

CONSULTATION PAPER

**CUSTODY OF CHILDREN: JURISDICTION AND
ENFORCEMENT WITHIN THE UNITED KINGDOM:
JURISDICTION OF THE SHERIFF COURT**

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INTRODUCTION

Purpose of consultation

1. Following the publication of their joint Working Paper/Memorandum, "Custody of Children - Jurisdiction and enforcement within the United Kingdom",¹ and extensive negotiations and consultation, the two Law Commissions reached agreement on a uniform scheme for jurisdiction in proceedings relating to the custody of children, although in some particulars the rules are not yet finally settled. In the course of considering the scheme, we have had to examine the existing jurisdictional rules applying to the sheriff court, and have concluded that they are unsatisfactory and in need of reform, quite apart from implementing the new scheme. Accordingly, the purpose of this limited consultation is to seek views on proposals for the jurisdiction of the sheriff court in child custody cases. The proposals, of course, present options which are compatible with the new scheme, as provisionally agreed. But they also raise issues which should be resolved, whether or not the scheme is implemented in the future. On that basis, we are concerned to have consultees' views on our proposals, whatever their views may be of the new scheme as a whole.

The jurisdictional scheme

2. The following, in outline, is the scheme provisionally agreed between the two Commissions. Because it is meant to apply throughout the United Kingdom, it refers, for example, to wardship and to (English) proceedings for presumption of death and dissolution of marriage:

Jurisdiction to make custody orders in matrimonial proceedings ("the ancillary jurisdiction")

- (a) Where a United Kingdom court has jurisdiction in proceedings for divorce, separation, nullity of marriage or in proceedings for death to be presumed and a marriage to be dissolved under sections 5, 7, 8 or 13, as the case may be, of the Domicile and Matrimonial Proceedings Act 1973, that court should have jurisdiction to make orders in the course of those proceedings for the custody of children or for access to them.

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

Jurisdiction in independent¹ custody proceedings ("the primary jurisdiction")

- (b) A court in a United Kingdom country should have jurisdiction to entertain wardship or other independent proceedings for custody or access if the child in question is habitually resident in that country at the date of the commencement of those proceedings.

Jurisdiction in emergency cases ("the emergency jurisdiction")

- (c) Where a child is physically present in a United Kingdom country at the date of the commencement of the proceedings, the superior courts of that country should have jurisdiction to entertain wardship or other independent proceedings for custody or access, if the immediate intervention of the court is necessary for the protection of the child.

Jurisdiction on the basis of presence ("the residual jurisdiction")

- (d) Where none of the preceding grounds of jurisdiction apply, a superior court in a United Kingdom country should have jurisdiction to entertain wardship or other independent proceedings for custody or access if the child in question is physically present within the court's territory; and the courts of no other part of the United Kingdom are entertaining matrimonial proceedings involving the custody of the child; and the child is not habitually resident in another part of the United Kingdom.

3. These basic principles are to apply in accordance with the following priority rules:

Primacy of the ancillary jurisdiction over the primary jurisdiction

- (a) Except in the case of emergency, a United Kingdom court should decline to exercise jurisdiction in wardship or other independent proceedings relating to the custody of a child or to access while matrimonial proceedings involving the custody of that child are continuing in another United Kingdom country.

¹That is, not ancillary to matrimonial proceedings.

Primacy of the ancillary and primary jurisdiction over the emergency and residual jurisdiction

- (b) An order made in exercise of the emergency jurisdiction or the residual jurisdiction should be liable to be superseded at any time by an order of a United Kingdom court in which matrimonial proceedings have commenced or of the United Kingdom court of the place where the child is or has become habitually resident.

Combined proceedings for custody and maintenance

- (c) Where there are combined proceedings for custody or access and for maintenance or aliment, the custody and maintenance or alimentary aspects of the claim should be treated for the purposes of jurisdiction as if they were independent proceedings.

The ancillary jurisdiction

4. This does not, as such,¹ seem to give rise to difficulties. The application of the rules to the sheriff court should be straightforward. The sheriff would have jurisdiction to deal with custody in an action for separation or (prospectively) divorce if he had jurisdiction in the action for separation or divorce itself. A detailed description of these rules is contained in the Appendix.

The primary jurisdiction

5. The main problem of the primary jurisdiction is how, precisely, the new requirement, that the child in question should be habitually resident in Scotland, should be fitted into the jurisdictional rules which might apply to the sheriff court. We discuss this in detail below.

The emergency jurisdiction

6. Some consultees favoured the view that the emergency jurisdiction should be conferred on the sheriff court as well as on the Court of

¹There may, however, be problems under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 which gives the sheriff jurisdiction to vary or recall certain custody orders made by the Court of Session. See paras. 16-17, 34-35 below.

Session to which, at present, it is confined as agreed by the Commissions. However, extending the jurisdiction to the sheriff court would be acceptable to the English Law Commission, if this were considered desirable, and it is therefore one of the purposes of our present consultation to ask consultees to re-assess that alternative in the context of the new jurisdictional rules which might apply to the sheriff court.

The residual jurisdiction

7. The residual jurisdiction is based on the mere physical presence of the child in the territory of the court. As the mode of designating it implies, it is available only where there are no other grounds under the scheme for assuming jurisdiction. As provisionally agreed, and like the emergency jurisdiction, it is confined to the Court of Session, but we do not, at present, envisage extending it to the sheriff court.

THE PRIMARY JURISDICTION

The issue

8. To implement the new scheme, it is necessary to introduce a legislative requirement that the sheriff court will only exercise jurisdiction in matters of custody (apart from cases of emergency, or where custody is ancillary to separation or divorce) if the child in question is habitually resident in Scotland. The question is how, precisely, this condition might be introduced, given the unsatisfactory state of the existing jurisdictional rules.

The present law: common law powers of the sheriff court

9. At common law it was assumed that custody actions were within the exclusive jurisdiction of the Court of Session.¹ It was conceded, however, that the sheriff court had certain limited powers at common law, notably:

- (a) to make interim orders regulating the custody of children;²

¹Fraser, Parent and Child, 3rd edn., pp. 294 and 162.

²Naysmith v. Naysmith 1910, 2 SLT 135; Murray v. Forsyth 1917 SC 721 at p. 727; Kitson v. Kitson 1945 SC 434 per L.J.C. Cooper at pp. 439-440.

- (b) to give effect to and to enforce the prima facie legal title of a father to have the custody of his legitimate child¹ and the similar right of a mother to have the custody of her illegitimate child;² and
- (c) (possibly) to adjust rights of access.³

10. The common law jurisdictional bases upon which the sheriff may exercise those powers are not wholly clear but for all practical purposes are superseded by the present statutory rules.

Statutory powers of the sheriff court

11. Sections 5 and 9 of the Guardianship of Infants Act 1886 empower the Court of Session or the sheriff court within whose jurisdiction the respondent or respondents or any of them resided on the application of the mother or the father⁴ of any child under 16 years of age⁵ to make an order regarding the custody of the child and the right of access to it of either parent.

12. The competence of the sheriff court to entertain actions for custody is also regulated by section 5 of the Sheriff Courts (Scotland) Act 1907 (as amended by the Sheriff Courts (Scotland) Act 1913), which refers quite generally to "actions for regulating the custody of children". Where the sheriff has power to make a custody order it is thought that he may also make an order for access.⁶

13. The jurisdictional basis of the sheriff's competence to make custody orders under the 1907 (and 1913) Act is nowhere explicitly stated. The most general provisions are those in section 6 of the 1907 Act, which

¹Hill or Lang v. Lang (1849) 21 Scot. Jur. 485; Shannon v. Gowans 1921, 37 Sh. Ct. Rep. 235; Samson v. Samson 1922 SLT (Sh. Ct.) 34. Now both parents of a legitimate child have equal rights to custody - Guardianship Act 1973, section 10.

²Brand v. Shaws (1888) 15R 449 at p. 453; Murray v. Forsyth 1917 S.C. 721 per Lord Skerrington at p. 724; Fraser, Parent and Child, 3rd edn., p. 162.

³Kitson v. Kitson 1945 S.C. 434 per L.J.C. Cooper at p. 441.

⁴Administration of Justice Act 1928, sections 16, 20(3).

⁵Custody of Children (Scotland) Act 1939, section 1. The power was extended to cover illegitimate children by the Illegitimate Children (Scotland) Act 1930, section 2(1), now amended by the Guardianship Act 1973, Schedule 5, paragraph 3.

⁶Cook v. McGinnes 1982 SLT (Sh. Ct.) 101.

appears to say that any action competent in the sheriff court may be brought where the jurisdictional criteria set out in paragraphs (a) to (j) of that section are fulfilled, although on the authority of Kitson v. Kitson¹ only paragraph (a) (defender's residence for 40 days etc) may be relevant.

14. In the context of the 1907 Act it has been held that the word "resides" is to be construed as giving effect to the common law ground of jurisdiction implying residence for 40 days before the date of citation in the action.² It would seem likely, although there is no authority on the point, that the term "reside" in section 9 of the 1886 Act would be given a similar construction. That section defines "the Court" for the purposes of that Act as "the Court of Session or the sheriff court within whose jurisdiction the respondent ... may reside".

15. If these words and the corresponding provisions of section 6 of the 1907 Act were to be construed literally the sheriff would have a wider basis of jurisdiction than the Court of Session which in principle - and apart from ancillary jurisdiction to make custody orders in the course of consistorial proceedings - is confined to cases where the child is domiciled in Scotland. It is at least arguable, however, that these various provisions relate merely to the allocation of cases to the appropriate sheriff court and that there is a further condition that the courts of Scotland must possess jurisdiction in the international sense in the circumstances of the case.³

16. The jurisdiction of the sheriff court is extended by section 7 of the Maintenance Orders Act 1950. In cases where one parent resides in England or in Northern Ireland, and the other and the child in Scotland, jurisdiction is conferred upon the sheriff court within whose territory the other resides, and this jurisdiction is exercisable notwithstanding that any party to the proceedings is not domiciled in Scotland.⁴

¹1945 S.C.434. But that case is not altogether satisfactory. See also paras. 17-18 below.

²McNeill v. McNeill 1960 S.C.30.

³Jelfs v. Jelfs 1939 SLT 286 at p.290. But contrast McNeill v. McNeill 1960 S.C. 30.

⁴Section 27(2). The Report of the Committee on the Sheriff Court (Cmd. 3248 (1967)) recommends (para. 93) that a custody action should be competent in the court of the mother's residence even if the father resides in Scotland, provided mother and child are together.

17. The sheriff court is also empowered by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966¹ to entertain applications for the variation and recall of certain orders made by the Court of Session including:

- (a) orders for the custody, maintenance, and education of children under section 9 of the Conjugal Rights (Scotland) (Amendment) Act 1861;
- (b) orders for the custody, maintenance and education of children made under Part II of the Matrimonial Proceedings (Children) Act 1958;
- (c) orders relating to care and custody made by virtue of Part II of the Guardianship Act 1973; and
- (d) orders varying any such orders.

18. The sheriff court may exercise its powers under the 1966 Act only when it has jurisdiction over any party upon whom the application has to be served upon one of the grounds mentioned in paragraphs (a), (b) or (j) of section 6 of the 1907 Act, that is, defender's residence (for 40 days etc) or place of business and prorogation. The principles underlying this particular selection of grounds from section 6 are not clear, even reading Kitson v. Kitson² as authority only for excluding reconvention (paragraph (h) of section 6) as an appropriate ground of jurisdiction.

First option: add a new requirement to the existing rules

19. Turning to the implementation of the proposed new scheme of jurisdiction, the first option to consider is simply superimposing the further requirement of habitual residence of the child in Scotland on the existing jurisdictional rules without changing these rules in any way. The effect of this would be to leave the internal allocation of jurisdiction as between one sheriff court and another to be settled by the existing rules.

20. The advantage of this approach is that it is probably the easiest legislatively. It is the minimum required to give effect to the new scheme.

21. There are, however, serious disadvantages. First, it would leave the existing rules as they are, and, as our account of them shows,

¹Section 8.

²1945 S.C. 434, and see para. 13 above.

they are not at all satisfactory.¹ Secondly, leaving the inter-relations of the old and new rules undetermined would be merely to add one more complexity to an already complex situation, and make it even more difficult to achieve a single consistent interpretation of all rules together. Thirdly, it would ignore the important precedent set by the most recent legislation in this area, namely the Domicile and Matrimonial Proceedings Act 1973 and the Civil Jurisdiction and Judgments Act 1982. In each of those Acts new jurisdictional rules were introduced, and in both cases it was thought appropriate to disapply the existing rules so far as applicable to the proceedings with which the Acts were concerned.²

22. On balance, therefore, we are against this approach despite its legislative simplicity. It is the easy solution but not, in our view, the best solution.

Second option: replace existing rules

23. The second option is to replace the existing grounds of jurisdiction in the sheriff court with entirely new rules. The object of the new rules would be to establish both the new ground of jurisdiction, habitual residence of the child in Scotland, and an acceptable criterion for allocating that jurisdiction internally as between one sheriff court and another. What then should the content of the new rules be?

24. First solution. The most obvious solution would be to use the same rule for both external and internal purposes, and to base the sheriff's jurisdiction in custody cases on the habitual residence of the child in the sheriffdom. This would no doubt be quite workable if the presumption of habitual residence which we propose in the Working Paper/Memorandum,³ in relation to habitual residence in a United Kingdom country, were also available in a localised version. Briefly, the test, as proposed, looks to the longest period of cumulative residence in the year preceding commencement of action.

25. However, since the presumption is merely one of fact, national and local tests would have to be compatible. For example, in the joint Working Paper/Memorandum⁴ we pose the case of the child who spends the greater part of the year at boarding school in England,

¹See the criticism in Kitson v. Kitson 1945 S.C. 434, for example.

²1973 Act, Schedule 4, paragraph 1; 1982 Act, section 20(3). (The 1982 Act is not yet in force in this respect.)

³Paras. 3.74-3.75 and 3.78(2).

⁴Para. 3.74.

but whose parental home is in Scotland. Complicate this further by supposing his parents are separated and live in different parts of Scotland, and it can be seen that the sheriff may have the problem of applying the test of habitual residence first at the national and then at the local level. This may be a rare occurrence, of course, but the possibility detracts somewhat from the apparent simplicity of the solution. Besides, in more general terms, it may be unnecessary or undesirable to require sheriffs to investigate the question of whether a child is habitually resident in this or that sheriffdom, if there is no doubt that he is habitually resident in Scotland.

26. Second solution. If a dual condition, imposing the new requirement of the scheme and separately allocating the internal jurisdiction, is thought more appropriate, the problem is to determine what is the most acceptable rule for allocating a custody jurisdiction within Scotland to one sheriff court rather than another.

27. The starting point may be that, in practice, an issue of custody is likely to arise in conjunction with a claim for aliment. This points to coincidence of the grounds of jurisdiction in relation to both issues. To put it another way, it would seem clearly desirable that a court with jurisdiction to determine a claim for aliment should also have, so far as possible, jurisdiction to determine custody which may be in issue along with that claim.

28. Under the Civil Jurisdiction and Judgments Act 1982, section 20 and Schedule 8, there will be new rules of jurisdiction in matters relating to maintenance. The primary ground of jurisdiction will be the domicile of the maintenance debtor, the court with jurisdiction being the court for the place of domicile; or, alternatively, the domicile or habitual residence of the maintenance creditor, the court with jurisdiction again being the court of the place of domicile, or the place of habitual residence.

29. "Domicile" is used in a special sense in the 1982 Act. For the purposes of the Act, domicile in a particular place in Scotland means residence in Scotland of such a nature or in such circumstances as indicate a substantial connection with Scotland, plus residence in that place.¹ If the first condition is not satisfied, but the individual is nevertheless domiciled in the United Kingdom, in the sense of being

¹1982 Act, section 41.

resident in the United Kingdom in such a way as indicates a substantial connection with the United Kingdom, or by virtue of the presumption mentioned below, then, provided he is resident in Scotland, he will be domiciled there.¹

30. Habitual residence is not defined. But since there is a rebuttable presumption that three months' residence amounts to domicile,² it would seem that the distinction between these concepts will not be significant in most cases.

31. The most reasonable criterion, therefore, for allocating jurisdiction in custody to a particular sheriff court may be that:

- (a) the child is habitually resident in Scotland;
and
- (b) either the pursuer or the defender in the action is habitually resident in the sheriffdom.

This should ensure that where a sheriff court has jurisdiction in aliment it would almost invariably have jurisdiction in custody, provided the child in question was habitually resident in Scotland. It would also mean that the sheriff would not have to investigate unnecessarily, whether the child was habitually resident in his sheriffdom rather than another sheriffdom.

32. Third solution. Another possibility is to combine the first and second solutions, and allocate jurisdiction in custody on the basis that:

- (a) the child is habitually resident in the sheriffdom; or
- (b) the child is habitually resident in Scotland, and the pursuer or the defender is habitually resident in the sheriffdom.

This would have all the advantages of the second solution but would also ensure that a custody dispute could always be dealt with in the sheriffdom of the child's habitual residence. This would seem to be desirable, and would be consistent with the policy adopted for the United Kingdom as a whole. Our provisional preference is for this third solution.

¹1982 Act, section 41(5).

²1982 Act, section 41(6).

33. Other solutions. Other rules are also possible. For example, it could be provided that the sheriff would have jurisdiction in custody if (a) the child was habitually resident in Scotland and (b) some other condition was satisfied. This other condition could be modelled on section 8 of the Domicile and Matrimonial Proceedings Act 1973¹ or the Guardianship of Infants Act 1886² (defender's residence), or section 7 of the Maintenance Orders Act 1950 (residence of one parent and child in the sheriffdom, if other parent resident in England or Northern Ireland)³, or section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (defender's residence/place of business, prorogation).⁴ But none of these alternatives would seem to offer any advantage over the proposed condition modelled on the 1982 Act.

Local authorities as parties
in custody proceedings

34. Where children are in care, local authorities may have a locus in custody proceedings, and it would not necessarily be the case that all other parties involved in such proceedings would be resident within the local authority area. The question therefore arises whether, where the child is in local authority care, there should be a special rule to limit jurisdiction to sheriff courts within the region concerned. This might be supported on the ground that it would save public expense and inconvenience for local authority officials, who might be concerned in many actions involving children. On the other hand, there is no such special rule at present and such a rule might cause expense and inconvenience for parents or other individuals. Moreover, there would be sheriff courts within a region which would be inconvenient for local authority officials. The special rule would also complicate the scheme. We have formed no concluded view on this question but invite views.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1966

35. We described above the powers of the sheriff court to entertain applications for the variation and recall of certain custody orders made by the Court of Session.⁵ The criteria on which jurisdiction is allocated to a particular sheriff court are the defender's residence (for 40 days etc), or place of business and prorogation. The question arises whether the conditions which we have suggested might apply in

¹See Appendix, paras. 3, 5.

²See paras. 11, 14 above.

³See para. 16 above; or for yet another variant see footnote 4 to para. 16

⁴See para. 18 above.

⁵Paras. 17-18 above.

independent custody cases, should apply with appropriate modifications in place of the criteria specified in the 1966 Act.

36. In effect, the sheriff court is exercising a jurisdiction which the Court of Session could exercise, and that jurisdiction would subsist under the new scheme until the court of another United Kingdom country made an order based on the habitual residence of the child (or some other ground recognised in the scheme). This means that for the purpose of the sheriff court rules in this context, the requirement of habitual residence of the child in Scotland can be disregarded, at least so long as the Court of Session's jurisdiction subsists under the scheme by virtue of its original order. It seems to us that, subject to this, the conditions suggested for independent custody cases could appropriately apply to applications under the 1966 Act in relation to the variation or recall of an order for custody made by the Court of Session. In other words, in line with our preferred solution¹, the sheriff should have jurisdiction in such a case if the child, or the pursuer, or the defender is habitually resident in the sheriffdom.

Summary of issues

37. The various options discussed above in relation to the primary jurisdiction of the sheriff court, and our provisional views, can be summarised as follows:

- (1) Should the existing rules on the sheriff's jurisdiction in independent custody proceedings be left unchanged and the child's habitual residence in Scotland merely be superimposed as an additional requirement?

(Paras. 19-22).

Our provisional view is that this would not be a satisfactory solution.

- (2) Alternatively, should the existing rules be replaced by new rules?

(Para. 23).

Our provisional view is that they should be.

¹See para. 32 above.

(3) If so, should the sheriff have jurisdiction to regulate custody:

(a) if the child is habitually resident in the sheriffdom;

(Paras. 24-25)

(b) if the child is habitually resident in Scotland and either the pursuer or the defender is habitually resident in the sheriffdom;

(Paras. 26-31)

(c) if either (a) or (b) is satisfied?

(Para. 32)

Our provisional preference is for (c).

(4) If none of these is appropriate, should some other condition be adopted (that is, over and above the requirement of habitual residence of the child in Scotland), and, if so, what?

(Para. 33).

(5) Should the rules be modified where local authorities are involved in custody proceedings, and, if so, how?

(Para. 34).

We have come to no provisional conclusion on this issue.

(6) Where, under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, a sheriff has jurisdiction to recall or vary an order of the Court of Session relating to custody, should the grounds of jurisdiction specified in the Act be replaced by a modified version of the grounds adopted in independent proceedings for custody in the sheriff court?

(Paras. 35-36).

Our provisional view is that they should be.

THE EMERGENCY JURISDICTION

The present law

38. We mentioned above certain powers which the sheriff court may have at common law.¹ In addition to these, it has sometimes been suggested that the sheriff court, like the Bill Chamber,² possessed a species of

¹See para. 9 above.

²Buchan v. Cardross (1842) 4D 1268.

emergency jurisdiction in custody cases.¹ However, the scope of this power, if it exists, and the grounds of jurisdiction appropriate to it, cannot be delineated with any great certainty, and it may be the court's right to act in an emergency derived simply from its power to make interim orders in cases where it possessed jurisdiction to make such orders.

Extending the emergency jurisdiction

39. As also mentioned above,² certain consultees suggested that the emergency jurisdiction proposed in the new scheme should be conferred on the sheriff court as well as on the Court of Session. This may be thought no large step, if in fact it can be regarded as merely confirming an already existing jurisdiction, although it is a departure from the existing agreement between the two Commissions. However, as we indicated, this course would not be opposed by the English Law Commission, if it were considered desirable in Scotland.

40. There are certainly plausible reasons for the sheriff court having an emergency jurisdiction. First, emergency by definition requires prompt action. In case of an emergency in some remote part of Scotland, the need to transmit information to Edinburgh to be put before the Court of Session could occasion undesirable delay. Secondly, the sheriff court is likely to be deciding most issues of custody in the near future if the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Bill becomes law. It is in effect becoming the family court in Scotland, and it would be strange if action in case of emergency could only be taken by the Court of Session.

41. If the emergency jurisdiction were to be conferred on the sheriff court, the ground of jurisdiction would clearly be the actual physical presence of the child within the sheriffdom. Residence, habitual or otherwise, would be irrelevant, as would any further condition applying to either pursuer or defender in the action.

42. The issue, therefore, is straightforwardly:

Should the emergency jurisdiction be conferred on the
sheriff court?

¹Cf. Fraser, Parent and Child, 3rd edn., p.162.

²Para. 6 above.

Jurisdiction of the sheriff court to make custody orders in matrimonial proceedings

1. Section 10 of the Domicile and Matrimonial Proceedings Act 1973 provides that, where the Court of Session has jurisdiction in divorce and other consistorial proceedings affecting matrimonial status, or the sheriff court has jurisdiction in separation, they also have, respectively jurisdiction to entertain applications for ancillary or collateral orders, including custody orders, made under specified enactments or rules of law. A similar principle applies to jurisdiction in applications for the variation and recall of such ancillary or collateral orders. The enactments and rules of law referred to are specified in Parts I and II of Schedule 2 of the 1973 Act and at present include:

- (a) orders made under paragraph (2) of section 5 of the Sheriff Courts (Scotland) Act 1907 so far as relating to orders for aliment or for regulating the custody of a child;
- (b) orders varying or recalling such orders.

2. Similar provision is made, prospectively, in relation to divorce in the sheriff court by virtue of clauses 1 and 6(1) and Schedule 1, paragraphs 4 and 17 of the Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Bill¹ as read with section 10 and Schedule 2, paragraph 4 of the 1973 Act.

3. This means, in effect, that so far as a crave for regulating the custody of children is ancillary to an action for separation or (prospectively) an action for divorce, the relevant grounds of jurisdiction are those contained in section 8 of the 1973 Act. That provision lays down two requirements both of which must be satisfied.

4. The first is satisfied if, and only if, either party to the marriage (a) is domiciled² in Scotland at the date when the action is begun or (b) was habitually resident in Scotland throughout the period of one year ending with that date.

5. The second requirement is met if, and only if, either party to the marriage (a) was resident in the sheriffdom for a period of 40 days ending with the date of commencement of the action or (b) had been resident in the sheriffdom for a period of not less than 40 days ending not more than 40 days before that date, and has no known residence in Scotland at that date.

¹Print, 4 November 1982.

²"Domicile" is used in its common law sense which is distinct from "domicile" as defined in the Civil Jurisdiction and Judgments Act 1982 - see paras. 29-30 above.