SCOTTISH LAW COMMISSION

RESTRICTED CONSULTATION PAPER

ON

ILLEGITIMACY AND THE GUARDIANSHIP ACTS

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Purpose of consultation. The Commission proposes, in its Report on *Illegitimacy*, to recommend various changes in the law on the tutory and curatory of illegitimate children. The provisional proposals on these matters made in the Consultative Memorandum on *Illegitimacy* published in 1982 were widely supported on consultation and the recommendations will generally follow them. The effect will be to apply to all children many of the rules on tutory and curatory applying at present to legitimate children only. The father of an illegitimate child will not, however, be his tutor or curator or have any other parental rights (other than those conferred by particular statutes) unless he has been appointed tutor or curator or has been given the parental rights in question by a court. The result of this approach is that certain consequential amendments will be necessary to the Guardianship of Infants Acts 1886 and 1925, as amended, and the Guardianship Act 1973. The purpose of this consultation is to ask whether the opportunity should be taken to repeal the Acts of 1886 and 1925 and to restate those provisions which still have value, with certain amendments, in a concise modern form and in a way which is adapted to Scottish rather than English needs and which applies to all children. The Commission's statutory functions include "the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the

simplification of the law" and, in the Commission's view, the opportunity should be taken to replace the Acts of 1886 and 1925. As however, this would involve going slightly beyond the consultation carried outon Illegitimacy and would involve certain minor changes (generally of form rather than substance) in the law relating to legitimate children, the Commission considers it right to carry out a further limited consultation on this topic.

The present state of the Guardianship Acts. The Acts of 1886 and 1925 are examples of legislation passed for England and Wales and applied to Scotland in a crude way. The results are now more incongruous than ever because the legislation in question has been consolidated for England and Wales (Guardianship of Minors Act 1971). The English Law Commission has recommended a further restatement, with amendments, in its recent Report on Illegitimacy (Law Com. No.118, 1982). The Acts, as they apply to Scotland, contain terminology which is manifestly inappropriate. Apart from the use of the term "guardian" itself, which is not a term of art in Scots law, there are references to "infants", to mothers applying to a court "without next friend" and to decrees "nisi or absolute for divorce". The Acts define "guardian" as "tutor" and say nothing about curatory of minors (although the Guardianship Act 1973 deals with parental curatory of minors). The 1925 Act (s.6) and the 1973 Act (s.10(3)) contain overlapping provisions on disputes between joint guardians. The 1886 Act contains a number of unnecessary provisions (e.g. ss.10, 11 and 13). The rules on title to sue for custody in the 1886 Act are too narrow (originally mother, extended in 1928 to father) and do not cover, for example, applications by a tutor. The failure to give title to sue to a tutor necessitated

various piecemeal provisions in the 1925 Act enabling a tutor in various circumstances to apply for custody. These would be unnecessary if title to sue were more widely expressed in the main provision. The Acts are incoherent in relation to jurisdiction to appoint and remove tutors. One provision confines the power to remove tutors to the Court of Session (1886 Act, s.6): others give the sheriff courts certain powers to appoint and remove tutors (1925 Act, ss.4(1), (2) and (2A), 5(4)). There is a provision in the 1886 Act (s.7) which gives the court power on granting a decree of separation or "a decree either nisi or absolute for divorce" to declare "the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any of the marriage" with the stated effect that "the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children". This provision, so far as we are aware, is rarely if ever used. It was enacted long before the introduction of the statutory principle that in any question relating to the custody or upbringing of a child the welfare of the child is the first and paramount consideration and long before the introduction of the irretrievable breakdown of the marriage as the sole ground of divorce. It now seems unnecessary and out of touch with current principles and practice. The 1925 Act contains a provision (s.3) enabling the court to make orders for the custody of or access to a child while the parents are living together. This also seems unnecessary. It was passed when, in the absence of a court decree, the father of a legitimate child had parental rights to the exclusion of the mother. It enabled the mother to pave the way for a separation by obtaining an award of custody before she left. Now

the mother has equal rights by operation of law. There is, in any event, nothing in the general law of Scotland which would prevent a court from making orders relating to the custody of, or access to, a child (whether the parents are married to each other or not) merely because the parents are living together for the time being. Section 4(1) and (2) of the Act, which provide for the surviving parent to become "guardian" on the death of the other is also unnecessary now that both parents are generally tutors and curators anyway while both are alive. On the death of one the other will automatically continue as tutor or curator. The provisions of these subsections enabling a court to appoint a "guardian" to act along with the surviving parent would be unnecessary if, as we propose, there is a general provision for applications to the court for the appointment of a tutor or curator. Section 4(2A) of the 1925 Act would also be rendered unnecessary by such a general provision.

The Guardianship of Infants Act 1925, as amended, contains a few miscellaneous provisions relating to "maintenance". Section 3(2) empowers a court which has made a custody order while the parents of a child are living together to order the parent excluded from custody to pay maintenance for the child. Section 5(4) empowers a court which has ordered that a testamentary tutor should be sole "guardian" to the exclusion of the surviving parent to order the parent to pay maintenance for the child to the tutor. Section 6, as extended by the Children and Young Persons (Scotland) Act 1932, empowers a court in exercising its powers to resolve differences between joint guardians to order a parent to pay sums towards the maintenance of the child. Section 8 introduces an anomalous set of rules for the enforcement of certain orders for the payment of money under the Acts, but not all such orders. These rules include a one-off

provision, for this extremely limited purpose, for the "attachment" of an income or pension. If our Report on Aliment and Financial Provision (Scot. Law Com. No.67) were implemented these provisions would all be repealed, in so far as they relate to aliment, and superseded by the more general provisions on aliment in the Bill attached to that Report. We are not entitled, however, to assume that that Report will be implemented before our Report on Illegitimacy, or in exactly the terms we have recommended, or indeed at all. We have to proceed on the basis of the present law without making assumptions of any kind as to how it might be changed in the future. We propose, therefore, to include in our draft Bill on Illegitimacy clauses removing the differences between legitimate and illegitimate children in relation to aliment and regulating title to sue for aliment for a child. These clauses (not reproduced here) would simply repeat the policy of our Report on Aliment and Financial Provision in relation to aliment as between parent and child. Their inclusion would enable the government, if so advised, to initiate implementation of our Report on Illegitimacy before, or independently of, our Report on Aliment and Financial Provision. They would also, and this is the important point for present purposes, enable the miscellaneous provisions on maintenance in the Guardianship Acts to be repealed as unnecessary.

Section 10(2) of the Guardianship Act 1973 provides that an agreement for a man or woman to give up his or her parental rights and authority in whole or in part shall be unenforceable "except that an agreement made between husband and wife which is to operate only during their separation while married may, in relation to a child of theirs, provide for either of them to do so; but no such

agreement between husband and wife shall be enforced by any court if the court is of the opinion that it will not be for the benefit of the child to give effect to it". Although it might be suggested that this provision should be extended to unmarried parents, it seems to the Commission that there is a case for repealing it. The provision appears to be unnecessary and unsatisfactory. The first part is unnecessary because it is already the case under the general law that parental rights are extra commercium and cannot be validly renounced or transferred. A parent cannot renounce his parental tutory or curatory (Robertson (1865) 3 M. 1077 per Lord Justice-Clerk Inglis at p.1079) or permanently give up his right to custody. This is why there is no common law adoption: a parent who handed over his child to someone else could always, at common law, reclaim the child. He could not transfer his parental rights. The second part of the provision is unnecessary in so far as its purpose is only to permit amicable arrangements between separated parents as to the exercise of parental rights e.g. that one shall have custody of the child and the other access. Such arrangements are commonplace and not in any way restricted by the general law. Of course, if any question of enforcement arises a court would, in any event, regard the welfare of the child as the first and paramount consideration. This follows from section 1 of the 1925 Act and the provision in section 10(2) of the 1973 Act adds nothing in this respect. In so far as the provision in section 10(2) may be held to imply that a parent may by agreement with the other parent actually deprive himself of his or her right to tutory or curatory it seems objectionable. Third parties may have an interest in knowing who is tutor or curator to a child. It seems wrong that they should be affected by a private agreement between spouses which may be quite

informal, which may presumably be departed from by subsequent agreement, and which may not be "enforceable" in any event if a court considers it would "not be for the benefit of the child to give effect to it". The subsection would probably not have been enacted for Scotland had there not been a similar provision, enabling a father in a separation deed to give up custody or control of his children to the mother, passed for England and Wales in the Custody of Infants Act 1873 at a time when the mother had no custody rights by law and re-enacted for England and Wales so as to apply to either parent, in the 1973 Act. The only arguments for retaining the provision would seem to be that it might have a certain beneficial effect in making it clear to people that they can enter into amicable agreements relating to the exercise of parental rights and that people might think that some change in the law was intended by its repeal. Both arguments assume that the section is widely known and misunderstood. Neither seems very weighty. The Commission would welcome views on whether there would be any objection to the repeal of the subsection.

The Commission's proposals. The Commission would propose, subject to consideration of any views expressed on consultation, to recommend that, in the course of restating the rules in the 1886 Act and 1925 Act in a way which can apply to all children, the following changes should be made.

1. References to "infants" should be replaced by references to "children" (under 16) in the context of custody or access and by reference to "pupils or minors" in the context of tutory or curatory.

2. "Guardian" should be replaced by "tutor or curator". At present the 1886 and 1925 Acts apply only to tutors. The replacement of "guardian" by "tutor or curator" in the draft clauses seems to us to be justified so long as Scots law provides for tutors and curators but does not provide for "guardians". It is arguable that the law on tutors and curators is itself out of date and in need of reform. This is a question which we propose to examine in a future consultative memorandum.

3. The overlapping provisions on disputes between joint guardians in section 6 of the 1925 Act and section 10(3) of the 1973 Act should be combined in one provision. (See draft clause 5.)

4. The following provisions should be repealed as unnecessary and not replaced as such, although some of them would in effect be replaced by more general provisions in the proposed Bill: 1886 Act, sections 8 ("Application of Act to Scotland"), 9 ("Interpretation of Terms"), 10 ("As to removing proceedings and appeals"), 11 ("Rules as to procedure"), 13 ("Saving clause"); 1925 Act sections 3 (custody etc. where parents living together), 4 ("Rights of surviving parent as to guardianship"), 8 ("Enforcement of orders for payment of money").

5. Title to apply for custody under the Acts should be conferred not only on the mother or father of a child but also on the tutor

or curator. It should be made clear that this is without prejudice to any power of the court to entertain an application by any other person (e.g. a grandparent or foster parent) under the general law. (See draft clause 2.)

6. The powers under the Acts (relating to custody, access, tutory and curatory) should be exercisable by either the Court of Session or a sheriff court. (See draft clause 8.) At present most of the powers are exercisable by either court but the power to remove tutors under section 6 of the 1886 Act is confined to the Court of Session.

7. Section 7 of the 1886 Act and section 10(2) of the 1973 Act should be repealed as unnecessary and unsatisfactory. (See above.)

8. Section 16 of the Administration of Justice Act 1928 (father's right to apply for custody) and section 73 of the Children and Young Persons (Scotland) Act 1932 (extension of powers of court under s.6 of 1925 Act) should be repealed. They were rendered necessary only by the restricted way in which certain provisions were originally drafted.

What the revised and restated provisions might look like. The result of the above changes and the changes consequential on the recommendations to be made on illegitimacy would be something like the following New words or provisions are underlined. Simple repeals are not mentioned. It should be noted that some 20 sections of the present law, spread over several Acts, would be replaced by 8 clauses applying to legitimate and illegitimate children alike. It is envisaged that the draft clauses reproduced below would form one part of (or possibly a schedule to) a Bill designed to give effect to our other recommendations on illegitimacy.

Welfare of child or minor paramount

1. Where, in any proceeding before any court, the custody or upbringing of a child, or the administration of any property belonging to or held on trust for a pupil or minor, or the application of the income thereof, or the appointment or removal of a tutor or curator to a pupil or minor, is in question, the court, in deciding that question, shall regard the welfare of the child, pupil or minor as the [first and] paramount consideration.

[Derivation: 1925 Act, s.1. This, like the following provisions, would now apply equally to illegitimate children. It is for consideration whether the words "first and" are necessary.]

Orders as to custody and access.

2. Without prejudice to any power of the court to entertain an application therefor by any other person, the court may, on the application of a parent, tutor or curator of a child, make such order as it thinks fit as to the custody of such child (including an order for joint custody) and the right of access thereto.

[Derivation: 1886 Act, s.5 read with Administration of Justice Act 1928, s.16. This would also replace s.2(1) of the Illegitimate Children (Scotland) Act 1930.

Note. The reference to joint custody is important in the context of children born out of wedlock because sometimes the father of such a child would wish (e.g. if cohabiting with the mother) to apply for custody along with the mother. It is for consideration whether, instead of the "Without prejudice" formula the clause should provide that "the court may, on the application of a parent, tutor or curator of a child, or of any person having an interest to apply" etc.. This would avoid the need for referring to the common law.]

Orders as to tutory and curatory.

3. The court may, on the application of any person, make such order as it thinks fit as to the tutory or curatory of a pupil or minor including an order appointing or removing a tutor or curator.

[Note. This replaces, and extends, s.6 of the 1886 Act and would implement the Commission's proposed recommendation that the father of an illegitimate child should be able to apply to the court for tutory or curatory. It also replaces s.4(2A) of the 1925 Act.]

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4. (1) The parent of a pupil or minor may by deed or will appoint any person to be tutor or curator of the pupil or minor after his death, but any such appointment shall be of no effect unless, immediately before his death, the parent was tutor or curator of the pupil or minor.

(2) Any tutor or curator so appointed shall act jointly with the mother or father, as the case may be, of the pupil or minor so long as the mother or father is tutor or curator, unless the mother or father objects to his so acting.

(3) If the mother or father so objects, the tutor or curator may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole tutor or curator) or make an order that the tutor or curator so appointed shall act jointly with the mother or father or that he shall be sole tutor or curator of the pupil or minor.

(4) Where tutors or curators are appointed by both parents, the tutors or curators so appointed shall, after the death of the surviving parent act jointly.

[Derivation: 1925 Act, s.5. Note: the rule that a person appointed as tutor or curator by a deceased parent can, in effect, be deprived of office by an objection even if informal, by the surviving parent is one which we propose to examine in our future work in the law on children. In the meantime, the above provisions merely repeat, in this respect, a rule which has been in existence since 1925.]

)isputes as to parental rights.

5. Where two or more persons are entitled to any parental right in relation to a pupil or minor and they are unable to agree on any question relating to the exercise of that right, any of them may apply to the court for its direction, and the court may make such order thereanent as it thinks fit.

[Derivation: 1925 Act s.6. Would also replace Guardianship Act 1973, s.10(3).]

Tutors.

6. (1) Tutors, being administrators in law, tutors nominate or tutors appointed or acting in terms of this Act who shall, by virtue of their office, administer the estate of any pupil, shall be deemed to be tutors within the meaning of the Judicial Factors Act 1849, and shall be subject to the provisions thereof:

1849 c.51.

Provided that such tutors shall not be bound to find caution in terms of sections 26 and 27 of that Act unless the court, upon the application of any party having an interest, shall so direct.

(2) A father or mother acting as tutor of a pupil shall be deemed to be, and always to have been, a trustee within the meaning of the Trusts (Scotland) Act 1921.

1921 c.58

[Derivation: 1886 Act s.12; 1925 Act, s.10. The latter provision, reproduced in (2) above, was necessary because of the decision in Shearer's Tutor 1924 S.C. 445.]

Supplementary provisions.

7. (1) Any power to make an order conferred by this Part of this Act shall include a power to vary or discharge the order.

(2) Any order relating to the custody of, or access to, a child made under this Part of this Act shall cease to have effect when the child attains the age of 16 years.

(3) Any person appointed by a court to be tutor to a child under this Part of this Act shall, unless the court orders otherwise, become curator to that child on his attainment of the age of minority.

Interpretation.

8. In this Act, unless the context otherwise requires, the following expressions shall have the following meanings respectively assigned to them -

"child" means a child under the age of 16 years;

"the court" means the Court of Session or the sheriff;

"deed" means any disposition, contract, instrument or writing whether inter vivos or mortis causa;

"parental rights" means the rights of tutory, curatory, custody or access, as the case may require, and any right relating to the welfare or upbringing of a child conferred on a parent by the common law;

"parents" means natural parents.

Custody and guardianship: should the legislation require the court to be satisfied before it makes an order that the order is consistent with the principle that the welfare of the child is the first and paramount consideration?

It has been drawn to our attention that it is a fairly common practice in the sheriff courts for decrees in undefended actions for custody to be granted without the court making any enquiry so as to satisfy itself that the granting of the decree will be in the interests of the child concerned. Actions for custody are not consistorial actions, so that no proof is necessary before decree can be granted and Rule 23 of the First Schedule to the Sheriff Courts (Scotland) Act 1907 introduces only a procedural obstacle which can be got round by the pursuer enrolling the cause and craving a decree in absence.[1] Section 1 of the Guardianship of Infants Act 1925 (welfare of child to be first and paramount consideration) does not seem to be generally regarded as requiring the sheriff to be satisfied regarding the child's welfare before granting decree.

This question is of relevance to our Report on Illegitimacy because of our proposed recommendations that the father of an illegitimate child should be able to apply to a court for tutory, curatory or custody, and that provision should be made by Rules of Court for a special form of procedure for joint applications by both parents. In this context we would wish to make it clear that the court should make an order for tutory, curatory or custody only if satisfied that that would be in the best interests of the child. It would, however, be highly anomalous to require the court to be satisfied in this way

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[1] See Beverley v. Beverley 1977 S.L.T. (Sh.Ct.) 3.

in the case of illegitimate children but not in the case of legitimate children, particularly as the general thrust of our recommendations will be to abolish all legal differences between children which depend on the marital status of their parents. We must, therefore, consider whether it should be made clear by statute that in <u>all</u> cases concerning the custody, tutory curatory or upbringing of children a court should be satisfied before making an order that the order will be consistent with the governing principle that the interests of the child are the first and paramount consideration. Our provisional view, on which we would welcome comments, is that this should be made clear by statute. That would not mean that there would have to be a proof in every case. The court might be satisfied by statements by or on behalf of the parties, or by a report. If it could not otherwise be satisfied it should be entitled to require proof. The statement of the proposed statutory rule would leave it open for Rules of Court to regulate, if need be, the ways in which the court could be satisfied. It seems to us, however, that the principle is an important one and that it ought to be clearly laid down by statute.

<u>Nature and time scale of consultation</u>

The points on which we seek comments in this Paper are fairly limited ones which arise out of our work on Illegitimacy. We intend to begin work at an early date on a more general review of the law relating to children. Our proposed consultative memorandum on that subject will explore major policy issues such as whether there is still a need for two categories of guardians (tutors and curators). The present exercise can be regarded as akin to statute law revision

or consolidation with certain amendments. It is without prejudice to further work on the law of children.

The draft clauses reproduced above are not necessarily in their final form. It would be premature to spend a great deal of time on detailed consideration of them before we know whether the general idea of this type of "consolidation plus" is acceptable. The clauses are set out only to make clear the sort of thing we have in mind. If this meets with approval in principle we shall give the clauses further scrutiny. This process is very likely to result in changes and refinements.

As the issues are limited and as we are already well advanced with our draft Report and anxious to make further progress, with a view to submission this summer, we would be very grateful if replies to the following questions could, if possible, be sent to us by 30 May 1983.

Questions on which views are invited

1. Do you approve or disapprove of the Commission's provisional proposal to repeal and replace, with modifications of the type outlined above, the provisions of the Guardianship of Infants Acts 1886 and 1925?

2. Should it be made clear by statute that a court should not make any order relating to the tutory, curatory, custody or upbringing of a child unless satisfied that the order is consistent with the principle that the welfare of the child is the first and paramount consideration?

3. Do you have any other comments?