

**CONFLICTS OF JURISDICTION AFFECTING
THE CUSTODY OF CHILDREN**

SUPPLEMENTARY CONSULTATION PAPER

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Introduction

1. A joint Working Paper/Memorandum "Custody of Children - Jurisdiction and Enforcement within the UK"¹ was published by the two Law Commissions in 1976 and, following lengthy negotiation and consultation, agreement was reached in principle on a uniform scheme for jurisdiction in proceedings relating to the custody of children. This agreement, referred to as "the Concordat", was the subject of further consultation in 1980.

2. The purpose of this paper is to identify one area in which the English Law Commission now feels compelled to depart from the terms of the Concordat so that an opportunity may be given for further comment.

The Concordat

3. The Concordat provides four separate grounds of jurisdiction as follows:

- a) Jurisdiction in independent proceedings for custody based on the habitual residence of the child in the UK country concerned.
- b) Jurisdiction to make custody orders in the course of matrimonial proceedings (divorce, nullity and separation).
- c) Jurisdiction in emergency cases where the immediate intervention of a court is necessary for the protection of the child.
- d) A residual jurisdiction where none of the preceding grounds of jurisdiction applies, i.e. where the child is not habitually resident anywhere in the UK, and no UK court is entertaining matrimonial proceedings involving the child, based on the physical presence of the child within the UK country concerned.

¹The Law Commission Working Paper No.68/The Scottish Law Commission Memorandum No.23.

4. In addition, provision is made for a scheme of priority to determine which basis of jurisdiction should take precedence, the general principles being:

(1) That an order made under the emergency or residual presence jurisdiction can be superseded at any time by an order made in exercise of either of the remaining jurisdictions.

(2) That a later order based on a competent ground of jurisdiction supersedes an earlier order so that, for example, if an order is made in England on the ground of habitual residence of the child in England and the child later acquires an habitual residence in Scotland, a Scottish order made on the basis of habitual residence supersedes the earlier English order (but this is subject to safeguards to minimise the risk of a child's habitual residence being changed by a parent in order to acquire jurisdiction in another part of the United Kingdom).

(3) That subject to certain qualifications the details of which are still being discussed between the Commissions, when a court in one part of the United Kingdom has jurisdiction to make an order by virtue of matrimonial proceedings (para. 3(b) above) no court in another part of the United Kingdom is to have jurisdiction except on grounds of emergency.

5. A system of reciprocal registration and enforcement of custody orders is also proposed.

Departure from the Concordat: residual presence jurisdiction in the county and magistrates courts

6. The scheme as originally agreed proposed that the residual presence jurisdiction would be exercisable only by the "supreme courts", i.e. the High Court and Court of Session. This was a concession to the Scottish opposition which was voiced in principle to this ground of jurisdiction.

7. The proposal now made by the English Law Commission is that the residual presence jurisdiction should be exercisable also by the county and magistrates courts. These courts at present have jurisdiction in custody proceedings in terms of the Guardianship of Minors

Act 1971 and the Domestic Proceedings and Magistrates Courts Act 1978, jurisdiction being founded on the ordinary residence of either of the parents or alternatively, on the residence of any of the mother, father or child, according to which of the two statutes proceedings are taken under.

8. To abolish this jurisdiction altogether would, in the view of the English Law Commission, provoke such overwhelming opposition in England that the whole scheme might be jeopardised. The proposal therefore adds to the existing requirement under the two Acts of residence of one of the parties the further requirements that the child be physically present in England and Wales, although not necessarily in the territorial area of the court and that he be not habitually resident anywhere in the UK. The other negative requirement would also apply, namely that no court in any other part of the UK is entertaining matrimonial proceedings involving the child. In other words, the intention is to preserve the existing jurisdiction enjoyed by the county and magistrates courts in a qualified form, by extending the residual presence jurisdiction to these courts.

Matters for consideration

9. The fundamental point at issue is whether or not the extension of the residual presence jurisdiction to the lower courts is acceptable. In this connection, it should be noted that the Working Paper/Memorandum¹ proposed that all courts, including the county and magistrates courts, should retain their existing jurisdiction in cases

¹Ibid, Paragraph 3.2.

where the child was not habitually resident in any part of the UK. Accordingly, the extension now proposed, although contrary to what was agreed in the Concordat after very prolonged negotiations, does not fall outwith the tenor of the original proposals.

10. Bearing in mind the Scottish reservations regarding this basis of jurisdiction, the concern would be to ensure that it was properly exercised, only in circumstances where no other ground of jurisdiction was available to any other UK court. Provision would therefore be made for evidence to be presented on the jurisdictional issues to the courts in England so that they would be required to determine in each case that there were no matrimonial proceedings continuing and that the child had no habitual residence anywhere in the UK. The custody order would also contain an express finding as to the basis of jurisdiction on which it had been made.

11. If it is decided that the new proposal for England referred to above in relation to jurisdiction in custody under the two Acts being continued, provided that the child is physically present in England and not habitually resident anywhere in the UK, is not so unacceptable that we would have to abandon support for the scheme as a whole, the question arises whether any roughly corresponding provision should be proposed for Scotland. It is thought that mere presence of a child is, from the Scottish viewpoint, not a very satisfactory 'connecting factor' for this purpose and provided that there is an adequate emergency jurisdiction, it may be unnecessary. The agreement in the Concordat that the supreme court in each country should have a jurisdiction based on mere presence where there is no other ground of jurisdiction in the UK, represented, as we understand it, a compromise to secure agreement, and we are not suggesting departing from it.

12. We are proposing a clarification of the sheriff court rules of jurisdiction in relation to custody which would not necessarily depend on the habitual residence of the child (as opposed to one of the parties) within the sheriffdom, but in terms of the Concordat it will be a condition of such jurisdiction that either the child is habitually resident in Scotland or that there are matrimonial proceedings in the sheriff court in question. If we wish to make provision corresponding to the new English proposals, we could add that the sheriff court which would have jurisdiction on grounds of habitual residence of one of the parties within the sheriffdom and habitual residence of the child in Scotland should also have jurisdiction where the child is physically present in Scotland and not habitually resident anywhere in the UK, and where there are no matrimonial proceedings continuing anywhere in the UK. A provision on these lines would correspond roughly with what the English now propose as regards the magistrates' courts, but we question whether there is any need to complicate our law by introducing such a provision.

Emergency jurisdiction

13. It has all along, as we understand it, been agreed on both sides of the Border that it is essential to retain a jurisdiction in cases of emergency where no other ground exists. The Concordat provided that this jurisdiction should be exercisable only by the supreme courts in each country. We rather think that this was a concession to a fairly strongly held view in some quarters in Scotland that the inferior courts and particularly the lay courts in England might not be relied on to confine this jurisdiction to the cases for which is intended, that is to say cases of real emergency. We do not think that the English have any intention of departing in principle from

this, though we understand that they contemplate that this jurisdiction will be exercised by county court judges, if, as is possible, they are given jurisdiction in wardship proceedings.

14. It has been strongly represented to us from some quarters that the emergency jurisdiction should be available to the sheriff courts. This is partly on the expressed view that in some instances it may be more practical on grounds of convenience and expense for a party at least in some parts of the country to get immediate access to the sheriff than to the Court of Session, in cases which by definition require to be dealt with urgently. It is also argued that now that divorce is going to be dealt with in the sheriff courts, those courts will be what one might call the principal family courts in Scotland and therefore appropriate to deal with this matter of emergency jurisdiction. We are inclined in this Commission to support this proposal, to which incidentally the English have no objection, but as it again represents a departure from what has been previously agreed, we think it right to discuss it with certain of our consultees. We have already mentioned this matter in the consultation paper on Sheriff Court Jurisdiction of 11 February 1983.