in this Act to proceedings in respect of the marriage of the parents of a child shall, in relation to a child who, although not a child of both parties to the marriage, is a child of the family of those parties, be construed as a reference to proceedings in respect of that marriage; and for this purpose “child of the family”—

- (a) if the proceedings are in England and Wales, means any child who has been treated by both parties as a child of their family, except a child who has been boarded out with those parties by a local authority or a voluntary organisation;
- (b) if the proceedings are in Scotland, means any child of one of the parties who has been accepted as one of the family by the other party;
- (c) if the proceedings are in Northern Ireland, means any child who has been treated by both parties as a child of their family, except a child who has been boarded out with those parties by or on behalf of the Department of Health and Social Services or a voluntary organisation.

(5) References in this Act to custody orders include (except where the context otherwise requires) references to custody orders as varied; and for the purposes of this Act each of the following orders shall be treated as varying the custody order to which it relates—

- (a) an order which provides for a person to be given access to a child who is the subject of a custody order, or which makes provision for the education of such a child,

EXPLANATORY NOTES

Clause 41

1. This clause defines certain terms for the purposes of the Bill.

Subsection (1)

2. This subsection defines the terms “certified copy” and “prescribed”. Acts of sederunt are, in this context, the Scottish equivalent of rules of court.

Subsection (2)

3. This subsection is ancillary to the operation of the clauses in the Bill which refer to “continuing” proceedings for divorce, nullity and judicial separation. Those clauses provide in effect that the jurisdiction of a court to make an order relating to the custody of a child is excluded if on the relevant date proceedings for divorce, nullity or judicial separation in respect of the marriage of the parents of the child concerned are continuing in a court in another part of the United Kingdom. The effect of the subsection is that, once proceedings for divorce, nullity or judicial separation have begun in England and Wales or in Northern Ireland, they are to be treated as continuing until the child in question reaches the age of eighteen or until the proceedings are dismissed (see paragraphs 4.8 to 4.10 of the report).

Subsection (3)

4. This subsection makes provisions for Scotland similar to that made in subsection (2) for England and Wales and Northern Ireland. Scottish proceedings are however only treated as continuing until the child in question reaches the age of 16.

Subsection (4)

5. This definition of “proceedings in respect of the marriage of the parents of a child” and of “child of the family” follows, in relation to England and Wales, the definition in section 52(1) of the Matrimonial Causes Act 1973 and section 88(1) of the Domestic Proceedings and Magistrates’ Courts Act 1978. It is required, amongst other things, for the interpretation of clauses 3(2), 6(3), 20(2), 23(3) and 38. The definition so far as Northern Ireland is concerned is taken from Article 2(2) of the Matrimonial Causes (Northern Ireland) Order 1978. The Scottish definition follows that in section 7(1) of the Matrimonial Proceedings (Children) Act 1958.

Subsection (5)

6. This subsection provides that references to custody orders include (except where the context otherwise requires) references to custody orders as varied, and that certain orders are to be treated for the purposes of the Bill as variations of the custody orders to which they relate. The latter provision is necessary to ensure that particulars of the variation orders in question are capable of registration and enforcement (see clauses 28 and 29). The subsection overlaps with the wider definition of variation which is contained in clause 15(3) for the purpose of the jurisdiction of a Scottish court to vary its own orders.

Child Custody

1973 c. 18.
S.I. 1978/1045
(N.I. 15).

(b) an order under section 42(6) of the Matrimonial Causes Act 1973 or Article 45(6) of the Matrimonial Causes (Northern Ireland) Order 1978,

(c) an order under section 42(7) of that Act or Article 45(7) of that Order, and

1978 c. 22.
S.I. 1980/563
(N.I. 5).

(d) an order under section 19(6) of the Domestic Proceedings and Magistrates' Courts Act 1978 or Article 20(6) of the Domestic Proceedings (Northern Ireland) Order 1980.

(6) References in this Act to proceedings in respect of the custody of a child include, in relation to proceedings outside the United Kingdom, references to proceedings before a tribunal or other authority having power under the law having effect there to determine questions relating to the custody of children.

(7) References in this Act to a part of the United Kingdom are references to England and Wales, to Scotland or to Northern Ireland.

EXPLANATORY NOTES

Clause 41 (continued)

7. *Paragraph (a)* is self-explanatory. Its object is to ensure that an access order or an order relating to the education of a child who is already the subject of a custody order is to be treated as a variation of the custody order whether the order is so expressed or not.

8. *Paragraph (b)* relates to an order made under section 42(6) of the Matrimonial Causes Act 1973 or its equivalent in Northern Ireland. Section 42(1) of the 1973 Act provides that, in any proceedings for divorce, nullity or judicial separation, the court may make such order as it thinks fit for the custody and education of any child of the family and section 42(2) confers a similar power on the court to make a custody order where it is making a financial provision order under section 27 of the Act. Section 42(6) provides that these powers "shall be exercisable from time to time" and also that, where an order has been made on dismissal of an application, the court may from time to time "make a further order". Such orders might not be variations under the terminology of the 1973 Act because a separate power is given under section 42(7) to vary or discharge an order previously made; but for the purposes of this Bill, they should be treated in the same way as variations.

9. *Paragraph (c)* deals with orders made under section 42(7) of the Matrimonial Causes Act 1973 or its equivalent in Northern Ireland. That subsection provides that "the court shall have power to vary or discharge an order made under this section or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended". It is desirable for the purposes of the Bill that such a suspension or revival should be treated as if it were a variation, though it is not so described in the 1973 Act.

10 *Paragraph (d)* relates to orders made under section 19(6) of the Domestic Proceedings and Magistrates' Courts Act 1978 and its equivalent in Northern Ireland for the continuance of an interim custody order. The interim custody order itself (i.e. an order made under section 19(1)(ii) of the 1978 Act) is a "custody order" for the purposes of the Bill, by reason of its inclusion in clause 1(1)(a)(v) of the Bill. It is logical that an extension of such an interim order should be treated for the purposes of the Bill as if it were a variation although it is not so described in the 1978 Act.

Subsection (6)

11. This subsection defines the meaning of "proceedings in a country outside the United Kingdom" as including proceedings before a tribunal or other authority having power under the law having effect in that country to determine questions relating to the custody of children. This is necessary because in some countries—e.g. Denmark, Norway, and Switzerland—decisions on custody may be taken by administrative authorities.

Subsection (7)

12. This subsection defines a part of the United Kingdom as referring to England and Wales, to Scotland or to Northern Ireland.

Child Custody

Part VI

Minor and consequential amendments and repeals.

42.—(1) The enactments and orders specified in Schedule 1 to this Act shall have effect subject to the amendments specified in that Schedule, being minor amendments or amendments consequential on the provisions of this Act.

(2) The enactments mentioned in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

EXPLANATORY NOTES

Clause 42

Subsection (1)

1. This subsection makes formal provision for the amendments to existing legislation specified in Schedule 1. These are explained in the Note on that Schedule.

Subsection (2)

2. This subsection makes formal provision for the repeals of existing legislation specified in Schedule 2. These are explained in the Note on that Schedule.

Child Custody

Part VI

Short title and
commencement.

43.—(1) This Act may be cited as the Child Custody Act 1984.

(2) This Act shall come into force on 1st January 1985.

EXPLANATORY NOTES

Clause 43

Subsection (1)

1. This subsection makes formal provision for the short title of the Act.

Subsection (2)

2. This subsection provides a readily ascertainable date for commencement. The date chosen will however have to be adjusted to allow for the passage of the legislation, the preparation of the rules necessary to prescribe the matters referred to in clauses 27(2), 28(1) and 39, and other consequential matters.

Child Custody
SCHEDULES

SCHEDULE 1

MINOR AND CONSEQUENTIAL AMENDMENTS

ACTS

The Conjugal Rights (Scotland) Amendment Act 1861 (c. 86)

1. In section 9 of the Conjugal Rights (Scotland) Amendment Act 1861—

(a) after the words “decree make” there shall be inserted the words “an order making”;

(b) at the end there shall be added the following subsection—

“(2) An order made by a court under subsection (1) above with respect to the custody or education of a child may, on the application of any person concerned, be varied, recalled or set aside by a subsequent order by that court made at any time before the child concerned attains the age of sixteen.”.

The Guardianship of Infants Act 1886 (c. 27)

2. In section 9 of the Guardianship of Infants Act 1886, in the paragraph beginning “In Ireland” for the words from “the county court” to the end there shall be substituted the words “any county court, except that provision may be made by county court rules that in the case of such applications to County Courts as are prescribed by county court rules only such county courts as are so prescribed shall be authorised to hear those applications”.

The Sheriff Courts (Scotland) Act 1907 (c. 51)

3. In section 6 of the Sheriff Courts (Scotland) Act 1907, after the words “Act 1973” there shall be inserted the words “and Part III of the Child Custody Act 1984”.

The Matrimonial Proceedings (Children) Act 1958 (c. 40)

4. In section 8(1) of the Matrimonial Proceedings (Children) Act 1958—

(a) for the words from “custody” to “jurisdiction” there shall be substituted the words “custody the court has power”;

(b) at the end there shall be added the words “In this subsection “child” does not include a child with respect to whom the court has made an order under section 13(6) or 14(2) of the Child Custody Act 1984”.

EXPLANATORY NOTES

Schedule 1

The Conjugal Rights (Scotland) Amendment Act 1891 (c.86)

1. The amendment in *paragraph 1* of the Schedule is consequential on the definition of “continuing” matrimonial proceedings in clause 41(3). It confers a statutory power on the matrimonial court to vary or recall a custody order until the child concerned reaches the age of 16. The Scottish Law Commission have made a similar, but more wide-reaching, recommendation in their Report on *Illegitimacy* (see draft Law Reform (Parent and Child) (Scotland) Bill, Schedule 1, appended to Scot Law Com. No. 82).

2. The amendment omits reference to the court’s power to make an order with respect to maintenance of the child. This is in accordance with a recommendation made by the Scottish Law Commission in their Report on *Aliment and Financial Provision* (see draft Family Law (Financial Provision) (Scotland) Bill, Schedule 2, appended to Scot. Law Com. No. 67). If the present Report is implemented before Scot. Law Com. No. 67, the reference to maintenance should be preserved for the time being.

The Guardianship of Infants Act 1886 (c.27)

3. *Paragraph 2* of the Schedule amends section 9 of the Guardianship of Infants Act 1886 to permit the designation by rules of court in Northern Ireland of particular county courts to hear guardianship proceedings. The object of this provision, like that of the corresponding amendment to the Guardianship of Minors Act 1971 explained in paragraph 12 below, is to permit the rules governing internal allocation of cases between courts to be prescribed by rules of court, and thus avoid the need to embody them in a statute.

The Sheriff Courts (Scotland) Act 1907 (c.51)

4. *Paragraph 3* of the Schedule adds to section 6 of the Sheriff Courts (Scotland) Act 1907 (which defines the circumstances in which a sheriff court has jurisdiction) a reference to Part III of the Bill (Jurisdiction of Courts in Scotland).

The Matrimonial Proceedings (Children) Act 1958 (c.40)

5. *Paragraph 4(a)* of the Schedule is a drafting amendment designed to achieve legislative consistency (see section 12(1) of the 1958 Act). *Paragraph 4(b)* is consequential to clauses 13(6) and 14(2) of the Bill.

6. *Paragraph 5* of the Schedule amends section 9(1) of the Matrimonial Proceedings (Children) Act 1958, which gives a court in Scotland power to entertain an application for a custody order either forthwith after dismissing the proceedings or granting a decree of absolvitor or within a reasonable time thereafter. The amendment substitutes a reference to clause 13(2) of the Bill, which requires the application to have been made on or before the dismissal or the granting of the decree.

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5. In section 9(1) of that Act, for the words from “either forthwith” to “granted therein” there shall be substituted the words “, subject to section 13(2) of the Child Custody Act 1984.”.

6. In section 10(1) of that Act, for the words from “custody” to “jurisdiction” there shall be substituted the words “custody the court has power”.

7. In section 11(1) of that Act, for the words from “custody” to “jurisdiction” there shall be substituted the words “custody the court has power”.

8. In section 13(1) of that Act, for the words from “jurisdiction” to “education” there shall be substituted the words “power to make orders with respect to the custody”.

*The Law Reform (Miscellaneous Provisions) (Scotland) Act
1966 (c. 19)*

9. In section 8(6) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, in the definition of “sheriff”—

(a) after the words “means” there shall be inserted the words—
“(a) in relation to an order under subsection (1)(a), (b) or (c) above or an order varying any such order”;

(b) at the end there shall be added the words—
“(b) in relation to an order mentioned in subsection (1)(d) above or an order varying any such order, the sheriff having jurisdiction under section 9, 10 or 12 of the Child Custody Act 1984.”.

The Guardianship of Minors Act 1971 (c. 3)

10. In section 15 of the Guardianship of Minors Act 1971—

(a) for subsection (1) there shall be substituted the following subsection—

“(1) Subject to the provisions of this section “the court” for the purposes of this Act means the High Court, any county court or any magistrates’ court, except that provision may be made by rules of court that in the case of such applications to a county court, or such applications to a magistrates’ court, as are prescribed, only such county courts, or as the case may be such magistrates’ courts, as are prescribed shall be authorised to hear those applications.”;

(b) after subsection (2) there shall be inserted the following subsections—

EXPLANATORY NOTES

Schedule 1 (continued)

7. Paragraphs 6, 7 and 8 amend respectively sections 10(1), 11(1) and 13(1) of the Matrimonial Proceedings (Children) Act 1958 by omitting reference to "maintenance and education" and by referring to the court's power to make provision as to custody instead of its jurisdiction to do so. These amendments are to achieve consistency in drafting with section 12(1) of the 1958 Act and also reflect recommendations made by the Scottish Law Commission in an earlier Report (see draft Law Reform (Parent and Child) (Scotland) Bill, Schedule 2, appended to Scot. Law Com. No. 82).

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (c.19).

8. Section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 enables sheriffs to vary and recall certain orders made by the Court of Session in respect of maintenance, custody, etc. For this purpose the term "sheriff" is defined in section 8(6) as meaning "the sheriff having jurisdiction over any party on whom the application has to be served, on any of the grounds mentioned in paragraph, (a), (b) or (j) of section 6 of the Sheriff Courts (Scotland) Act 1907". The effect of the amendments in *paragraph 9* of the Schedule is to confine the existing definition of the word "sheriff" to matters not relating to custody and to provide that, in matters relating to custody, the term "sheriff" means a sheriff having jurisdiction under clause 9, 10 or 12 of the draft Bill.

The Guardianship of Minors Act 1971 (c.3)

General

9. The jurisdictional provisions of the Guardianship of Minors Act 1971 are amended by *paragraphs 10 and 11* of this Schedule and by the repeal by *paragraph 12* of section 17(2) of the 1971 Act. The effect of these changes is that the general provision determining whether a court in England and Wales does or does not have jurisdiction in guardianship proceedings will in future be clause 3 of the Bill. In consequence, the jurisdiction of the court will depend on whether the child is habitually resident in England and Wales, or, if not, whether the child is present in England and Wales and not habitually resident in any part of the United Kingdom. The purpose of section 15 of the Guardianship of Minors Act 1971 as now amended will be solely to provide for the internal allocation of custody cases within England and Wales as between magistrates' courts or, as the case may be, as between county courts, and for the service of process outside England and Wales where this is necessary.

10. It will still be necessary to preserve the jurisdiction of a court in England and Wales to make an order for the child's maintenance under section 9(2) of the 1971 Act against a person residing in England and Wales, although the child resides elsewhere (and will therefore no longer be subject to the custody jurisdiction). This is achieved by the insertion in the 1971 Act (by *paragraph 11* of the Schedule) of a new section 15A.

11. Section 17(2) of the 1971 Act, which is a declaratory provision preserving pre-1971 Act jurisdiction, is now to be repealed, since the present Bill in

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“(2A) It is hereby declared that any power conferred on a magistrates’ court under this Act is exercisable notwithstanding that any party to the proceedings is residing outside England and Wales.

(2B) Where any party to the proceedings on an application to a magistrates’ court under this Act resides outside the United Kingdom and does not appear at the time and place appointed for the hearing of the application, the court shall not hear the application unless it is proved to the satisfaction of the court, in such manner as is prescribed, that such steps as are prescribed have been taken to give to that party notice of the application and of the time and place appointed for the hearing of it.

(2C) In this section “prescribed” means prescribed by rules of court.”;

(c) subsections (3) to (6) shall cease to have effect.

11. After section 15 of that Act there shall be inserted the following section—

“Financial provision for minor resident in country outside England and Wales.

15A.—(1) Where one parent of a minor resides in England and Wales and the other parent and the minor reside outside England and Wales, the court shall have power, on an application made by that other parent, to make one or both of the orders mentioned in section 9(2)(a) and (b) of this Act against the parent resident in England and Wales, notwithstanding that no order has been made under section 9(1) of this Act regarding the custody of the child; and in relation to such an application section 9(2)(a) and (b) shall have effect as if for any reference to the parent excluded from actual custody there were substituted a reference to the parent resident in England and Wales.

(2) Any reference in this Act to the powers of the court under section 9(2) of this Act or to an order made under the said section 9(2) shall include a reference to the powers which the court has by virtue of subsection (1) above or, as the case may be, to an order made by virtue of subsection (1) above.”

12. In section 17 of that Act subsection (2) shall cease to have effect.

The Matrimonial Causes Act 1973 (c. 18)

13. In section 41(1) of the Matrimonial Causes Act 1973, at the end of paragraph (b) there shall be inserted the following sub-paragraph—

“(iii) such arrangements have been made in respect of every child named in the order except any child with respect to whom the court has made an order under section 4(5) or 5(2) of the Child Custody Act 1984 (orders precluding or staying proceedings for a custody order), or”.

EXPLANATORY NOTES

Schedule 1 (continued)

combination with the 1971 Act as amended now sets out all the jurisdictional provisions which it is desired to preserve.

Section 15 of the 1971 Act

12. Subsection (1) of section 15 as amended by *paragraph 10(a)* of the Schedule recites that (as before) jurisdiction in guardianship proceedings in England and Wales rests with the High Court, county courts and magistrates' courts and goes on to provide that the county courts and magistrates' courts which are to hear particular applications are to be as prescribed by rules of court. It will be for the respective rule-making authorities to consider what the distribution should be (see paragraph 4.64 of the report).

13. Subsection (2) of section 15 of the 1971 Act remains unchanged, and is therefore not mentioned in the Schedule. This subsection, as amended by section 38(1) of the Domestic Proceedings and Magistrates' Courts Act 1978, provides that a magistrates' court shall not be competent to entertain any application involving the administration or application of any property belonging to or held in trust for a minor, or the income thereof.

Subsection (2A)

14. *Paragraph 10(b)* of the Schedule adds to the 1971 Act a new subsection (2A) declaring that any power conferred on a magistrates' court under the Bill is exercisable notwithstanding that any party to the proceedings is residing outside England and Wales. This declaratory provision is necessary to ensure that the general principle underlying the Bill, i.e. that custody jurisdiction (except in divorce, nullity and judicial separation) shall be related to the circumstances of the child, will not be nullified in practice by any existing rule of law relating to the residence of the parties to the proceedings. The need for it is discussed in paragraphs 4.62 to 4.64 of the report. There is a similar, though narrower, declaratory provision in section 15(5) of the 1971 Act.

Subsections (2B) and (2C)

15. These subsections, as substituted by *paragraph 10(b)* of the Schedule, permit magistrates' courts' rules to prescribe how service of process is to be effected on a person outside the United Kingdom (as is already done, in relation to proceedings brought under the Matrimonial Causes Act 1973, in the Rules of the Supreme Court and the Matrimonial Causes Rules) and provide that the court should be satisfied, before the hearing the application, that the prescribed rules have been complied with. The question of service of process generally is discussed in paragraphs 4.58 to 4.61 of the report.

Section 15(3) to (6) of the Guardianship of Minors Act 1971 to cease to have effect

16. *Paragraph 10(c)* of the Schedule provides that subsections (3) to (6) of section 15 of the Guardianship of Minors Act 1971 are to cease to have effect. The existing subsections (3) to (6) provide in subsection (3) that the summons must be served on the respondent in England and Wales, unless the case is

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The Guardianship Act 1973 (c. 29)

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14. The following provisions of the Guardianship Act 1973 shall cease to have effect—

- (a) in section 1(6), the words from “except that” to the end of the subsection;
- (b) in section 2(1), the words “15”, “and section 15(3) to (6)” and “they are”;
- (c) section 5(3);
- (d) in Part I of Schedule 2, paragraph 3;
- (e) in Part II of Schedule 2, the text of section 15(3) to (6) of the Guardianship of Minors Act 1971.

15. In section 1(6) of the Guardianship Act 1973 for the words “15(1) to (3)” there shall be substituted the words “15(1) to (2A), section 15 (2C)”.

16. In section 10(3) of that Act, for the words from “any sheriff” to “1886” there shall be substituted the words “the sheriff court”.

The Children Act 1975 (c. 72)

17. In section 33(1) of the Children Act 1975 the words “if the child is in England or Wales at the time the application is made” shall cease to have effect.

18. In section 100 of that Act—

- (a) in subsection (2) after the word “If” there shall be inserted the words “in the case of an application for any order other than an order under Part II of this Act”;
- (b) for subsection (7) there shall be substituted the following subsection—

“(7) In the case of an application for an order under Part II of this Act, the following are authorised courts—

 - (a) the High Court,
 - (b) for the purposes of such applications under the said Part II as are prescribed by rules made under section 75 of the County Courts Act 1984, any county court so prescribed in relation to those applications;
 - (c) for the purposes of such applications under the said Part II as are prescribed by rules made under section 144 of the Magistrates’ Courts Act 1980, any magistrates’ court so prescribed in relation to those applications.”;
- (c) in subsection (8) the words “or 42” shall cease to have effect.

EXPLANATORY NOTES

Schedule 1 (continued)

covered by later subsections; in subsection (4), that an order may be made if one parent and the minor reside in England and Wales and the other parent in Scotland or Northern Ireland; in subsection (5), that a magistrates' court has jurisdiction where the proceedings are brought by a person residing in Scotland or Northern Ireland; and in subsection (6), that, in a case brought by a person residing in Scotland or Northern Ireland, a magistrates' court may make any order permitted under section 9 of the 1971 Act. These subsections, based as they are on the residence of the applicant or the respondent, are inconsistent with the provisions of clause 3 of the Bill, which bases jurisdiction solely on the habitual residence or presence of the child, and are accordingly to cease to have effect.

New section 15A added to the 1971 Act

17. *Paragraph 11* of the Schedule inserts a new section 15A in the Guardianship of Minors Act 1971. This new provision will enable a court in England and Wales to make an order under section 9(2) of the 1971 Act requiring a parent in England and Wales to make periodical payments or pay a lump sum to a minor or for the benefit of a minor, although the court has not made a custody order in respect of the same child. The new section is now necessary because, if the child is neither habitually resident nor present in England and Wales, the court will not in future have jurisdiction to make a custody order. The English court will still need to have jurisdiction to make an order for financial relief, both on the general ground that such an order may be required to ensure the welfare of the child, and on the particular ground that this may be necessary to accord with conventions which the United Kingdom Government has implemented—e.g. the United Nations Convention of 1956 on the Recovery Abroad of Maintenance (Cmnd. 4485).

Omission of section 17(2) of the 1971 Act

18. *Paragraph 12* of the Schedule provides for the omission of section 17(2) of the Guardianship of Minors Act 1971. That subsection provides that nothing in section 15 is to be considered as derogating from any jurisdiction exercisable apart from those provisions. The subsection is no longer necessary, because in future jurisdiction in guardianship proceedings will stem solely from clause 3 of the Bill and from sections 15 and 15A of the 1971 Act as now amended and added by the Bill.

The Matrimonial Causes Act 1973 (c.18)

19. *Paragraph 13* inserts a new sub-paragraph (iii) in section 41(1)(b) of the Matrimonial Causes Act 1973. Section 41(1)(b) prohibits the court from making absolute a decree of divorce or nullity or from granting a decree of judicial separation unless it has declared that it is satisfied either that proper arrangements have been made for the welfare of any children of the family, or that it is impracticable for the parties to make such arrangements. The additional sub-paragraph is necessary to enable the courts to exercise the discretion conferred

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The Domestic Proceedings and Magistrates' Courts Act 1978 (c. 22)

19. In section 8(2) of the Domestic Proceedings and Magistrates' Courts Act 1978, after the words "the said section 2, 6 or 7" there shall be inserted the words "(but subject to section 2 of the Child Custody Act 1984)".

20. In section 30(1) of that Act, after the words "subject to" there shall be inserted the words "section 2 of the Child Custody Act 1984 and".

ORDERS

The Matrimonial Causes (Northern Ireland) Order 1978 *S.I. 1978/1045 (N.I. 15)*

21. In Article 44(1) of the Matrimonial Causes (Northern Ireland) Order 1978, at the end of sub-paragraph (b) there shall be inserted the following head—

"(iii) such arrangements have been made in respect of every child named in the order except any child with respect to whom the court has made an order under section 21(5) or 22(2) of the Child Custody Act 1984 (orders precluding or staying proceedings for a custody order), or".

The Domestic Proceedings (Northern Ireland) Order 1980 *S.I. 1980/563 (N.I. 5)*

22. In Article 10(2) of the Domestic Proceedings (Northern Ireland) Order 1980, after the words "that Article" there shall be inserted the words "(but subject to section 19 of the Child Custody Act 1984)".

23. In Article 32(1) of that Order, for the words "Without prejudice" there shall be substituted the words "Subject to section 2 of the Child Custody Act 1984 and without prejudice".

EXPLANATORY NOTES

Schedule 1 (continued)

on them by clause 4(5) of the Bill, which allows a court dealing with divorce, nullity or judicial separation to direct that no order under section 42(1) of the 1973 Act (i.e. an order relating to the custody of a child of the family) shall be made in connection with those proceedings because the court considers that the custody issue would more appropriately be dealt with in a country outside England and Wales—e.g. the country where the child is habitually resident. It is also necessary to enable a court to use the discretion given by clause 5(2)(b) of the Bill to stay custody proceedings already begun if it considers that it would be more appropriate for these matters to be determined in proceedings outside England and Wales.

The Guardianship Act 1973 (c.29)

20. *Paragraph 14* of the Schedule provides that various provisions of the Guardianship Act 1973 shall cease to have effect.

- (a) Section 1(6) of the Guardianship Act 1973 (which provides that the jurisdiction of courts to resolve disagreements between parents on questions affecting their children's welfare shall be the same as in custody proceedings under the Guardianship of Minors Act 1971) contains an exception allowing proceedings for revocation, revival or variation of any order resolving such disagreements to be brought against a person residing in Scotland or Northern Ireland even if such proceedings would otherwise be barred by the provisions of section 15(3) of the 1971 Act. This exception in the 1973 Act will no longer apply if the Bill is passed in its present form, because subsections (3) to (6) of section 15 are being replaced by the provisions set out in paragraph 10 of this Schedule, which do not contain any similar limitation.
- (b) Section 2(1) of and Schedule 2 to the Guardianship Act 1973 provide that various sections of the Guardianship of Minors Act 1971, including section 15, are to be amended. Because section 15 of the 1971 Act has itself been amended by paragraph 10 of this Schedule, the provisions in the 1973 Act which previously amended it are now spent and are therefore declared to cease to have effect.
- (c) Section 5(3) of the Guardianship Act 1973 gives jurisdiction to a county court or magistrates' court to make, vary or discharge certain interim orders where there is an application for custody under section 9 of the 1971 Act but the applicant or the respondent resides in Scotland or Northern Ireland. This provision is now unnecessary because, by reason of clause 3 of the Bill and paragraph 10 of this Schedule, the court's jurisdiction will be based on the residence of the child, and the place of residence of the applicant or the respondent will cease to be material.

EXPLANATORY NOTES

Schedule 1 (continued)

- (d) Paragraph 3 of Part I of Schedule 2 to the Guardianship Act 1973 amended subsections (4) to (6) of section 15 of the Guardianship of Minors Act 1971 to take account of the conferring by the 1973 Act of equal parental rights on both the father and mother of the child of a marriage. Since subsections (3) to (6) of section 15 of the 1971 Act are now declared by paragraph 10 of this Schedule to be of no effect (being replaced by the provisions in clause 3 of this Bill and paragraph 10 of this Schedule) the 1973 Act provision is also spent and is therefore also declared to be of no effect.
- (e) Similarly, subsections (3) to (6) of section 15 of the 1971 Act, as they are set out in Schedule 2 to the 1973 Act, is now spent and declared to be of no effect.

21. *Paragraph 15* of the Schedule amends section 1(6) of the Guardianship Act 1973 (which provides that the jurisdiction of courts to resolve disagreements of parents on questions affecting their children's welfare shall be the same as in custody proceedings under the Guardianship of Minors Act 1971) by substituting references to section 15(1), (2A) and (2C) of the 1971 Act for references to section 15(1) to (3). This amendment is consequential on the changes to section 15 of the 1971 Act which are made in paragraph 10 of this Schedule.

22. *Paragraph 16* of the Schedule amends section 10(3) of the Guardianship Act 1973 (which permits either parent of a pupil or minor in Scotland to ask the Court of Session or a sheriff court to resolve a disagreement between them on a question affecting the child's welfare) by replacing the reference to "any sheriff court having jurisdiction under the Guardianship of Infants Act 1886" by a reference to "any sheriff court". The reference to the 1886 Act will now cease to be appropriate because the jurisdiction of the sheriff court in matters relating to the tutory or curatory of a child will be governed by clause 16 of the Bill.

The Children Act 1975

23. *Paragraph 17* of the Schedule provides for the omission of the words in section 33(1) of the Children Act 1975 which make physical presence of the child in England or Wales the sole jurisdictional criterion for the entertaining by an English court of an application for a custodianship order. In future the jurisdictional requirements for the entertaining of such an application will be those embodied in clause 3 of the Bill.

24. *Paragraph 18* of the Schedule amends section 100 of the Children Act 1975, which specifies the courts which are "authorised courts" for the purposes of the Act.

- (a) *Paragraph 18(a)* amends section 100(2) by limiting the application of that subsection to proceedings other than those relating to custodianship orders.
- (b) *Paragraph 18(b)* inserts an amended subsection (7) into section 100 of the 1975 Act, re-defining which courts are "authorised courts" for

EXPLANATORY NOTES

Schedule 1 (continued)

proceedings relating to custodianship orders (i.e. those under Part II of the Act). Since these courts will only have jurisdiction if the case also falls within the general criteria set out in clause 3 of the Bill, subsection (7) relates only to internal allocation. As in guardianship proceedings, the internal procedural rules to determine which county court or magistrates' court is to deal with a particular case will in future be embodied in rules of court instead of in the statute.

- (c) *Paragraph 18(c)* provides for the omission from section 100(8) of the Children Act 1975 of a reference to section 42 of the Act. Section 42 enables an "authorised court", on the application of a person who has applied for a custodianship order and from whose custody the child has been removed, to order in certain circumstances that the child shall be returned to the applicant. Section 100(8) restricts the definition of "authorised court" for this purpose to the High Court or the county court or magistrates' court within whose area the applicant lives. The effect of the omission of the reference to section 42 from section 100(8) is to apply section 100(7) as amended, i.e. to leave the internal jurisdictional rules to be prescribed in rules of court.

The Domestic Proceedings and Magistrates' Courts Act 1978

25. *Paragraphs 19 and 20* of the Schedule amend sections 8(2) and 30(1) of the Domestic Proceedings and Magistrates' Courts Act 1978 (which specify that jurisdiction of magistrates' courts under Part I of the Act) by inserting a reference to clause 2 of the Bill. Part I relates to proceedings in magistrates' courts between spouses for financial relief, and gives the court ancillary powers to make custody orders in respect of children of the family. The effect of the insertion is that the ancillary jurisdiction to make custody orders will be exercisable only if there is jurisdiction under clause 3 of the Bill (i.e. if the child is habitually resident in England and Wales, or present there and not habitually resident in any part of the United Kingdom) as well as jurisdiction under section 30 as it now stands.

ORDERS

The Matrimonial Causes (Northern Ireland) Order 1978

26. *Paragraph 21* of the Schedule makes an amendment to the Matrimonial Causes (Northern Ireland) Order 1978, which contains Northern Ireland provisions on the same lines as those applying to England and Wales in the Matrimonial Causes Act 1973 (as amended). The effect of the amendment is the same as that relating to England and Wales which is contained in *paragraph 13* of the Schedule.

The Domestic Proceedings (Northern Ireland) Order 1980

27. The 1980 Order is the equivalent in Northern Ireland of Part I of the Domestic Proceedings and Magistrates' Courts Act 1978. The effect in Northern Ireland of the amendments in *paragraphs 22 and 23* of the Schedule is the same as the effect in England and Wales of the amendments in *paragraphs 19 to 20* of the Schedule.

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Section 42(2)

SCHEDULE 2

REPEALS

Chapter	Short title	Extent of repeal
49 & 50 Vict. c. 27.	The Guardianship of Infants Act 1886.	In section 9, the words from "court within" to "reside".
14 Geo. 6. c. 37.	The Maintenance Orders Act 1950.	Section 7.
6 & 7 Eliz. 2 c. 40.	The Matrimonial Pro- ceedings (Children) Act 1958.	Section 13.
1966 c. 19.	The Law Reform (Mis- cellaneous Provisions) (Scotland) Act 1966.	In section 8(2), the words "made in a consistorial action."
1971 c. 3.	The Guardianship of Minors Act 1971.	Section 15(3) to (6). Section 17(2).
1973 c. 29.	The Guardianship Act 1973.	In section 1(6), the words from "except that" to the end. In section 2(1), the words "15", "and section 15(3) to (6)" and "they are". Section 5(3). In Schedule 2, in Part I, para- graph 3, and in Part II, the text of section 15(3) to (6) of the Guardianship of Minors Act 1971.
1975 c. 22.	The Children Act 1975.	In section 33(1), the words from "if" onwards. In section 53(1), the words from "but where" to the end. Section 54. In section 100(8), the words "or 42".

EXPLANATORY NOTES

Schedule 2

1. This Schedule sets out the extent of repeals effected by clause 42(2). The reasons for the repeals are as follows.

- (a) Section 9 of the Guardianship of Infants Act 1886 confers jurisdiction in Scotland on the sheriff "court within whose jurisdiction the respondent or respondents or any of them may reside." These words are repealed as this ground of jurisdiction is superseded by the jurisdictional provisions contained in Part III of the Bill (see paragraphs 2.65 and 4.69 of the report).
- (b) Section 7 of the Maintenance Orders Act 1950, which relates to the jurisdiction of the sheriff in Scotland to make custody orders, is superseded by the new jurisdictional provisions in Part III of the Bill (see paragraphs 2.69 and 4.69 of the report).
- (c) Section 13 of the Matrimonial Proceedings (Children) Act 1958, which enables the Court of Session to prohibit the removal of a child from Scotland or out of the control of the person having custody of him, is superseded by subsections (3) and (4) of clause 35.
- (d) Section 8(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 provides that, where a person has a right to make application for the variation or recall of orders of the kind specified in the section which were made in a consistorial action, he may make such an application to the sheriff court. The orders specified include orders under Part II of the Guardianship Act 1973, which are not made in a consistorial action. The words are therefore repealed as being no longer appropriate (see paragraph 2.72 of the report).
- (e) The repeals of sections 15(3) to (6) and 17(2) of the Guardianship of Minors Act 1971 are consequential on paragraphs 10(c) and 12 of Schedule 1 above.
- (f) The repeals of the specified provisions of the Guardianship Act 1973 are consequential on paragraph 14 of Schedule 1 above.
- (g) The repeal of provisions of the Children Act 1975 is for the following reasons:
 - (i) the repeal of the words in section 33(1) is consequential on paragraph 17 of Schedule 1 above;
 - (ii) the repeal of the words in section 53(1) (which give a court in Scotland jurisdiction to make a custody order instead of an adoption order even if it would not have had jurisdiction to hear a custody application) is necessary for conformity with the jurisdictional provisions in Part III of the Bill (see also paragraphs 3.8, 3.9 and 4.67 of the report);
 - (iii) the repeal of section 54 (which specifies grounds of custody jurisdiction in Scotland) is necessary for conformity with the jurisdictional provisions in Part III of the Bill (see paragraphs 4.67 and 4.69 of the Report);
 - (iv) the repeal of the words "or 42" in section 100(8) is consequential on paragraph 18(c) of Schedule 1 above.

APPENDIX B

Membership of the Joint Working Party

The Rt. Hon. Lord Justice Scarman, O.B.E., <i>Chairman</i>	
The Hon. Mr. Justice Cooke	} Law Commission
Mr. J. Churchill	
Mr. A. E. Anton, C.B.E.	} Scottish Law Commission
Mr. N. R. Whitty	
Mr. R. K. Batstone	
Mr. D. A. Bennet	(Foreign and Commonwealth Office)
Mr. M. C. Blair	(Scottish Education Department)
Mr. G. P. H. Aitken ¹	(Lord Chancellor's Office)
Mr. G. C. Duke	} Scottish Courts Administration
Mr. R. L. Jones	
Mr. W. J. Pickering ²	(Home Office)
Mr. J. W. Wilson	(Principal Registry of the Family Division)
Mr. A. Akbar <i>Secretary</i>	(Assistant Secretary to Supreme Court of Northern Ireland)
	(Law Commission)

¹ Mr. Aitken resigned in August 1975 on transfer to other work; he was succeeded by Mr. Duke.

² Mr. Pickering resigned in December 1975 on retirement from the Civil Service.

APPENDIX C

List of persons and organisations who sent comments on Working Paper No.68; Memorandum No. 23¹

University of Aberdeen, Faculty of Law
Association of Chief Police Officers (Scotland)
The Rt. Hon. Sir George Baker, O.B.E., President of the Family Division
Professor P. M. Bromley
The Rt. Hon. Lord Justice Bridge
The Rt. Hon. Lord Justice Browne
The Rt. Hon. Lord Justice Cairns
The Rt. Hon. Lord Cross of Chelsea
Ms. J. Corrin
The Hon. Lord Emslie, Lord President of the Court of Session
Faculty of Advocates
Family Law Bar Association
His Honour Judge Connolly H. Gage
University of Glasgow, Faculty of Law
The Rt. Hon. The Lord Hodson
Home Office
Justices' Clerks' Society
The Hon. Mr. Justice Latey
The Law Society, Family Law Sub-committee
The Law Society of Scotland
Mr. R. D. Leslie
The Hon. Mr. Justice MacDermott
Dr. J. H. C. Morris
The National Council of Women
The Rt. Hon. Lord Justice Ormrod
Mrs. C. Parsowith
Professor J. C. Schultz
Senate of the Inns of Court and Bar, Law Reform Committee
Scottish Law Agents Society
The Rt. Hon. Lord Justice Stamp
The Rt. Hon. Lord Justice Stephenson
Mr. D. Tolstoy, Q.C.
Professor P. R. H. Webb
Women's National Commission
Society of Writers to the Signet

¹ This list refers to the positions held by persons when their comments were made.

